

HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No.2177 of 1998

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JUDGMENT:

The defendant in O.S. No.69 of 1989 on the file of I Additional Senior Civil Judge, Kakinada, (for short, "the trial court") preferred this appeal challenging the Decree and Judgment dated 30.06.1998, whereby the defendant/ appellant was directed to execute registered sale deed, conveying the schedule property in favour of the plaintiff/ respondent or his nominee, on receipt of balance of sale consideration.

02. The ranks given to the parties before the trial court in O.S. No.69 of 1989 will hereinafter be adopted throughout the Judgment, for convenience.

03. The plaintiff filed the suit for specific performance of agreement of sale seeking a direction against the defendant/ appellant to execute registered sale deed in favour of the plaintiff or his nominee in terms of the agreement of sale, deliver vacant possession of the schedule property, alleging that the defendant/ appellant offered to sell the schedule property and the plaintiff agreed to purchase at Rs.88,750/-. On 30.10.1985 receiving an amount of Rs.30,000/- as advance, the defendant executed agreement of sale in favour of the plaintiff. As per the terms and conditions of the agreement of sale, the defendant has to execute the registered sale deed in favour of the plaintiff on or before 28.02.1986 on payment of balance of sale consideration at the time of registration.

04. Subsequent to the execution of agreement of sale, on 12.12.1985 a sum of Rs.20,000/- was paid to the defendant through her husband out of the balance of sale consideration, the same was endorsed on the reverse of the agreement of sale. Subsequently, the defendant's husband received a sum of Rs.20,000/- on behalf of the defendant passed a receipt dated 27.11.1986. Thus, the defendant received a total sum of Rs.70,000/- out of Rs.88,750/- towards advance sale consideration and the balance to be paid was only Rs.18,750/-.

05. The plaintiff is always ready and willing to perform his part of obligation under the agreement of sale. Despite demands, the defendant failed to receive balance of sale consideration to execute registered sale deed. Having no other alternative, the plaintiff got issued a notice dated 03.02.1989 demanding the defendant to execute

registered sale deed in terms of the agreement of sale. As the defendant failed to perform her part of obligation under the agreement of sale, the suit was filed.

06. The defendant filed written statement denying material allegations of the plaint, inter alia contending that the plaintiff/ respondent is not entitled to claim discretionary relief of specific performance on account of laches on the part of the plaintiff/ respondent.

07. As per the terms of agreement of sale, the plaintiff has to pay balance of sale consideration on or before 28.02.1986, but failed to pay the balance as agreed. On the other hand, the plaintiff paid advance of Rs.10,000/- initially and obtained agreement of sale. The defendant/ appellant denied payment of Rs.30,000/- as advance on 30.10.1985 while contending that the plaintiff paid only Rs.10,000/- prior to the date of agreement of sale and obtained blank signed papers by the husband of the defendant, taking advantage of those papers, the agreement is brought into existence. The defendant/ appellant denied receipt of Rs.20,000/- on 27.11.1986 and that no amount was paid on the said date to the defendant by the plaintiff or atleast to her husband. The blank signed papers were utilized by the plaintiff, fabricated receipt dated 27.11.1986, though no amount was paid on that date. The plaint schedule property is vacant site abutting to Kakinada - Pitapuram road, the plaintiff is carrying on real estate business purchasing vacant site, selling to others in the surrounding areas of Kakinada, by obtaining agreements in his name or in the name of his nominees. The plaintiff purchased several vacant plots from several persons and started harassing several vendors without paying balance of sale consideration within the stipulated time and such vendors are Manchala Veerabhadrrao, Kolluboyina Ramaswamy, Thota Kamaraju. The plaintiff also obtained present suit agreement on 30.10.1985 with the same intention.

08. It is specifically contended that the defendant sold the property at Rs.250/- per square yards only with a view to discharge the family debt. The present market value of the site is Rs.500/- per square yard. The defendant's husband obtained loan from Cooperative Building Society and he could not discharge the debt, as the plaintiff failed to perform his part of obligation under the agreement of sale within the stipulated time, though time is the essence of the contract. The Cooperative Bank issued notice dated 12.10.1988 to the husband of the defendant demanding to discharge loan of Rs.24,541.20ps., but he could not discharge the debt as no money

was readily available with him to discharge, on account of non performance of obligation of the plaintiff under the agreement of sale. On this ground alone, the plaintiff is disentitled to claim equitable and discretionary relief of specific performance. Finally, it is contended that the plaintiff was never ready and willing to perform his part of obligation under the agreement of sale and that the registered notice was issued just before filing the suit and that there was no boundary dispute as contended by the plaintiff and prayed to dismiss the suit.

09. Basing on the above pleadings, the trial court framed the issues on 20.02.1990 and later they were re-casted on 17.09.1997, as follows:

- 01. Whether the plaintiff paid Rs.30,000/- as advance to the defendant on 30.10.1985?*
- 02. Whether the defendant received Rs.10,000/- only as advance on 30.10.1985 from the plaintiff?*
- 03. Whether the plaintiff paid Rs.20,000/- towards part of sale consideration on 27.11.1986 and whether the receipt dated 27.11.1986 is true, valid and binding on the defendant?*
- 04. Whether the time is the essence of the contract?*
- 05. Whether the suit is barred by limitation?*
- 06. Whether the plaintiff is entitled to seek specific performance of the suit agreement of sale?*
- 07. To what relief?*

10. During trial, on behalf of plaintiff, P.Ws.1 and 2 were examined, Exs.A.1 to A.9 were marked and on behalf of the defendant, D.Ws.1 and 2 were examined and Exs.B.1 to B.5 were marked.

11. Upon hearing argument of both the counsel, the trial court believed both the execution of agreement of sale and payment of amount on different dates, granted the decree in favour of the plaintiff, directing the defendant to execute registered sale deed receiving balance of sale consideration.

12. Aggrieved by the Decree and Judgment in O.S. No.69 of 1989 on the file of I Additional Senior Civil Judge, Kakinada, the defendant preferred the appeal on various grounds.

13. The main contention of the defendant is that the plaintiff though agreed to pay balance of sale consideration on or before 28.02.1986, did not pay the same within the time stipulated and it amounts to violation of terms and conditions of the

agreement of sale, which disentitled him to claim equitable and discretionary relief of specific performance. Similarly, the alleged payment of Rs.30,000/- under Ex.A.1 is not supported by any evidence, but the trial court believed the contention of the plaintiff without any legal evidence on record.

14. The trial court overlooked the plea of the defendant that the plaintiff paid only Rs.10,000/- prior to execution of Ex.A.1, obtained signature of her husband on the blank papers and utilized the same to fabricate the receipt and that the purpose of sale of the property is to discharge the debt due by the husband of the defendant to Cooperative Building Society and on account of failure of discharge of debt by the husband of the defendant, the Society issued demand notice, but the defendant's husband could not discharge the debt, due to non-payment of balance of sale consideration within the time. In such circumstances, the plaintiff is not entitled to claim discretionary relief, but the trial court, on erroneous appreciation of evidence, decreed the suit without any basis. Finally, it is contended that the plaintiff failed to prove his readiness and willingness, which is mandatory to grant relief of specific performance, but still the trial court erroneously granted relief for specific performance and finally prayed to dismiss the suit, allowing this appeal, setting aside the Decree and Judgment under challenge.

15. During hearing, learned counsel for the defendant/ appellant, Sri S. Srinivasa Rao Velivala, mainly contended that the alleged payment of Rs.20,000/- to the husband of the defendant does not amount to payment to the defendant, as there is no implied or express agency between the defendant and her husband to transact with the plaintiff for sale of the property. Therefore, the alleged payment is not binding on the defendant, consequently, the plaintiff disentitled on account of setting up such false plea and that this plea was not considered by the trial court in proper perspective. It is also contended that when the plaintiff agreed to pay balance of sale consideration within the specified time i.e on 28.02.1986, failure to pay balance of sale consideration disentitled the plaintiff to claim the relief of specific performance, which is purely discretionary and placed reliance on the Judgments of the Apex Court reported in **Saradamani Kandappan v. S. Rajalakshmi and others and K. S. Vidyanadam and others v. Vairavan, Venkappa Gurappa Hosur v. Kasawwa c/o.Rangappa Kulgod and Man Kaur (Dead) by L.Rs. v. Hartar Singh Sangha.**

16. Finally, it is contended that payment of part of balance of sale consideration in installments, if proved, would indicate that the plaintiff is not willing to perform his

part of obligation under the agreement of sale, thereby disentitled to claim purely discretionary and equitable relief of specific performance under Section 20 of the Specific Relief Act, 1963 (for short, 'the Act'). But the trial court without appreciating the facts with reference to law, granted relief of specific performance and committed an error, prayed to set aside the Decree and Judgment, dismissing the suit.

17. Learned counsel for the respondent/ plaintiff, Sri S. Subba Reddy, mainly contended that there is an implied or express agency between the defendant and her husband, therefore, he received payment, acknowledging the payment of Rs.20,000/- passed a receipt marked as Ex.A.5. He has drawn the attention of this Court to the deposition of D.W.1 to establish that he settled the bargain on behalf of his wife. Based on the evidence of D.W.1, the plea of the defendant that payment of Rs.20,000/- to D.W.1 is not sufficient compliance of the terms and conditions of agreement of sale can be thrown overboard. Finally, it is contended that though the defendant agreed to pay balance of sale consideration on or before 28.02.1986, the defendant accepted the payment subsequent to the date fixed, which amounts to waiver of such condition. Consequently, non-payment of balance of sale consideration within the specified time fixed under the agreement of sale does not amount to breach of contract, since, it amounts to waiver.

18. Apart from the waiver of right by the defendant, the plaintiff proved his readiness and willingness by producing cogent and satisfactory evidence, which is mandatory under Section 16(c) of the Act, thereby the plaintiff is entitled to decree for specific performance and accordingly, the trial court rightly decreed the suit and even after reappraisal of entire material, the Decree and Judgment of the trial court, do not call for interference of this Court and finally prayed to dismiss the appeal, confirming the Decree and Judgment passed by the trial court.

19. Considering rival contentions, perusing oral and documentary evidence, including the Decree and Judgment under challenge, the points that arise for consideration are as follows:

- 1. Whether payment of Rs.20,000/- towards balance of sale consideration to D.W.1 by the plaintiff amounts to payment of balance to the defendant?*
- 2. Whether non- payment of balance of sale consideration on or before 28.02.1986 amounts to breach of contract under Section 16(b) of Specific relief Act?*

3. *Whether the plaintiff was always ready and willing to perform his part of obligation under the agreement of sale as required under Section 16(c) of the Act?*
4. *Whether the plaintiff is entitled to discretionary and equitable relief of specific performance under Section 20 of the Act?*

Point No.1:

20. Undisputedly, the agreement was executed by the defendant in favour of the plaintiff, agreeing to sell the schedule property at the rate of Rs.250/- per square yard. The defendant denied receipt of Rs.30,000/- under the agreement of sale - Ex.A.1. The trial court found that the plaintiff paid Rs.30,000/- on the date of execution of Ex.A.1. The same is not challenged before this court specifically, though the specific ground is raised in grounds 4 and 5 of the memorandum of grounds of appeal.

21. The learned counsel for the appellant, during argument, limited his contention to the other contentions referred to above. Therefore, it is wholly unnecessary to decide passing of consideration of Rs.30,000/- on the date of execution of Ex.A.1.

22. One of the major contention of the plaintiff is that he paid Rs.20,000/- under Ex.A.5 dated 27.11.1986 towards balance of sale consideration to D.W.1, husband of the defendant. This fact was asserted by the plaintiff in paragraph 7 of the plaint, in clear terms, that the plaintiff paid Rs.20,000/- to the husband of the defendant towards balance of sale consideration on 27.11.1986. In paragraph 2 of the written statement, the defendant specifically denied payment of Rs.20,000/- towards balance of sale consideration and signing on Ex.A.5 by the husband of the defendant. In the evidence of P.W.1, he asserted that Rs.20,000/- was paid on 27.11.1986 under Ex.A.5 to the husband of the defendant. Therefore, it is consistent case of the plaintiff, from the beginning, that he paid Rs.20,000/- towards balance of sale consideration to D.W.1 - husband of the defendant. In view of this controversy between the parties, and specific contention urged during hearing that payment of Rs.20,000/- to D.W.1 does not amount to payment of balance of sale consideration to the defendant. It is the duty of the Court to decide, whether such payment to D.W.1 would amount to payment to the defendant.

23. To prove payment of Rs.20,000/- under Ex.A.5, the plaintiff himself was examined P.W.1. In examination-in-chief, he asserted that he paid Rs.20,000/- to D.W.1 towards balance of sale consideration on 27.11.1986. In the cross-examination, at paragraph 7, a suggestion was put to P.W.1 that he did not pay

Rs.20,000/- to D.W.1 on 27.11.1986 and did not pass Ex.A.5 receipt and that taking advantage of signature on blank white papers Ex.A.5 was created, got denial of those suggestions. P.W.2 testified about payment of Rs.20,000/- under Ex.A.5 by plaintiff to D.W.1. A similar suggestion was put to P.W.2, got denial of it.

24. Turning to the evidence of D.W.1 to whom the plaintiff allegedly paid Rs.20,000/- , in the examination-in-chief, he denied the receipt of Rs.20,000/- under Ex.A.5 in clear terms while contending that Ex.A.5 was created taking advantage of signature on blank white papers. In the cross-examination of D.W.1, he admitted that Ex.A.5 is the receipt for Rs.20,000/- was given by him. Thus, D.W.1 admitted about acknowledging receipt of Rs.20,000/- under Ex.A.5 as balance of sale consideration under the agreement of sale. Hence, no further proof is required to establish payment of Rs.20,000/- under receipt marked as Ex.A.5. Now question is, whether such payment constitute, payment of balance of sale consideration to the defendant.

25. Undisputedly, the agreement is between the plaintiff and the wife of D.W.1. The evidence on record established that D.W.1 is looking after the affairs of his wife, the defendant. In the first few sentences of examination-in-chief, D.W.1 admitted that the plaint schedule property belongs to his wife and he is looking after the affairs of his wife, he sold the property under the agreement of sale in the month of October, 1985. This piece of evidence is suffice to conclude that husband of the defendant himself looking after the affairs of the defendant and he himself settled the bargain. However, execution of agreement of sale by the defendant, Suravarapu Vijaya Lakshmi, is not in dispute. Similarly, Ex.A.4 payment endorsement dated 12.12.1985 is also not in dispute. Ex.A.1 created a contractual relationship between the plaintiff and the defendant and similarly, the defendant herself received Rs.20,000/-, endorsed on the reverse of the agreement, which is marked as Ex.A.4 and it is later in point of time to Ex.A.5 - receipt. Thus, the plaintiff is aware that the defendant herself is competent to receive balance of sale consideration and obtained acknowledgment of receipt of Rs.20,000/- dated 12.12.1985 which is marked as Ex.A.4. Even as per the terms of Ex.A.1, the plaintiff agreed to pay balance of sale consideration within four months from the date of execution of Ex.A.1 to the defendant. Therefore, it is clear from the recitals of Ex.A.1 and conduct of the plaintiff in payment of Rs.20,000/- under Ex.A.4 that the plaintiff has to pay balance of sale consideration only to the defendant. But, contrary to the intention of the parties, and agreed terms of Ex.A.1, failed to pay Rs.20,000/- under receipt marked as Ex.A.5 to

defendant.

26. It is the contention of the plaintiff that D.W.1 is looking after the affairs of his wife, the defendant and he received Rs.20,000/- in view of implied agency between D.W.1 and his wife. He has drawn the attention of this court to several admissions, to the notice of this Court about implied agency. No doubt, various admissions in the cross- examination of D.W.1 indicates that D.W.1 is looking after the affairs of his wife and he himself entered into the contract on behalf of his wife. However, in the absence of *privity* of contract between the plaintiff and D.W.1, he is not competent to receive any amount and acknowledge the same on behalf of his wife.

27. Under the Indian Contract Act, 1872, wife and husband are independent and the court cannot infer an implied agency between the wife and husband. In the absence of any authorization, D.W.1 received balance of sale consideration on behalf of the defendant, receipt of Rs.20,000/- by D.W.1, issue of Ex.A.5 would not bind the defendant.

28. Similar question came up before this Court in **M/s Jawaharlal Daima and Co., Vs. Ch. Chittemma and another**, wherein it was held as follows:

"If the wife has her own property the presumption is that she acts on her own authority. The ancient doctrine that the husband and wife are one person is not true in modern times. The wife cannot be reduced to a subordinated position in . . . 9 . . . respect of her property matters by the application of the doctrine of implied agency. The obligation on the part of the husband to meet the requirement of his wife stems from the fact of cohabitation in a domestic establishment. By implied authority the wife acts as the agent of the husband making the latter liable for the expenditure incurred by her in respect of necessities of life. There cannot be any such implied authority in a case where the wife owns separate properties. Marriage will not make the husband an agent of the wife to deal with her property matters without her authority. By virtue of marriage a husband has no authority to contract on behalf of his wife"

29. In **KalipatnapuAtchutamma Vs. Kommana Sambamurthy [died] per L.Rs. and others**, while reiterating the principle laid down in the decision in **M/s Jawaharlal Dama's** case referred to supra, held in paragraph 17 as follows:

"The legal position is thus obvious that there is no implied authority in favour of the husband in respect of the separate properties of the wife, having regard to the clear legal position, the theory propounded that there has been implied authority, cannot be countenanced."

30. Undoubtedly, these two decisions pertain to implied agency between wife and husband. Even according to Section 120 of Indian Evidence Act, one of the spouses are competent witnesses to testify on behalf of other in civil case, accordingly

defendant examined her husband as D.W.1. However, no implied agency can be inferred between wife and husband in respect of immovable properties, unless a specific authorization in writing is given.

31. In **Badiga Phanibhushana Rao and another Vs. Mathi Venkata Krishna Kutumba Rao and another & Talluri Nagaraju Vs. Mathi Venkata Krishna Kutumba Rao and two others**, this Court held as follows:

“When there is no implied or express agency between father and son, execution of agreement by the son is not binding on the alleged principal and relief of specific performance cannot be granted as they approached the Court with unclean hands since relief of specific performance is discretionary.”

32. In the decisions referred to supra, the question of implied agency between the wife and husband came up for consideration before this Court and this Court succinctly held that in the absence of any express agency, husband cannot act as an agent of wife in respect of her properties, but wife can act as agent of her husband for the necessities of family and not for any other purpose. If such implied agency is accepted between the wife and husband, even in relation to the property, it would amount to insubordination of wife under law and by virtue of marriage, as such the Court cannot infer an implied agency between wife and husband. If the principles laid down in the above decisions are applied to the present facts of the case, certainly this Court has no option except to hold that there is no implied or express agency between the defendant and her husband D.W.1 to deal with the immovable property of the defendant.

33. In the instant case, the plaintiff is aware that he entered into an agreement of sale with the defendant, of course, through her husband - D.W.1, subsequent to execution of Ex.A.1, he paid Rs.20,000/- under the agreement marked as Ex.A.4, this also clearly indicates that the transaction is only between the plaintiff and the defendant, even as per the recitals of Ex.A.1, the plaintiff agreed to pay balance of sale consideration only to the defendant. If really there is an implied agency between the defendant and her husband, there would have been a recital for payment of balance of sale consideration either to the defendant or to her agent. But in the present case, there was no such recital in Ex.A.1, which permits the plaintiff to pay balance of sale consideration to D.W.1. Though D.W.1 admitted about the receipt of Rs.20,000/- and issue of Ex.A.5, such payment would not bind the defendant and she is not under obligation to execute registered sale deed, receiving

balance of sale consideration of Rs.18,750/-.

34. Learned counsel for the defendant while contending that payment of Rs.20,000/- under Ex.A.5 to D.W.1 does not amount to payment to defendant, though they are closely related, as wife and husband, drawn attention of this Court to a Judgment reported in **Mankaur's** case referred to supra. But the principle laid down therein has no direct application to the present facts. Since the principle laid down in the above judgment is regarding the proof of readiness and willingness by the party to the suit.

35. When I adverted to the other document i.e. registered correspondence marked as Ex.A.7, letter dated 23.12.1988, the plaintiff demanded the defendant to execute registered sale deed receiving balance of sale consideration without reference to any payment. Similarly, in registered notice dated 03.02.1989, the plaintiff admitted that he paid only Rs.20,000/- on 27.11.1986 to D.W.1 and obtained receipt marked as Ex.A.5. At best, these documents would establish the payment of Rs.20,000/- to D.W.1 and the same was admitted in cross-examination of D.W.1. But such payment cannot be construed as payment to the defendant. It is difficult for this Court to accept the contention that he paid Rs.20,000/- to the defendant as part of balance of sale consideration. Hence, in view of the principle laid down in the above two decisions, there was no implied or express agency between D.W.1 and his wife, the defendant/ appellant herein and payment of any amount to D.W.1 does not amount to payment of balance of sale consideration to the defendant. Accordingly, point No.1 is answered.

Point No.2:

36. One of the major contention raised by the learned counsel for the appellant/ defendant is that when the plaintiff agreed to pay balance of sale consideration within four months from the date of execution of Ex.A.1 i.e. on or before 28.02.1986, it is for the plaintiff to pay balance of sale consideration, obtain registered sale deed within the stipulated time as per the terms of Ex.A.1. Non- payment of balance of sale consideration would amount to breach of terms and conditions. On the other hand, learned counsel for the plaintiff/respondent would contend that when the defendant accepted the payment of Rs.20,000/- under endorsement marked as Ex.A.4 and passing receipt evidencing payment of Rs.20,000/- by D.W.1 amounts to waiver. The word 'Waiver' means 'giving up a known legal right'.

37. Undisputedly, as per the terms of Ex.A.1, the plaintiff has to pay balance of sale consideration on or before 28.02.1986 and obtain registered sale deed. Surprisingly, the defendant did not pay balance of sale consideration, but paid Rs.20,000/- on 12.12.1985 under Ex.A.4 to the defendant and allegedly paid Rs.20,000/- on 27.11.1986 to D.W.1. Even by the date of filing the suit on 27.02.1989 the plaintiff did not pay the entire balance of sale consideration without any reason, to the defendant. Therefore, non-payment of balance of sale consideration to obtain registered sale deed within the stipulated time i.e. on or before 28.02.1986, certainly amount to breach of agreement of sale. Even as per the recitals at page 2 of Ex.A.1, the plaintiff agreed to pay balance of sale consideration within four months from the date of execution of Ex.A.1 i.e. on or before 28.02.1986 at the time of registration of sale deed before the Sub-Registrar. Strangely, the plaintiff did not demand the defendant to receive the balance of sale consideration and execute registered sale deed before the stipulated period i.e. on or before 28.02.1986, but for the first time, addressed a letter dated 23.12.1988 and got issued a legal notice dated 03.02.1989 demanding execution of registered sale deed by the defendant, receiving balance of sale consideration.

38. Non-payment of balance of sale consideration within the stipulated time directly amounts to breach of terms and conditions of agreement of sale. Section 16 of the Act is relevant provision which deals with the personal bars to relief of specific performance of agreement of sale. According to personal bars to relief of specific performance, particularly Section 16(b) a purchaser who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract or who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract is disentitled to relief of specific performance.

39. In the present case, the plaintiff agreed to pay balance of sale consideration on or before 28.02.1986 though time it is not essence of the contract, since there was no condition to terminate the contract in the event of failure to pay balance of sale consideration, still it was the duty of the plaintiff to adhere to the terms and conditions of agreement of sale - Ex.A.1. Such failure directly disentitles the plaintiff to claim specific performance of agreement of sale as held by the Apex Court in

Chand Rani (dead) by L.Rs. v. Kamal Rani (dead) by L.Rs. wherein the Constitutional Bench of the Apex Court held as follows:

"In case 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 (1) from the express terms of the contract (2) from the nature of property and (3) from the surrounding circumstances."

Where in an agreement to sell the immovable property it was stipulated that amount in part was to be paid within 10 days of the execution of the agreement and the balance has to be paid at the time of registration of deed and it was agreed that the vendor would redeem the property which was mortgaged and also obtain the Income tax clearance certificate and the word 'only' was used twice i.e. To qualify the amount and to qualify the period of payment of such amount i.e. Ten days it was held that the intention of the parties was to make time as essence of contract and in such case, when the purchaser was not ready and willing to pay the amount in part as agreed, before delivery of possession and income tax clearance certificate and redemption of property, it was contrary to the conditions of the agreement and the purchaser was not entitled to the specific performance of contract".

40. Similar view was expressed by the Apex Court in another Judgment reported in **K.S. Vidyanadham and others Vs. Vairavan and** in the subsequent judgment reported in **Saradamani Kandappan Vs. S. Rajalakshmi & Others** the Apex Court held as follows:

"The order of performance of reciprocal promises does not depend upon the order in which the terms of the agreement are reduced into writing. The order of performance should be expressly stated or provided, that is, the agreement should say only after performance of obligations of vendors, the purchaser will have to perform her obligations. In the present case the agreement of sale expressly provided that the purchaser shall pay the balance sale consideration within time schedule as specified. The payment of sale price was delinked from execution of sale deed. The purchaser had to fulfill her obligation in regard to payment of price and thereafter vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser. The agreement provided specifically that having paid the balance price, if the purchaser is not satisfied about the title and on being intimated about the same if the vendors fail to satisfy the purchaser about their title, all amounts paid towards the price should be refunded to purchaser. This clearly demonstrates that the payment of balance of sale price in terms of the contract was not postponed nor made conditional upon the purchaser being satisfied about the title, but that payment of the balance price should be made to the vendors as agreed unconditionally. In such circumstances the plea of purchaser that since clause providing that execution of the sale deed shall depend upon the purchaser getting satisfied regarding title to the lands and that property is not subject of any encumbrance; precedes clause requiring payment of balance consideration in

installments, the satisfaction of the purchaser in regard to the vendor's title to the land and the encumbrance, was a condition precedent for payment of the balance consideration cannot be accepted. Since section 52 cannot be come in aid of purchaser to save his non payment of balance consideration within time fixed when time was essence of contract. Therefore, the failure of the appellant purchaser to pay the balance sale consideration within time fixed, clearly amounted to breach of contract. As the time for payment was, the essence of the contract, the respondents were justified in determining the agreement of sale. The rejection of the prayer for specific performance was, therefore, proper."

41. As seen from the principle laid down in the above judgment, when the specific date is stipulated under the agreement of sale, it is for the parties to adhere to the terms and balance of sale consideration. When failed to perform their part of obligation, it amounts to violation of essential terms and conditions of the agreement and it is breach of contract, though time was not the essence of the contract.

42. It is the consistent view of the Apex Court in various Judgments that the plaintiff has to approach the Court within a reasonable time seeking relief of specific performance. In the present case, the plaintiff approached the Court after lapse of more than three years from the date stipulated in the agreement. The agreement of sale - Ex.A.1 was entered into on 30.10.1985, balance was agreed to be paid on or before 28.02.1986 before the Sub-Registrar at the time of registration without imposing any obligation on the defendant, to perform any obligation before the payment of balance of sale consideration. Instead of payment of balance of sale consideration before the stipulated period, the defendant was paid Rs.20,000/- on 12.12.1985 i.e. almost after 10 months and Rs.20,000/- on 27.11.1986 to the defendant's husband under Exs.A.4 and A.5. But such belated payment, more particularly, when the defendant sold the property to discharge the debt of the family, amounts to breach of agreement of sale. However, the suit was filed after long lapse of time i.e. in the year 27.02.1989 i.e. almost after 3 years 5 months 28 days. Thus, the plaintiff did not approach the Court within reasonable time after execution of the agreement of sale. What is reasonable time depends upon the circumstances of the case and a similar question came up before the Apex Court in **K.S.Vidyanadham's** case referred to supra, wherein it was held as follows:

"The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give

an exact definition of the word “reasonable”. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the “reasonable time” is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit.”

43. Even if the principle laid down in the above Judgment is applied to the present facts of the case, the plaintiff did not approach the Court within a reasonable time. Therefore, the plaintiff is disentitled to claim equitable relief of specific performance of agreement of sale on the ground that he committed breach of terms and conditions of the agreement, though time was not the essence of the contract and that he did not approach the Court within reasonable time, but approached the Court after 3 years 5 months 28 days from the date of execution of Ex.A.1. On this ground alone, the suit is liable to be dismissed. But the trial court did not consider the factum of breach of terms and conditions of the contract with reference to Section 16(b) of the Act as the plaintiff approached the Court after 3 years 5 months 28 days seeking equitable and discretionary relief of specific performance. Thus, the trial court without advert to the law laid down by the Apex Court with reference to the facts, erroneously granted Decree in favour of the plaintiff and the same is liable to be set aside.

44. One of the contentions during argument is that when once limitation began to run, it will not stop. Therefore, the suit is barred by limitation and drawn attention of this Court reported in **Venkappa Gurappa Hosur's** case referred to supra.

45. In the above judgment, the Apex Court held that once the limitation began to run, it runs its full course. Therefore, the suit has not been filed after expiry of 3 years from the date of knowledge of denial, by operation of Article 54 of the Schedule to the Limitation Act 1963. The suit is hopelessly barred by limitation.

46. In the present case, plea of limitation was not specifically set up. However, it is not pure question of law, depending upon the facts and it can not be raised even otherwise Section 3 of the Act permits the Court to consider the question of limitation, though such plea was not set up by the defendant. In the present case, the agreement under Ex.A.1 was obtained on 30.10.1985 and later the plaintiff paid Rs.20,000/- under Ex.A.4 to the defendant and the same was established. Thus by receiving Rs.20,000/- under Ex.A.4 the defendant accepted the agreement and her obligation to perform agreement of sale and it does not amount to denial of her

obligation to perform the her obligation under agreement of sale. Therefore, limitation under Article 54 of the Limitation Act starts only from the date of denial of her obligation. Hence, the suit can be dismissed on the ground that it is barred by limitation as contended by the defendant counsel.

47. In view of the aforesaid reasons, this point is held in favour of the defendant and against the plaintiff.

Point Nos.3 and 4:

48. One of the contentions of the plaintiff is that he is always ready and willing to perform his part of obligation under the agreement of sale, but the defendant evaded to receive balance of sale consideration, execute registered sale deed, despite oral demands, by letter and registered notice marked as Exs.A.7 and A.8. Whereas the defendant contended that the plaintiff was not ready and willing to perform his part of obligation under the agreement of sale and in view of Section 16(c) of the Act, the plaintiff is disentitled to claim equitable and discretionary relief of specific performance of agreement of sale.

49. Undisputedly, the time for payment of balance of sale consideration to obtain registered sale deed was stipulated in Ex.A.1 as 28.02.1986, but the plaintiff did not pay balance of sale consideration within the stipulated time. The plaintiff paid Rs.20,000/- on 12.12.1985, obtained an endorsement on the reverse of the first page of Ex.A.1 from the defendant, duly acknowledging the receipt of Rs.20,000/-, which is marked as Ex.A.4 i.e. almost after 10 months from the date fixed for payment of balance of sale consideration. Mere acceptance of Rs.20,000/- as part of balance of sale consideration does not amount to waiver or giving up a known legal right. If really, the plaintiff was ready and willing to perform his part of obligation, the plaintiff would have demanded the defendant for execution of registered sale deed on receipt of balance of sale consideration before the stipulated date i.e. 28.02.1986, but he kept quiet for a long time and paid Rs.20,000/- under endorsement marked as Ex.A.4 after 10 months from the date stipulated for payment of balance of sale consideration. Even he did not issue any legal notice calling upon the defendant to perform her part of obligation and execute registered sale deed. Even thereafter, he allegedly addressed a letter dated 23.12.1988 calling upon the defendant to execute registered sale deed marked as Ex.A.7 and later got issued registered notice dated 03.02.1989 marked as Ex.A.8 calling upon the defendant to execute registered sale

deed receiving balance of sale consideration. Though the receipts of Exs.A.7 and A.8 was denied by the defendant, in the evidence of D.W.1, he admitted that he is residing at the address mentioned in the letters. When the registered notice was returned with an endorsement 'not available', it amounts due service of notice, drawing presumption under Section 27 of the General Clauses Act. However, the letter marked as Exs.A.7 and A.8, at best, shows that the plaintiff expressed his readiness and willingness to perform his part of obligation on 23.12.1988 and on 03.02.1989.

50. According to Section 16(c) of the Specific Relief Act, it is for the plaintiff to plead and prove that he is always ready and willing to perform his part of obligation under the agreement of sale to obtain discretionary relief of specific performance. Here, the plaintiff for the first time called upon the defendant to execute registered sale deed receiving balance of sale consideration only by addressing letter marked as Ex.A.7. Moreover, no reliable evidence was brought on record to accept the contention that the plaintiff is always ready and willing to perform his part of obligation as mandated under Section 16(c) of the Act prior to issue of Ex.A.7. Thus, the plaintiff miserably failed to prove his readiness and willingness to perform his part of obligation throughout, which disentitled him to claim discretionary relief under Section 16(c) of the Act.

51. The relief of specific performance is purely discretionary under Section 20 of the Act and such discretion has to be exercised judiciously. Such exercise of jurisdiction is hedged by two exceptions contained in Section 20(2) of the Act. The relief of specific performance cannot be granted merely because it is lawful to grant and the Court has to take into consideration the conduct of the parties and the surrounding circumstances, including the terms and conditions of the agreement of sale. In the present case, the plaintiff maintained silence for 3 years 5 months and 28 days, except payment of Rs.20,000/- directly to the defendant, marked as Ex.A.4, not even demanded the defendant to perform her part of obligation under the agreement of sale. When the plaintiff maintained silence for a considerable period of more than three years without making any demand and approached the Court after 3 years 5 months and 28 days, shows that the plaintiff is not ready and willing to perform his part of obligation under the agreement of sale. At the same time he allegedly paid Rs.20,000/- to D.W.1, husband of the defendant which cannot be treated as part payment of balance of sale consideration to the defendant as agreed under Ex.A.1.

Thus the plaintiff did not approach the Court with clean hands, in such case he is disentitled to claim discretionary and equitable relief of specific performance in view of the law declared by the Apex Court in **Lourdu Mari David and others v. Louis Chinnaya Arogiaswamy and others** wherein it was held as follows:

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

52. In **G. Jayashree and others v. Bhagwandas S. Patel and others**, the Apex Court held as follows:

“When the plaintiff did not choose to file a suit for specific performance of contract at first instance speaks volumes about his conduct. However civil Courts, in matter of enforcement of an agreement to sell, exercise a discretionary jurisdiction. A plaintiff was expected to approach Court with clean hands and his conduct plays an importunate role in matter of exercise of discretionary jurisdiction by a court of law. He has to approach the court within reasonable time.”

53. Similarly in **Azhar Sultana v. B. Rajamani and others** wherein the Apex Court held as follows:

“The suit for specific performance of agreement must be filed within a reasonable time. What would be a reasonable time would depend upon facts and circumstances of each case. No hard and fast law can be laid down therefore. Conduct of parties in this regard would also assume significance.”

54. In view of the law declared by the Apex Court, it is for the plaintiff to approach the Court within a reasonable time with clean hands but the plaintiff failed to do so. Taking into consideration of the conduct of the plaintiff throughout, this Court can conclude that discretion cannot be exercised in favour of the plaintiff to grant relief of specific performance, as observed in the earlier paragraphs, the relief of specific performance is purely discretionary and such discretion has to be exercised in favour of the plaintiff only when the suit for specific performance is filed within reasonable time. A similar question came up before the Apex Court in **Nirmala Anand v. Advent Corporation (P) Limited and others** wherein it was held as follows:

“It is true that grant of decree of specific performance lies in the discretion of the Court and it is also well settled that it is not always necessary to grant specific

performance simply for the reason that it is legal to do so. It is further well settled that the Court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance.”

55. If the principle laid down in the above Judgment is applied to the present facts of the case, it is difficult to exercise discretion to grant relief of specific performance.

56. The trial court decreed the suit without appreciating the evidence on record in proper perspective with reference to law, not even looked into delay in filing the suit and conduct of the plaintiff in maintaining silence without making any demand in writing etc, committed a grave error in granting Decree for specific performance, exercising jurisdiction under Section 20 of the Act. Hence, the finding of the trial court in favour of the plaintiff and against the defendant holding that the plaintiff proved his readiness and willingness is hereby set aside.

57. In view of my findings on points 2 and 3, the plaintiff is disentitled to claim relief of specific performance. Hence, the Decree and Judgment of the trial court are hereby set aside.

58. In the result, the appeal is allowed setting aside the Decree and Judgment passed in O.S. No.69 of 1989 dated 30.06.1998 by the I Additional Senior Civil Judge, Kakinanda, but in the circumstances without costs.

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

M. SATYANARAYANA MURTHY, J

DT.18-12-2015

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HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY

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APPEAL SUIT No.2177 of 1998

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