THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

A.S.No.462 of 2007

JUDGMENT: (per Hon'ble Sri Justice M. Seetharama Murti)

The unsuccessful plaintiffs filed this appeal under Section 96 of the Code of Civil Procedure, 1908 ('the Code' for short) assailing the decree and judgment dated 28.02.2007 of the learned IV Additional District Judge (Judge, Fast Track Court), Ranga Reddy District passed in OS.No.39 of 2002 filed by the plaintiffs for specific performance of an agreement to sell dated 12.03.1999 in respect of 3 extents of land viz., Ac.9.06 guntas in S.No.315, Ac.18.22 guntas in S.No.316 and Ac.14.34 guntas in S.No.314 situate at Athvelly Village, Medchal Mandal of Ranga Reddy District within common boundaries more fully described in the schedule annexed to the plaint.

2. We have heard the submissions of the learned counsel for both the sides. We have perused the material record.

3. In this appeal suit, the parties shall hereinafter be referred to as the plaintiffs and the defendants as arrayed in the suit.

4. This Court of first appeal, being the last Court of fact, it is necessary to first refer to the admitted facts and the specific pleadings of both the parties on the issues involved in the lis.

5. Now, it is necessary to first mention the undisputed and admitted facts, which are as follows: "The defendants 1 and 2 who are the owners of the plaint schedule property had executed the suit agreement to sell dated 12.03.1999 in favour of the plaintiffs. The total consideration agreed to was Rs.3,02,40,000/-. The plaintiffs had paid to the defendants 1 and 2 Rs.50 lakhs towards part of sale consideration under the said agreement to sell. The plaintiffs had undertaken to pay the balance of sale consideration in two installments. Rs.1 Crore was agreed to be paid within a period of three months from the date of the agreement. The balance of Rs.1,52,40,000/- was agreed to be paid within three months from the above said payment. Thus, the total balance sale consideration of Rs.2,52,40,000/- was agreed to be paid within six months from the date of the agreement. In the event of the plaintiffs/ the purchasers not being able to complete the final payment within six months from the date of the agreement, the defendants 1 and 2 agreed to give them a grace period of additional three months. Thus, including the said grace period, the total time available to the plaintiffs to pay the balance of sale consideration is nine months from the date of the agreement. In the event of the failure of the plaintiffs to pay the balance of sale consideration as mentioned supra, the defendants 1 and 2 are entitled to forfeit the amount already paid and the agreement shall be treated as cancelled. Under the terms of the agreement the defendants 1 and 2 had made it clear to the plaintiffs 1 and 2 that the time is the essence of the contract for the reason that the sellers i.e., the defendants 1 and 2 had made commitment to discharge their liability to a third party and that the said liability could be discharged by the defendants 1 and 2 only on the payment of balance of sale consideration by the plaintiffs 1 and 2. It is also agreed to that if it comes out that there is any litigation pending in regard to this property or any litigation is filed before the stipulated payments, the payments shall be postponed till the expiry of the stipulated periods from the date of the disposal of such litigation or litigations. The defendants 1 and 2 had undertaken to deliver possession of the schedule property to the plaintiffs 1 and 2 and register the sale deeds at the cost of the plaintiffs either in their favour or in favour of the persons of the plaintiffs' choice. The defendants 1 and 2 had also agreed to handover all the link documents to them on payment of the total consideration. The plaintiffs had paid Rs.10 lakhs by way of cheque No.940948 dated 18.08.1999 drawn on Oriental Bank of Commerce, Nampalli Branch, Hyderabad to the defendants 1 and 2 towards part of the balance sale consideration and the said cheque was encashed by the defendants 1 and 2. Except that payment, the plaintiffs did not pay any other amount from out of the balance of sale consideration of Rs.2,52,40,000/-."

6. The specific case pleaded by the plaintiffs is this: "It is specifically agreed that if it comes out that there is any litigation pending with regard to the plaint schedule property or any litigation is filed before the stipulated time for payments, the payments shall be postponed till the expiry of the stipulated period from the date of disposal of litigations. The defendants 1 and 2 have declared and assured the plaintiffs that the suit schedule property is free from all encumbrances and that they have marketable title and had further agreed that they shall be held responsible in the event of any defect in the title. Soon after the agreement of sale, the plaintiffs came to know that an appeal in CCCA.No.34 of 1987 is pending before the High Court in which the plaint schedule property is part and parcel. However, on the request of the defendants 1 and 2, the plaintiffs had paid a further sum of Rs.10 lakhs by cheque dated 18.08.1999 drawn on Oriental Bank of Commerce, Nampally branch, Hyderabad and the same was encashed by the defendants 1 and 2. After coming to know of the above mentioned litigation, the plaintiffs had repeatedly requested the defendants 1 and 2 to inform the date of disposal of the said litigation, so that further payments could be made and the registered sale deed could be obtained. The plaintiffs had made necessary arrangements for payment of balance amount as per the terms of the agreement. But the defendants 1 and 2 have not communicated to the plaintiffs the date of disposal of the said appeal. After waiting for a considerable time, the 1st plaintiff wrote a letter dated 30.08.2001 to the defendants 1 and 2 requesting them to take steps to have the said appeal disposed of early and inform the same to the plaintiffs to enable the plaintiffs to perform their part of the contract. The defendants 1 and 2 had issued a reply dated 17.09.2001 with false and baseless allegations and had refused to take steps for disposal of the said appeal and claimed compensation for the loss sustained by them. In the said reply, the defendants 1 and 2 had taken a stand that they had already sold away the property through registered sale deeds but had failed to furnish the particulars of the purchasers. The said sale deeds, if any, executed by the defendants 1 and 2 in favour of their alleged purchasers are invalid and therefore, the defendants 1 and 2 and their alleged purchasers are bound to execute the sale deeds in favour of the plaintiffs. The plaintiffs are always ready and willing to perform their part of the obligations under the agreement to sell dated 12.03.1999. The defendants 1 and 2 failed to get clearance of the litigation before insisting for payment of the balance of sale consideration. Therefore, they are not entitled to take the plea of forfeiture of advance and cancellation of the agreement to sell. The agreement to sell is valid and subsisting. In the circumstances the plaintiffs are constrained to seek specific performance of the suit agreement to sell."

7. The specific defence of the defendants 1 and 2, in brief, is this: - 'The plaintiffs undertook to pay Rs.1 Crore within a period of three months from the date of the agreement to sell and had further agreed to pay the balance sum of Rs.1,52,40,000/- within a period of another three months. A grace period of three months more was also stipulated in the agreement to sell. In case of the failure on the part of the plaintiffs to make the payment of balance of sale consideration within the stipulated time including the grace period, it is also agreed that the sale agreement shall stand cancelled and the amounts already paid towards part of sale consideration shall be forfeited considering the time as the essence of the contract. Further, the litigation contemplated under the latter clause must be deemed to be a litigation to which the defendants 1 and 2 are parties and the existence of such litigation should be discovered before the expiry of period of nine months from the date of the agreement to sell. Otherwise the discovery of litigation will not revive the cancelled agreement. The plaintiffs had received copies of all the documents referred to in the agreement and one such document is the allotment order dated 12.05.1999 in E.P.No.2/1425/82 wherein it is clearly stated that the wife of Mohd.Fiazuddin Khan by name Kareemuniisa Begum had filed a suit in the City Civil Court claiming rights over the said property as she had to receive her Meher amount and that she had filed CCCA.34 of 1987. Therefore, it cannot be said that the plaintiffs came to know of this litigation subsequent to the sale agreement. The plaintiffs cannot take the plea of pendency of CCCA for the postponement of the payment of balance of the sale consideration. There is no truth in the contention of the plaintiffs that soon after the execution of the agreement they came to know of the pendency of the appeal in CCCA on the file of the High Court. The plaintiffs invented a false plea for the purpose of litigation. Long prior to the letter dated 30.08.2001, the defendants 1 and 2 had sold away the plaint schedule property to the 3rd defendant vide registered sale deeds dated 08.09.2000 and 11.09.2000. The sale agreement between the plaintiffs and the defendants 1 and 2 had come to an end automatically and stood cancelled at the end of 12th December 1999. One week prior to 02.09.2000, the plaintiffs had sent antisocial elements and those persons tried to break open the gate of the suit land to occupy the land forcibly. However, the watchman employed by these defendants had resisted them and on the same day the defendants 1 and 2 have given complaint to the S.I of Police, Medchal and a case in crime no.163 of 2000 was registered. Thereafter the plaintiffs had kept quiet for a long time. The plaintiffs know about the sale transactions with the 3rd defendant. However, they had given a letter with a view to gain undue advantage under the cancelled agreement. The defendants 1 and 2 had issued a reply dated 17.09.2001 claiming damages for the loss incurred by them on account of the plaintiffs failure to pay the balance of sale consideration within nine months from the date of the agreement. The sale deeds executed by the defendants 1 and 2 in favour of the 3rd defendant are valid. The defendants 1 and 2 are not precluded from selling the property to others after the expiry of the agreed period. The subsequent *bona fide* purchasers for value will get indefeasible title to the property. The suit is devoid of merit. The plaintiffs without any authority had advertised for the sale of the suit property. The plaintiffs had floated a company by name Madhu Real Estates and under its banner they had offered to sell individual plots. The illegal acts of the plaintiffs created adverse publicity and the defendants 1 and 2 have to settle for a lesser price with their vendees. The plaintiffs were never ready and willing to pay the balance of the sale consideration within nine months from the date of the agreement and the plaintiffs had committed breach of contract. The defendants 1 and 2 are not parties to the appeal in CCCA.34 of 1987 and there is no obligation on the part of these defendants to have the said appeal disposed of. The plaintiffs had committed breach of the agreement to sell. The defendants 1 and 2, on account of their pressing needs, were forced to sell the suit property for a lesser amount by incurring a loss of Rs.72,20,000/-. Hence, the defendants 1 and 2 are entitled to make a counter claim for the said amount with interest at 18% per annum. There is no cause of action. The plaintiffs' suit may be dismissed and the counter claim may be decreed entitling the defendants 1 and 2 to recover Rs.84,18,520/- including interest at 18% per annum."

8. The 3rd defendant filed a written statement stating that the suit is not maintainable and that the 3rd defendant had purchased the property for valuable consideration and that after the purchase it had invested huge amount to develop this property and that the title to the property passed to the 3rd defendant and that the suit is filed with false allegations only to cause hindrance to the enjoyment of the property by the 3rd defendant and that there is no enforceable right to the plaintiffs against the 3rd defendant and that the suit is not *bona fide* and that the suit is barred by limitation and is liable to be dismissed with exemplary costs.

9. The plaintiffs in their rejoinder/reply statement to the counter claim made by the defendants 1 and 2 had *inter alia* stated as follows: "The defendants 1 and 2 are guilty of suppression and misrepresentation of facts. The defendants 1 and 2 are misinterpreting the terms of the agreement. The defendants 1 and 2 are trying to get themselves unjustly enriched at the cost of the plaintiffs. The defendants 1 and 2 are bound to inform the intention to cancel the agreement. The have not done so. No notice was served. Without the knowledge and consent of the plaintiffs, the defendants 1 and 2 had sold away the plaint schedule property to the 3rd defendant. The said sale transaction by the defendants 1 and 2 in favour of the 3rd defendant for a nominal consideration is sham and nominal and the same is intended to defeat the rights of the plaintiffs. The defendants 1 and 2 must have received more consideration than that was mentioned in the sale deed of the 3rd defendant and the consideration must have been shown apparently at a low amount to avoid stamp duty and registration charges and to make an illegal claim against the plaintiffs. The defendants 1 and 2 are guilty of playing fraud on the plaintiffs. No prudent man would sell the property worth Rs.3 Crores for a petty sum of Rs.1,70,20,000/-. No loss was suffered by the defendants 1 and 2 as claimed in their written statement. The defendants 1 and 2 had alienated the property in a hasty manner after filing a false complaint. Since the defendants 1 and 2 contended that the terms of the agreement are void, they cannot retain the amount paid by the plaintiffs towards advance and that the clause that time is the essence of the contract is a formal clause and the defendants 1 and 2 assured and promised that it is a formal clause and not meant to be acted upon; and the said fact is evident from the fact that the defendants 1 and 2 have received Rs.10 lakhs towards part of balance of sale consideration, after the expiry of the stipulated time. The plaintiffs had spent monies on the plaint schedule property. The plaintiffs were permitted to level and clear the land by removing the bushes etcetera. The plaintiffs had obtained telephone connection on 10.05.1999 and had also obtained electricity connection to the plaint schedule property and had also got cleared the land by removing the bushes for the purpose of development of the property. The plaintiffs' intention in purchasing the suit schedule property is to develop the property and sell to third parties; and, for that purpose the company was incorporated. The plaintiffs had spent lot of money in bringing the land into good shape and had fixed an auspicious day for launching the project. Many VIPs and respectable persons including the defendants 1 and 2 had attended the function. The 2nd defendant has been canvassing with NRIs for the sale of the property. When some of such persons visited the suit schedule property and informed the plaintiffs that there is a proposal for a road through the middle of the suit schedule property, the plaintiffs had approached the defendants 1 and 2 and had apprised them of the said fact. The 1st defendant had assured the plaintiffs that he would see that the road will not be laid in the suit schedule property. Subsequently, the 1st defendant asked the plaintiffs to purchase, as it is, the suit land. The plaintiffs did not agree for the same, as their reputation would be at stake. Due to pendency of the CCCA.34 of 1987, it is very difficult to sell the property. By using their influence and by filing false complaints the defendants 1 and 2 had prevented the plaintiffs from entering into the suit schedule property. The defendants 1 and 2, who are the sellers, are bound to disclose the defects in title. The plaintiffs did not receive the copies of the documents as referred to in the agreement. The payment of Rs.10 lakhs was made *bona fide* on the demands of the defendants 1 and 2. The 3rd defendant is not a *bona fide* purchaser and the plaintiffs are not bound by the said sale deeds executed by the defendants 1 and 2 in favour of the 3rd defendant. The defendants 1 and 2 are not entitled to any decree in respect of the counter claim. Their counter claim is liable to be dismissed."

10. Taking into consideration the above pleadings, the trial Court had framed the following issues.

1. Whether the plaintiffs are entitled for specific performance of agreement of sale dated 12.03.1999 as prayed for and whether the plaintiffs are entitled for refund of Rs.60,000/- at 24% interest from the date of payment as prayed for?

2. Whether the defendants no.1 and 2 are entitled for counter claim on Rs.72,20,000/- together with interest thereon from 17.09.2001 onwards as prayed for in their counter claim, to what relief?

3. Whether the agreement of sale in favour of plaintiffs stood cancelled after expiry of 9 months from the date of its execution in terms and conditions of the said document as pleaded by d1 and D2 in their written statement?

4. To what relief?

[reproduced verbatim]

11. Before the trial court, the 1st plaintiff was examined as PW1 and exhibits A1 to A21 were marked. The 1st defendant and his supporting witness were examined as DWs1 and 2 and exhibits B1 to B7 were marked. On merits, the trial court had dismissed the suit of the plaintiffs and also the counter claim of the defendants 1 and 2 and granted the alternate relief of refund of advance consideration to the plaintiffs and decreed the plaintiffs' suit to the extent of refund of Rs.60 lakhs of rupees and had directed the defendants 1 and 2 to pay the said sum within three months from the date of judgment. The trial Court had further observed that in case of such failure to pay the said sum within three months, the same shall carry interest at 7.5% per annum from the date of judgment till date of payment to the plaintiffs.

12. The learned counsel for the plaintiffs would contend as follows: - 'The trial Court ought to have seen that in exhibit A1-agreement it is specifically mentioned as follows: - 'If it comes out that there is any litigation pending in regard to this property or any litigation is filed before the stipulated payments, the payments shall be postponed till the expiry of stipulated periods from the date of disposal of such litigation or litigations.' The trial court ought to have seen that soon after the agreement, i.e., about two months from the date of exhibit A1 the plaintiffs have come to know about the litigation which is pending i.e., CCCA.34 of 1987 on the file of the High Court and the said fact is elicited by the 1st defendant during the cross examination of PW1. The trial Court failed to see that the plaintiffs and the 1st defendant are related and that the former was requesting the latter orally to get cleared CCCA.34 of 1987 and intimate the same to him and the said fact is also brought out in the cross examination of PW1. The court below had failed to see that in exhibit A3-notice all the facts are specifically mentioned including the fact that the 1st plaintiff was requesting the defendants 1 and 2 repeatedly about the litigation. The trial Court failed to see that Rs.1 crore is to be paid by 12.06.1999 and that the plaintiffs had not paid the said amount by the due date as there was no demand from the 1st defendant and as the litigation regarding the suit property is pending. The trial Court failed to see that the plaintiffs paid Rs.10 lakhs on 18.08.1999 and the 1st defendant had received the same and therefore, it is clear that the suit agreement is subsisting and is not cancelled. The said fact also would show that there were discussions between the parties. The defendants 1 and 2 had never questioned the readiness and willingness on the part of the plaintiffs at any time either orally or by issuing a notice to that effect. The trial Court ought to have seen that there was no exchange of notices prior to exhibit A3 letter as there were discussions going on between the parties. The trial Court erred in drawing inferences contrary to the facts and in observing that the plaintiffs have no financial capacity and that exhibit A10-

bank statement would show that defendant No.1 received Rs.10 lakhs and that there are no entries in the said document to show that sufficient balance was available in the account of the plaintiffs to meet the requirement of payment of balance of sale consideration payable under the suit agreement to sell. There is no clause in the agreement that on failure of the plaintiffs to pay the balance of sale consideration within the stipulated time and the grace period, the agreement to sell would get cancelled automatically and that the advance paid would be forfeited without any further notice. The learned Judge having recorded a finding that the agreement of sale is subsisting had erred in refusing to grant a decree for specific performance. The trial Court ought to have seen that the 3rd defendant is not a *bona fide* purchaser for value and consideration and that the sale deeds of the 3rd defendant are sham and nominal and the same can be inferred from the fact that a property worth more than Rs.3 Crores was sold for a meager consideration of Rs.1,70,20,000/- by the defendants 1 and 2 to the 3rd defendant company. The sale deeds in favour of the 3rd defendant were brought into existence to defeat the just claim of the plaintiffs. The trial Court erred in refusing to grant the relief of specific performance of the suit agreement to sell having failed to properly appreciate the facts and the evidence and had thus erred in dismissing the suit in stead of decreeing the suit.'

13. On the other hand, the learned counsel for the defendants 1 and 2 would contend as follows: - 'The trial court accurately considered the purport of the terms of agreement to sell. On proper appreciation of the facts and the evidence, the trial Court had rightly held that the plaintiffs were never ready and willing to perform their part of the contract and that the plaintiffs have no financial capacity to pay the balance of sale consideration and that the said fact is evident from the exhibit A10, their own bank statement. The plaintiffs' contentions are not *bona fide* as observed by the trial Court. Therefore, the trial Court had rightly refused to grant the relief of specific performance. The trial Court ought to have recorded findings against the plaintiffs on all the issues and ought to have further held that the advance sale consideration stood forfeited on the cancellation of the suit agreement to sell and ought to have refused to grant the alternate relief for refund of the advance amount to the plaintiffs. The trial Court ought to have dismissed the suit of the plaintiffs and ought to have granted a decree in favour of the defendants 1 and 2 insofar as their counter-claim. However, the defendants 1 and 2 have not preferred any appeal or cross appeal. The plaintiffs are aware of the pending litigation in CCCA.34 of 1987 even by the time of the agreement. The defendants 1 and 2 are not parties to the said pending case. Therefore, the question of the defendants 1 and 2 having the matter disposed of early does not arise for consideration. The plaintiffs did not pay the balance of sale consideration by way of two installments and within the time prescribed under the agreement. The plaintiffs had further failed to show their readiness and willingness by issuing a notice within the stipulated time under the agreement. The plaintiffs had issued a notice belatedly, after the stipulated time only to get over their lapses and laches. Even the payment of Rs.10 lakhs was made after the stipulated time of six months. No reasons are forthcoming for making a paltry part payment and not the full payment. The plaintiffs have taken a false plea that they were permitted to enter into the property and that they made clearance of the bushes and then developed the land, though the agreement to sell specifically stipulated that on payment of total consideration the sellers undertake to deliver possession to the purchasers and register the regular sale deed at the cost of the purchasers and handover all the link documents to them. Therefore, it was contemplated that only on payment of total sale consideration the plaintiffs are entitled for delivery of possession. The plea regarding a proposed road passing through the middle of the property was raised as an after thought in the rejoinder. Thus, the plaintiffs have taken all false pleas and have not come to Court with clean hands. They are not entitled to the relief of specific performance which is an equitable relief.'

14. The learned counsel for the 3rd defendant while supporting the judgment of the trial Court had contended that the 3rd defendant is a bona fide purchaser for value and consideration.

15. We have bestowed our attention and have given earnest consideration to the facts and the submissions and the evidence brought on record.

16. Now the points for determination are:

> (1) **Whether the plaintiffs were always ready and willing to perform their part of the contract? And, if so, whether the plaintiffs are entitled to the relief of specific performance and not merely the alternate relief of refund of advance amount as granted by the trial court?**

(2) Whether the judgment and decree of the trial court are unsustainable under facts and in law?

(3) To what relief?

17. <u>POINT NO.1:</u>

17. (a) The admitted and established facts are as under: 'The execution of the exhibit A1-the agreement of sale between the plaintiffs on one hand and the defendants 1 and 2 on the other is admitted. The total sale consideration that was agreed to under exhibit A1 was Rs.3,02,40,000/-. Under exhibit A1, the plaintiffs had paid Rs.50 lakhs to the defendants 1 and 2 towards part of sale consideration. The plaintiffs had undertaken to pay the balance of sale consideration in two installments. Rs.1 Crore was agreed to be paid within a period of three months from the date of the agreement. The balance of Rs.1,52,40,000/- was agreed to be paid within three months from the above said payment. Thus, the total balance sale consideration of Rs.2,52,40,000/- was agreed to be paid within six months from the date of the agreement. In the event of the plaintiffs not being able to complete the final payment within six months from the date of the agreement, the defendants 1 and 2 had agreed to give them a grace period of additional three months. Thus, including the said grace period, the total time available to the plaintiffs to pay the balance of sale consideration is nine months from the date of the agreement. The plaintiffs had admittedly paid Rs.10,00,000/- only to the defendants 1 and 2 out of the 1st installment of Rupees one Crore that too on 18.08.1999 i.e., after the stipulated time of first three months.' In this factual back drop, it is necessary to refer to the other relevant and important terms of the agreement of sale-exhibit A1.

17. (b) The said relevant and important terms of the agreement are extracted hereunder verbatim.

> **'Whereas the Purchasers undertakes to pay the balance of sale consideration of Rs.1,00,00,000/- (Rupees One Crore only) within a period of 3 months from this day. The balance of Rs.1,52,40,000/- (Rupees One Crore Fifty Two Lacs Forty Thousand Only) shall be paid within 3 months of the II payment in the event of the Purchasers not being able to complete final payment within 6 months from this day, the seller has agreed to give him a grace period of additional 3 months. And in the event of the Purchasers**

> **failing to pay the balance of Sale Consideration as mentioned above the parties mutually agree that the amount already paid shall stand forfeited and the Agreement itself shall be treated as cancelled. The Sellers have made it clear to the Purchasers that time is the essence of this contract and that Sellers themselves have made commitment to discharge their liability to a third party and the said liability can be discharged only on payment of balance of sale consideration by the Purchasers. Therefore, the Purchasers have agreed that on their failure to make the payment within the stipulated time as above mentioned. If it comes out that there is any litigation pending in regard to this property or any litigation is filed before the stipulated payments, the payments shall be postponed till the expiry of stipulated periods from the date of disposal of such litigation or litigations.'**

Admittedly, the first installment of Rs.1 Crore was payable within three months from 12.03.1999, the date of the agreement. The second and last installment of Rs.1 Crore and Rs.1,52,40,000/- are payable within three months thereafter i.e., within six months from the date of the agreement. In the event of the plaintiffs failure to pay the total sale consideration within the above said six months period, they are entitled to a further grace period of three months as the sellers had agreed for providing the said grace period. The plaintiffs admittedly did not pay Rs.1 Crore within three months and also Rs.1,52,40,000/- within six months respectively from the date of the agreement. They also did not pay the entire balance of sale consideration within the nine months period including the three months grace period. All these facts are borne out by record and are also undisputed. It is also admitted by both the parties that a sum of Rs.10 lakhs was paid by way of a cheque dated 18.08.1999 towards part of sale consideration and the same was encashed. Therefore, in all only Rs.60 lakhs out of the total sale consideration of Rs.3,02,40,000/- was paid. It is specifically recited in the agreement that the sellers are selling the property to the purchasers and that time is the essence of the contract as the sellers had their own commitment to discharge their liability to a third party and that the liability of the defendants 1 and 2 to the 3rd party could be discharged only on payment of the balance of sale consideration by the plaintiffs/purchasers.

17. (c) The plaintiffs rely upon the following specific clause in the agreement in support of their contentions that they are always ready and willing to perform their part of the contract and that they are entitled to the relief of specific performance:

> **If it comes out that there is any litigation pending in regard to this property or any litigation is filed before the stipulated payments, the payments shall be postponed till the expiry of stipulated periods from the date of disposal of such litigation or litigations.**

The plaintiffs also rely upon the facts stated infra in support of their claim that the time for payment of the balance of sale consideration stood postponed and that time is not the essence of the contract. The first contention of the plaintiffs is that soon after the agreement to sell they had come to know that an appeal in CCCA.No.34 of 1987 is pending on the file of this Court and that having come to know of the same they had requested the defendants 1 and 2 to have that matter disposed of early so that they can pay the balance of sale consideration and have the sale deed registered. It is their further case that they are ready with balance of sale consideration. The next set of contentions of the plaintiffs in this regard are that despite their requests, the defendants 1 and 2 did not have the said appeal disposed of and that the plaintiffs are repeatedly requesting the defendants 1 and 2 to have the aforementioned matter disposed of and that there were discussions between the parties all through and that at the instance of the defendants 1 and 2, the plaintiffs had also paid Rs.10 lakhs on 18.08.1999 i.e., after the first three months period stipulated for payment of the 1^{st} installment of the balance of sale consideration in the exhibit A1-agreement to sell dated 12.03.1999 and that on receipt of the said payment by encashment of the cheque by the defendants 1 and 2, the time is no longer the essence of the contract.

17. (d) Per contra, according to the defendants 1 and 2, the plaintiffs are aware of the pending litigation even by the date of the agreement to sell as a relevant document viz., allotment order dated 12.05.1989 in E.P.2/1425/82 was delivered to the plaintiffs at the time of agreement to sell and that the defendants 1 and 2 are not parties to the said CCCA and therefore, no such requests for early disposal of the said CCCA were ever made by the plaintiffs and that as the defendants 1 and 2 are not parties to the said litigation, the defendants 1 and 2 getting the said *lis* disposed of early does not arise for consideration and that the contentions of the plaintiffs in this regard were invented to get over their lapses and laches and that on the failure of the plaintiffs to pay the balance of sale consideration within the stipulated time, the agreement stood cancelled automatically and that the advance amount stood forfeited and that the plaintiffs were never ready and willing to perform their part of the contract and that the plaintiffs were also not having any financial capacity as held by the trial Court and that the plaintiffs have taken false pleas and had failed to establish the pleas taken by them and that the plaintiffs are not entitled to the equitable relief of specific performance.

17.(e) Both the parties had adduced evidence in line with their respective contentions, which we have carefully perused.

17.(f) Now the merits of the rival contentions and the issue as to whether the plaintiffs were always ready and willing to perform their part of the contract are to be examined. It is to be noted that the suit agreement under exhibit A1 is dated 12.03.1999. The first installment of Rs.1 Crore is payable within three months from the said date. Even according to the plaintiffs they had come to know soon after the exhibit A1-agreement about the pendency of CCCA before this Court in respect of a property of which the suit schedule property is part and parcel. In the evidence, it is brought out that two months after the agreement, the plaintiffs had come to know about the said litigation. Even assuming for a moment that the plaintiffs have come to know for the first time about this litigation only two months after the exhibit A1-agreement, the plaintiffs ought to have made a demand in writing to the defendants 1 and 2 stating that they have come to know that CCCA is pending and ought to have stated that under the said circumstances they are not paying the balance amount due under the agreement and that the payment of the balance amount shall be postponed till the expiry of stipulated period from the date of disposal of the said litigation. They did not do so. To get over the fact that they were supplied with the crucial documents at the time of the agreement, which reflected the pendency of the above litigation, the plaintiffs had baldly contended that the documents mentioned in the agreement were not delivered. Let it be assumed for a moment that the contention of the plaintiffs that in spite of the demands by the plaintiffs, the defendants 1 and 2 did not comply with their demands for early disposal of the said litigation and that the defendants 1 and 2 were postponing the issue is correct. In such circumstances one would not expect the plaintiffs to keep quiet. The stipulated time of six months for payment of balance of sale consideration in two installments together with the grace period of three months i.e., the total period of nine months had expired by 11.12.1999. Within the said time, no written demand was made by the plaintiffs and it was not brought to the notice of the defendants 1 and 2 by a written notice or a letter that the litigation in CCCA is pending in regard to the agreement schedule property and that the stipulated time for payment of balance of sale consideration has to be counted from the date of disposal of that litigation. After 12.12.1999 the defendants 1 and 2 had admittedly sold the suit schedule property under registered sale deeds dated 08.09.2000 and 11.09.2000 to the 3rd defendant. Long after those dates i.e., on 30.08.2001 the 1st plaintiff for the first time had addressed a letter under the original of exhibit A3 mentioning about the pendency of the appeal in CCCA.34/1987 on the file of this Court. In that letter it is stated that repeated requests were made by him and that the defendants 1 and 2 had informed that they will communicate to him the date of disposal of the said litigation to enable him to make further payments and obtain the registered sale deed and that in spite of the 1st plaintiff making necessary arrangements for payment, the defendants 1 and 2 did not communicate to him the date of disposal of the above said CCCA. Therefore, in this letter the 1st plaintiff had made a request to the defendants 1 and 2 to take steps for immediate disposal of the pending litigation and inform him the date of disposal to enable him to perform his part of the contract. Why such a letter was not addressed earlier to 30.08.2001 could not be explained. Further, even by the date of payment of Rs.10 lakhs on 18.08.1999 the plaintiffs are aware of the litigation in CCCA. Even at that time of that part payment the plaintiffs did not take any endorsement or acknowledgement from the defendants 1 and 2 in writing in support of their contentions. This letter dated 30.08.2001 had emanated from the plaintiffs long after the property was sold by the defendants 1 and 2 to the 3rd defendant under two sale deeds dated 08.09.2000 and 11.09.2000, the copies of which are exhibited as exhibits A20 and A21. To this letter, the defendants 1 and 2 had issued a reply dated 17.09.2001 under exhibit A4. They had asserted in that reply that on account of the default on the part of the plaintiffs the agreement stood cancelled and that the amount of advance stood forfeited and that in or about the month of September 2000 the plaintiffs had engaged antisocial elements to forcibly occupy the above said property of the defendants 1 and 2 and that a police complaint was lodged and that the plaintiffs had resorted to such acts with a view to grab the property. It is asserted that the litigation pending has nothing to do with the agreement as the defendants 1 and 2 are not parties to the said litigation. It is also stated that the defendants 1 and 2 were constrained to make a distress sale and that eventually they had suffered a loss of Rs.72,20,000/- and that all the said facts are within the knowledge of the plaintiffs. Thus, just before the sale deeds were executed by the defendants 1 and 2 in favour of the 3rd defendant, there was an attempt on the part of the plaintiffs to enter into the possession of the schedule land is evident from the record. Admittedly possession of the property was not delivered to the plaintiffs under the exhibit A1-agreement. Even in the rejoinder filed in response to the counter claim of the defendants 1 and 2, the plaintiffs had urged that the plaintiffs were permitted to enter into possession of the property after the agreement to sell and that the plaintiffs were so permitted to level and clear the land by removing bushes etcetera and that the plaintiffs have obtained telephone connection on 10.05.1999 and also electrical connection for the suit schedule property and that the plaintiffs have also cleared the land by removing bushes etc., for the purpose of development of the property. It is clearly recited in the sale deeds under exhibits A20 and A21 that the said property was delivered by the vendors i.e., defendants 1 and 2 to the vendee i.e., the 3rd defendant. Thus, only within a short time before the execution of registered sale deeds, there was scramble for possession. On one hand the plaintiffs claimed that they had entered into the property after the agreement to sell for clearing and leveling of the land and on the other hand, the defendants 1 and 2 contended that possession was never delivered to the plaintiffs and that possession was delivered under exhibits A20 and A21 even by 8/11.09.2000 to the 3rd defendant. As already noted, it is clearly recited in the sale agreement that possession will be delivered only on payment of entire balance of sale consideration. The pleadings of the plaintiffs and the evidence are silent as to when the plaintiffs had entered into possession i.e., on what date subsequent to the agreement to sell. From the facts and circumstances, it appears that the plaintiffs have taken a false plea that the plaintiffs had entered the property, though they had admittedly not paid the entire sale consideration. There is no credible evidence to show that the plaintiffs had entered into the possession of the property with the permission of the defendants 1 and 2. Even a police complaint was lodged on 02.09.2000 by the defendants against the plaintiffs. If really there were discussions and there are no disputes, the defendants 1 and 2 ought not to have lodged such a complaint. The attested copy of relevant FIR and the attested copy of charge sheet were marked as exhibits B3 and B4. Even after the police complaint and the laying of the charge sheet, a suit for specific performance was not brought within a reasonable time. Even after the police complaint was lodged on 02.09.2000, the plaintiffs had kept quiet till 30.08.2001 that is for a period of nearly one year and had belatedly addressed the letter under exhibit A3 dated 30.08.2001 and had again kept silent till 13.03.2002, the date of filing of the suit. Be that as it may. When the plaintiffs had written a letter dated 30.08.2001 under exhibit A3, the defendants 1 and 2 had sent a reply dated 17.09.2001. Even within a reasonable proximity of time from that reply notice, the plaintiffs did not institute a suit. The present suit was instituted on 13.03.2002 i.e., about six months from the date of the said reply. No reasons are forthcoming for this belated institution of the suit. Further, the exhibit A10-statement of A/c.No.CA11161 in Oriental Bank of Commerce, which is filed by the plaintiffs, and which is in the name of Madhu Real Estates which is a company incorporated at the instance of the plaintiffs would show that the entries in the said account relate to the period from 01.04.1997 to 09.02.2004. A careful perusal of the total entries in the said account would show that only at one point of time there was a balance exceeding Rs.10 lakhs and that even that balance was maintained to honour the cheque dated 18.08.1999 for Rs.10 lakhs issued by the plaintiffs to the defendants 1 and 2 admittedly towards part of the balance sale consideration. All the other entries would show that the balance was always less than Rs.4 lakhs whereas the balance of sale consideration agreed to be paid and payable was Rs.2,52,40,000/-. No other documents are filed to show that the plaintiffs were and are having the capacity to pay the balance of sale consideration.

17. (g) What is to be next reiterated and noted is that the plaintiffs had taken a plea that they had entered into possession, which is contrary to the terms of the agreement and the plaintiffs could not prove the said contention that they had entered into possession lawfully with the permission of the defendants 1 and 2. Further, in the rejoinder filed, the plaintiffs urged as under: “The 2nd defendant has been canvassing with NRIs for the sale of the property. When some of such persons visited the suit schedule property and informed the plaintiffs that there is a proposal for a road through the middle of the suit schedule property, the plaintiffs had approached the defendants 1 and 2 and had apprised them of the said fact. The 1st defendant had assured the plaintiffs that he would see that the road will not be laid in the suit schedule property. Subsequently, the 1st defendant had asked the plaintiffs to purchase the suit land, as it is. The plaintiffs did not agree for the same, as their reputation would be at stake." In the rejoinder filed, the plaintiffs had raised for the first time this issue in regard to a proposed road which is likely to pass through the middle of the schedule property etcetera. Even this pleading is devoid of the relevant dates. All the facts coupled with reasoned findings cumulatively show that the plaintiffs were never ready and willing to perform their part of the contract.

17. (h) Be it noted that the terms of the exhibit A1 agreement, which were adverted to supra, would lay bare that the defendants 1 and 2 had agreed to sell the schedule property under a compulsion and as they were very much having the requirement for money to discharge their obligation to a 3rd party. As per the recitals in the agreement the defendants 1 and 2 had intended to discharge their said liability to a 3rd party only after receiving from the plaintiffs, the balance of sale consideration within the stipulated time under the agreement. Therefore, *ex facie* it can be said that the parties intended that the balance of sale consideration should be paid by the plaintiffs to the defendants 1 and 2 as per the payment schedule stipulated in the agreement to sell under exhibit A1. Whether the time was the essence of the contract or not, it is obvious that the defendants 1 and 2, who are the sellers under the exhibit A1 agreement, were in dire need of money and they had, therefore, entered into the exhibit A1 agreement with the plaintiffs. The exhibit A1-agreement is dated 12.03.1999. After the disputes had arisen, a police complaint under exhibit B3 was lodged on 02.09.2000. However, the suit was instituted by the plaintiffs belatedly on 13.03.2002 and no explanation was forth coming for the said inordinate delay. Therefore, this aspect of the matter also assumes importance in arriving at a just decision and while refusing the equitable relief.

17. (i) The learned counsel for the respondents/defendants had relied upon the following decision while supporting the decision of the trial Court. In **K.S. VIDYANADAM AND OTHERS Vs. VAIRAVAN**, the Hon'ble Supreme Court held as follows:

> **"It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a**

suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this court in Chand Rani v. Kamal Rani, [1993] 1 SCC 519, "it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident)? : (1) From the express terms of the contract; (2) from the nature of the property; and(3) from the surrounding circumstances, for example, the object of making the contract.

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973"

In this above cited case, the suit property was a house property situated in Madurai, which is one of the major cities of Tamil Nadu. The suit agreement was of December 1978 and the six months' period specified therein for completing the sale expired with 15-6-1979. The suit notice was issued by the plaintiff only on 11.7.1981, i.e., more than two years after the expiry of six months' period. The question was what was the plaintiff doing in this interval of more than two years? The plaintiffs contended that he has been calling upon defendants 1 to 3 to get the tenant vacated and execute the sale deed and that the defendants were postponing the same representing that the tenant is not vacating the building. The defendants have denied this story. The defendants' consistent refrain has been that the prices of house properties in Madurai have been rising fast, that within the said interval of 2 ½ years, the prices went up by three times and that only because of the said circumstance has the plaintiff [who had earlier abandoned any idea of going forward with the purchase of the suit property] turned round and demanded specific performance. Having regard to the above circumstances and the oral evidence of the parties, the Hon'ble Supreme Court had held that the court was inclined to accept the case put forward by defendants 1 to 3 and reject the story put forward by the plaintiff that during the said period of 2 ½ years, he has been repeatedly asking the defendants to get the tenant vacated and execute the sale deed and that they were asking for time on the ground that tenant was not vacating. The above decision was referred to in the decision of the Hon'ble Supreme Court in **SARADAMANI KANDAPPAN Vs. S. RAJALAKSHMI AND OTHERS**. In this case, the Hon'ble Supreme Court had also considered the following questions: `whether the time stipulated for payment of balance of sale consideration was the essence of contract and whether the defendants were justified in canceling the agreement when time schedule stipulated for such payment was not adhered to?'. The Hon'ble Supreme Court while answering the question had referred to Section 55 of the Indian Contract Act, which deals with the effect of failure to perform at fixed time in contract in which time is essential and had also referred to two earlier decisions and had held as follows:

> **"(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.**
>
> **(ii) The courts will apply greater scrutiny and strictness when considering whether the purchaser was `ready and willing' to perform his part of the contract.**
>
> **(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also `frown' upon suits which are**

> **not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser.”**

In **SHAIK MAHABOOB SAHEB Vs. KAMPASATI NAGESWARA RAO**, this Court while considering the question as to whether the time is essence of the contract, having regard to the facts of the case, had held as follows:

> **“Therefore, though time cannot be treated as essence of contract in this case, the failure of the appellant to pay the amount within stipulated time, and the point of time, at which he approached the Court, seeking the remedy, would have their own bearing on the manner in which the discretion must be exercised.”**

In this cited case, this Court had held that this is a typical case, where the discretion of the court vested under Section 22 of the Specific Relief Act, 1963 must be exercised to refuse the relief of specific performance in favour of the appellant. The ratios in the decisions squarely apply to the facts of the case. In the case on hand, though time cannot be treated as the essence of the contract, the failure of the appellants/plaintiffs to pay the amount of entire balance of sale consideration within the time stipulated in the agreement to sell, and the belated point of time at which the plaintiffs approached the Court seeking the remedy of specific performance have a bearing on the discretion to be exercised by this Court. Having regard to the express terms of the agreement-exhibit A1 and the surrounding and relevant circumstances, including the object with which the defendants 1 and 2 had entered into the contract, this Court holds that the defendants 1 and 2 are justified in contending that the plaintiffs are not ready and willing to perform their part of the contract. Accordingly, we hold that the plaintiffs are not ready and willing to perform their part of the contract and therefore, this is not a fit case to exercise the discretion in favour of the plaintiffs and that it is just and equitable to refuse the relief of specific performance. The law is very well settled that the jurisdiction to grant specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. Viewed thus, we find that the plaintiffs are not entitled to the equitable relief of specific performance. The point is accordingly answered against the plaintiffs.

18. Before taking up the next point, it is necessary to advert to the decisions relied upon by the learned counsel for the appellants/plaintiffs.

(i) Aniglase Yohannan v. Ramlatha and others. This decision was relied upon in support of the contention that if the plaintiff proves his readiness and willingness to perform his part of the contract, the said established fact is sufficient to grant the relief irrespective of the averments in the plaint. In this cited case, the Supreme Court having adverted to an earlier decision dealing with the provision of Section 16(c) of the Specific Relief Act had held as follows: - '**The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.**' There is no dispute with the legal proposition.

(ii) Surya Naraian Upadhyaya v. Ram Roop Pandey and others. The facts of this cited case would show that specific performance was refused also on the main ground that the appellant did not pay sufficient court fee on the date of presenting the plaint and that the deficit court fee was not made good for some time thereafter and that the same would show that the appellant had no capacity to pay the consideration and is not willing to perform his part of the contract. The Supreme Court did not approve the view expressed by the High Court.

19. Reverting to the facts of the case, this Court had already recorded a finding based on the facts peculiar to the case and the evidence on record that the plaintiffs are not ready and willing to perform their part of the contract and hence, they are not entitled to the equitable relief of specific performance. Therefore, the ratios in the decisions, which are rendered keeping in view the facts of the cited cases, are not helpful to the appellants/plaintiffs herein to advance their case any further. Be it noted that in view of the finding against the plaintiffs, there is no need to further examine any other issues like the bonafides of the subsequent purchasers.

20. POINT No.2:

We have gone through the decree and judgment of the trial Court. The trial Court having accurately considered the facts and having applied the evidence correctly to the facts of the case had recorded a well reasoned finding that the plaintiffs are not entitled to the relief of specific performance, which is an equitable relief, and had, therefore, granted a decree for the alternative relief of refund of the advance money paid by the plaintiffs to the defendants 1 and 2 and had dismissed the counter claim of the defendants 1 and 2. The defendants 1 and 2 did not prefer any appeal or cross appeal assailing the findings and decree against them in the above regard. For the reasons now assigned and in view of the findings recorded by us under point No.1, we find that the decree and judgment of the trial Court do not call for interference and that none of the grounds urged by the plaintiffs merit consideration and that the appeal is devoid of merit. We accordingly hold that the judgment and decree of the trial court are sustainable both under facts and in law. The point is answered accordingly.

21. POINT No.3

In the result and in view of the findings of this Court on points 1 and 2 against the appellants/plaintiffs, the Appeal Suit is dismissed, however, without costs.

Miscellaneous petitions pending, if any, in this appeal shall stand closed.

K.C. BHANU, J

M. SEETHARAMA MURTI, J

18.03.2015

Vjl