

**HON'BLE SRI JUSTICE M. SATYANARAYANA
MURTHY**

APPEAL SUIT No.2309 of 1996

JUDGMENT :

Defendants No.2 to 4 in O.S.No.64 of 1992 filed this appeal challenging the decree and judgment passed by the Subordinate Judge, Pithapuram (hereinafter called 'the trial Court' for convenience), dated 02.08.1996.

2. For the convenience of reference, the ranks given to the parties before the trial Court will be adopted throughout the judgment.

3. The plaintiff (1st respondent herein) filed the suit for specific performance of agreement of sale, dated 01.09.1995, seeking a direction against defendant No.1 to execute a registered sale deed in favour of the plaintiff or his nominee, conveying the schedule property by receiving the balance of sale consideration, deliver possession of the schedule property to the plaintiff or his nominee after ejecting the defendant therefrom, to appoint an advocate commissioner to measure the exact extent of land and for payment of Rs.15,000/- as damages for use and occupation of the schedule property by defendants and in the alternative for refund of Rs.14,500/- received by defendant No.1 as advance under the agreement of sale.

4. Defendant No.1, who is the alleged sole owner of the schedule property, sold the schedule property to the plaintiff at the rate of Rs.7,500/- per acre and executed an

agreement of sale, dated 01.09.1985, by receiving advance of Rs.10,000/- while agreeing to receive balance of sale consideration after ascertaining the exact extent of land. Defendant No.1 agreed to execute the registered sale deed after receiving balance of sale consideration on such ascertainment of extent and the plaintiff shall pay balance sale consideration at the time of registration and that defendant No.1 undertook not to alienate the property to the third parties.

5. While the matter stood thus, at the request of defendant No.1, plaintiff paid Rs.1,000/- on 03.10.1995, Rs.2,000/- on 06.10.1985 and Rs.1,500/- on 11.12.1985, endorsed those payments on the reverse of the agreement. Thus, the plaintiff in total paid Rs.14,500/- under the agreement of sale.

6. The plaintiff is always been ready and willing to perform his part of contract and realized the crop for the year 1985-86. While so, in the last week of November, 1985, the plaintiff requested defendant No.1 to get the land measured, but, the defendant even did not get the land measured, enabling the plaintiff to pay the balance sale consideration.

7. It came to notice of the plaintiff that defendant No.1 executed an agreement of sale in favour of defendant Nos.3 and 4, who are the wife and daughter of defendant No.2 and that they all came to schedule property, made an attempt to fell babul trees in the schedule property.

When questioned defendant No.1 about the truth of the claim of defendant Nos.2 to 4, defendant No.1 informed that he executed an agreement of sale in favour of defendant Nos.3 and 4 and that the same was cancelled as they committed default in payment of balance sale consideration and handed over the correspondence between defendant No.1 and defendant Nos.2 to 4. Defendant No.1 further stated that he never delivered the schedule land to defendant Nos.2 to 4. Thus, no contractual obligation is subsisting as on the date of filing of the suit between defendant No.1 and defendant Nos.3 and 4.

8. Though the plaintiff is always ready and willing to perform his part of obligation under the agreement of sale, defendant No.1 did not get the land measured, colluding with defendant Nos.2 to 4 inducted them into possession, to defeat the rights of the plaintiff. Hence, the plaintiff is entitled to recover possession of property and damages for use and occupation from the defendants, and sought a decree for the above reliefs.

9. Defendant No.1 filed written statement admitting the execution of agreement of sale, receipt of sale consideration of Rs.14,500/- on different dates, endorsement of the same on the reverse of agreement of sale and delivery of vacant possession of the schedule property to the plaintiff.

10. Defendant No.1 specifically contended that the

plaintiff shall obtain sale deed by 31.05.1986 on payment of entire balance sale consideration. But, he never expressed his readiness and willingness to pay the balance sale consideration to obtain registered sale deed. Therefore, the plaintiff is not entitled to claim the relief of specific performance and other consequential reliefs.

11. The plaintiff is in possession and enjoyment of the property, realized the crop worth of Rs.15,000/- for the agriculture year 1985-86 and defendant No.1 requested the plaintiff to comply with the terms and conditions of agreement of sale. But, the plaintiff did not cooperate with defendant No.1 and failed to obtain registered sale deed with a malicious intention.

12. Defendant No.1 expressed his readiness and willingness to perform his part of obligation under agreement of sale while contending that the plaintiff is not entitled to claim recovery of possession and damages from defendant No.1.

13. Defendant No.1 admitted about the execution of agreement of sale in favour of defendant Nos.3 and 4 and its cancellation by registered correspondence and finally prayed for dismissal of suit against him with exemplary costs.

14. Defendant No.2 filed a separate written statement alleging that he is not aware about the agreement of sale executed in favour of the plaintiff by defendant No.1.

Even if it is in existence, it is a collusive agreement of sale brought in to existence to defeat the rights of defendant Nos.2 to 4. The possession of the schedule property was never delivered to the plaintiff and in order to obtain registered sale deed, the plaintiff has to prove the payment of any amount as advance and realizing the crop for the year 1985-86.

15. Defendant Nos.2 to 4 are always ready and willing to perform their obligation under the contract, registered correspondence between them does not amount to cancellation of agreement of sale and that the plaintiff is not entitled to claim any of the reliefs against the defendants as the contract between defendant No.1 and defendant Nos.3 and 4 is still subsisting.

16. Defendant Nos.3 and 4 adopted the written statement filed by defendant No.2.

17. Basing on the above pleadings, the trial Court framed the following issues.

1. Whether the suit agreement is true and binding on D.3 and D.4?
2. Whether the agreement executed by D.1 in favour of D.3 and D.4 is subsisting?
3. Whether D.3 and D.4 are ready and willing to perform their part of the contract?
4. Whether plaintiff is entitled to damages, if so, to what amount and from whom?
5. To what relief?

18. During the course of trial, on behalf of plaintiff,

PWs.1 to 3 were examined and marked Exs.A.1 to A.15. On behalf of defendants, DWs.1 to 4 were examined and marked Exs.B.1 to B.6.

19. Upon hearing argument of both the counsel and considering the oral and documentary evidence, the trial Court decreed the suit in favour of the plaintiff granting relief of specific performance directing defendant No.1 to execute registered sale deed in favour of the plaintiff, conveying the schedule property on receipt of balance sale consideration while directing defendant Nos.2 to 4 to deliver vacant possession of the schedule property to the plaintiff and to pay damages of Rs.10,000/- for use and occupation of the land by defendant Nos.2 to 4.

20. Aggrieved by the decree and judgment under challenge passed by the trial Court in O.S.No.64 of 1992, defendant Nos.2 to 4 preferred the present appeal on various grounds.

21. The main contentions raised in the grounds of appeal are that the schedule property is the subject matter of litigation in another suit filed by defendant Nos.2 to 4 for specific performance of agreement of sale against defendant No.1 and that the present suit transaction is different from the transaction covered by the other suit. But, the trial Court framed the issue with regard to readiness and willingness of defendant Nos.3 and 4 to perform their part of obligation under contract, which is irrelevant, and answered the same against defendant

Nos.2 to 4 erroneously.

22. It is further contended that the suit transaction, which is the subject matter of Appeal Suit No.1509 of 1988 pending on the file of this Court and the subject matter of the present suit is one and the same and unless both the matters are decided, it is difficult for the Court to come to a definite conclusion and prayed to allow the appeal setting aside the decree and judgment of the trial Court.

23. During the course of argument, the learned counsel for defendants No.2 to 4 (appellants herein) submitted that the subject matter of the appeal A.S.No.1509 of 1988 is in respect of same property and the suit was remanded to the trial Court with certain directions and unless these two matters are decided together, it is difficult for this Court to come to a definite conclusion about the contractual obligations between the parties. If for any reason the present appeal is decided independently, it will have its own impact on the judgment in the appeal A.S. No.1509 of 1988, which was remanded to the trial Court. Even on merits also the agreement between defendant No.1 and his son as vendors and defendant Nos.3 and 4 was not cancelled. Even, otherwise the registered correspondence at best show that defendant No.1 being the joint promisee alone terminated the agreement of sale executed in favour of defendant Nos.3 and 4 and the other joint promisor i.e., son of defendant No.1 did not

join in termination of agreement/contract of sale, therefore, sale transaction covered by agreement of sale in favour defendant Nos.3 and 4 is still subsisting. When the property is the joint property of defendant No.1 and his son, defendant No.1 alone is incompetent to enter into agreement of sale and execute registered sale deed in favour of the plaintiff. Therefore, the agreement in favour of the plaintiff executed by defendant No.1 is unenforceable under law and defendant No.1 had no absolute and exclusive title over the property. On this ground alone, the suit is liable to be dismissed. Finally, it is contended that the trial Court is not supposed to frame an issue calling upon defendant Nos.3 and 4 to prove their readiness and willingness to perform their contractual obligation in a suit filed by the plaintiff based on a different agreement of sale. But, the trial Court on an erroneous appreciation of evidence recorded its findings erroneously, consequently, the finding on Issue No.3 is ex facie illegal and liable to be set aside.

24. According to the plaintiff, the plaintiff was inducted into possession of the schedule property during 1985-86 and in the absence of his forcible dispossession, the plaintiff is not entitled to claim damages for use and occupation from defendant Nos.2 to 4. Even otherwise the contest of defendants is that the word 'delivery' of possession of schedule property in the agreement of sale was subsequently incorporated, materially altering the

agreement of sale. In all facts and circumstances of the case, the Court has to decide independently the claim of the plaintiff. But, the trial Court on erroneous appreciation of facts and evidence, decided the claim of defendant Nos.3 and 4, subject matter of the other suit, which is subject matter of Appeal Suit No.1509 of 1988 and recorded its findings, thus, the trial Court committed an error. Finally, prayed to set aside the decree and judgment of the trial Court dismissing the suit.

25. Per contra, the learned counsel for the plaintiff (respondent No.1 herein) advanced his oral argument and filed written briefs almost raising similar contentions while reiterating the facts of the case, totally supporting the judgment and decree under challenge, and it is brought to the notice of this Court that defendant Nos.3 and 4 filed suit for specific performance and on the basis of Ex.B.1-agreement of sale dated 12.02.1984 as it was cancelled by defendant No.1 issuing Ex.A.7-notice, dated 14.12.1985, and more so, by the date of execution of Ex.A.1-agreement of sale, dated 01.09.1985, Ex.B.1-agreement, dated 12.02.1984 stood cancelled and the claim based on Ex.B.1 is barred by limitation. The plaint filed by defendant Nos.3 and 4 is in the year 2004, but it was registered as suit in the year 2009 for specific performance of agreement of sale, dated 12.02.1984, but the present suit, against which the present appeal is filed, is much earlier to O.S.No.73 of 2009. On this ground

alone, defendant Nos.3 and 4 are not entitled to claim any relief in the said suit. However, the pendency of O.S.No.73 of 2009 is not a ground to decline the relief of specific performance and allied reliefs.

26. It is further contended that defendant No.1 admitted in the written statement that the possession of the property was not delivered to defendant Nos.3 and 4 under Ex.B.1 and claiming possession on the basis of Ex.B.1 by materially altering the agreement, disentitle the defendants to claim equitable relief of specific performance in O.S.No.73 of 2009. Apart from inherent defect in the claim of defendant Nos.3 and 4, their claim cannot be decided in the present suit and they have no locus standi to challenge the decree passed by the trial Court against defendant No.1 directing him to execute registered sale deed by receiving balance sale consideration, since, defendant Nos.2 to 4 are not the aggrieved parties. Thereby, the decree and judgment under challenge does not suffer from any legal infirmities, calling for interference of this Court and finally prayed to dismiss the appeal confirming the decree and judgment of the trial Court.

27. The learned counsel for defendant No.1 while arguing totally in support of the decree and judgment of the trial Court, filed written briefs almost reiterating the submissions of the plaintiff, pointing out both judicial and oral admissions, in the pleadings and in the evidence and

that the suit filed by defendant Nos.3 and 4 is still pending on the file of the Senior Civil Judge's Court and the same is based on the terminated contract of sale, consequently the suit filed by the plaintiff cannot be dismissed due to pendency of the suit filed by defendants. On the other hand, the agreement of sale was executed by defendant No.1 alone in favour of the plaintiff in the present suit, however, agreement of sale in favour of defendant Nos.3 and 4 executed by defendant No.1 and his son was terminated totally by issuing notices. Thus, by the date of filing of the present suit, no contractual relationship was subsisting between defendant No.1 and his son as vendors and defendant Nos.3 and 4 as vendees, under the agreement of sale, which is subject matter of the suit in O.S.No.73 of 2009 pending on the file of the Senior Civil Judge's court for the present. Therefore, defendant Nos.2 to 4 are not entitled to challenge the decree to the extent of granting specific performance as they are not aggrieved parties.

28. Considering rival contentions, perusing the material on record ie., impugned decree and judgment, both oral and documentary evidence, the points that arise for consideration are as follows:

1. Whether readiness and willingness of defendant Nos.3 and 4 to obtain registered sale deed by paying balance sale consideration under Ex.B.1 can be

decided in the suit filed by a third party to the agreement i.e., plaintiff herein, if not, the findings recorded by the trial Court on Issue No.3 be sustained?

2. Whether the plaintiff is always ready and willing to perform his part of obligation under Ex.A.1-agreement of sale, if so, is he entitled to claim a decree for specific performance of agreement of sale under Ex.A.1?
3. Whether the plaintiff is entitled to recover possession of the schedule property and damages from defendant Nos.2 to 4?
4. Whether the plaintiff is entitled to recover Rs.14,500/- paid as advance under Ex.A.1, in the event of denial of primary relief of specific performance?

In re Point No.1 :

29. Undisputedly, defendant No.1 executed Ex.B.1-agreement of sale in favour of defendant Nos.3 and 4, who are wife and daughter of defendant No.2, on 12.02.1984 and whereas the same defendant executed an agreement of sale marked as Ex.A.1, dated 01.09.1985, in favour of plaintiff agreeing to sell the suit schedule property at Rs.7,000/- per acre and received advance of Rs.10,000/- on the date of execution of Ex.A.1 and subsequently received Rs.4,500/- endorsed those payments on the reverse of Ex.A.1, which is marked as Exs.A.2 to A.4. However, defendant Nos.2 to 4 contended that Ex.A.1 is a collusive document brought

into existence by the plaintiff and defendant No.1 to defeat the claim of defendant Nos.2 to 4 in the schedule property. Indirectly, defendant Nos.2 to 4 admitted about the execution of Ex.A.1 in favour of the plaintiff by defendant No.1. Thus, the undisputed facts are execution of Ex.A.1 by defendant No.1 in favour of the plaintiff and execution of Ex.B.1 by defendant No.1 in favour of defendant Nos.3 and 4 and defendant No.1 received advance of sale consideration from both parties under Ex.A.1 and Ex.B.1.

30. Now the question is cancellation of agreement of sale of Ex.B.1 by defendant No.1 executed in favour of defendant Nos.3 and 4. The trial Court strangely framed an issue calling upon defendant Nos.3 and 4 to prove their readiness and willingness. Issue No.3 is irrelevant, which compelled defendant Nos.3 and 4 to prove their readiness and willingness to perform their part of obligation under Ex.B.1. When a suit for specific performance is filed by defendant Nos.2 to 4 based on Ex.B.1-agreement of sale in O.S.No.73 of 2009, recording of any finding about readiness and willingness of defendant Nos.3 and 4 to perform their obligation under Ex.B.1, is unwarranted. Of course, it is a relevant consideration for deciding the cancellation of the agreement marked as Ex.B.1 by defendant No.1 by registered correspondence between defendant No.1 and defendant Nos.3 and 4. Ex.A.5 is the registered legal

notice, dated 07.10.1985 issued by defendant No.1 to defendant Nos.3 and 4, calling upon defendant Nos.3 and 4 to pay the balance of sale consideration and obtain registered sale deed. Ex.A.6, dated 09.11.1985 is the reply got issued by defendant Nos.3 and 4 and again defendant No.1 got issued a legal notice, dated 14.12.1985, which is marked as Ex.A.7 through his counsel and defendant Nos.3 and 4 sent proper reply marked as Exs.A.14 and A.15, dated 22.10.1985 and 12.10.1985 respectively. Decision on the cancellation of agreement of sale is incidental in the present suit for the reason that the claim based on Ex.B.1 is the subject matter of O.S.No.73 of 2009. In fact, according to the written briefs filed by the plaintiff's counsel, defendant Nos.3 and 4 filed suit in 2004, but it was registered in the year 2009. Of course, the reasons for delay in registering the plaint are not known. Thus, it is clear from the record that by the date of commencement of trial in the present suit, the suit in O.S.No.73 of 2009 was not pending, as the present suit against which the appeal is preferred was disposed of on 02.08.1996. Therefore, recording of finding about readiness and willingness of defendant Nos.3 and 4 under Ex.B.1 to perform their contractual obligation under Ex.B.1 is unwarranted. If for any reason, the agreement between defendant No.1 and defendant Nos.3 and 4 was subsisting by the date of filing of the suit, defendant No.1 is not entitled to execute agreement of

sale under Ex.A.1. Therefore, in that view of the matter, the trial Court felt that it is necessary to record a finding as to readiness and willingness of defendant Nos.3 and 4, but such finding is unwarranted for the reason that when the plaintiff filed the suit for specific performance of agreement of sale, he has to plead and prove his readiness and willingness in compliance of Section 16(c) of Specific Relief Act, but readiness and willingness of rival claims requires no examination. Hence, the finding of the trial Court is set aside.

In re Point No.2:

31. Curiously, Ex.B.1 was executed by defendant No.1 and his son-Prasad, being minor represented by defendant No.1. Representing his son Prasad, defendant No.1 signed as executant on Ex.B.1. The contents of Ex.B.1 disclose that both defendant No.1 and his son with an intention to purchase the property at different places, agreed to sell the ancestral property to defendant Nos.3 and 4 at Rs.1,00,000/-, received Rs.10,000/- as advance of sale consideration, while acknowledging receipt of Rs.30,000/- by 31.03.1984, agreed to receive Rs.60,000/- on 01.05.1984, agreed to execute registered sale deed for total extent of Ac.11.70 cents. The contents of Ex.B.1 are accepted as it is. The suit schedule property belongs to both defendant No.1 and his son, as it is ancestral property devolved upon them. By birth, Prasad-son of defendant No.1 became a coparcener and consequently

defendant No.1 and his son, being the coparceners alone, are competent to deal with the property, but not any one alone till it is partitioned. It is not the case of defendant No.1 that the property was partitioned between defendant No.1 and his son, therefore, the schedule property is the Hindu undivided joint family property. The proposed alienation in favour of defendant Nos.3 and 4 is only to acquire property at different places and alienation is not by any one of the coparceners but by both the coparceners. Whereas, Ex.A.1 was executed on 30.08.1985 by defendant No.1 alone and the contents of Ex.A.1 disclose that defendant No.1 agreed to sell the property allotted to his share in the partition and that the same is in exclusive possession and enjoyment of defendant No.1. The total extent agreed to be sold is Ac.12.63 cents in two different survey numbers. The extent covered by Ex.A.1 and Ex.B.1 is almost equivalent except Ac.0.25 cents in survey numbers 3. But the major extent covered by both Ex.A.1 and Ex.B.1 is one and the same. If the Court finds that the contractual obligation under Ex.B.1 is subsisting, the agreement marked as Ex.A.1 is unenforceable.

32. Though agreement Ex.B.1 was executed by both defendant No.1 and his son Prasad, represented by defendant No.1 as his son Prasad was minor by then, defendant No.1 issued Ex.A.5-notice, dated 07.10.1985, calling upon defendant Nos.3 and 4 to pay balance of

sale consideration with a threat to terminate the contract between defendant No.1 and defendant Nos.3 and 4 under Ex.B.1. On receipt of Ex.A.5-notice, dated 07.10.1985, defendant Nos.3 and 4 got issued a reply marked as Ex.A.6, dated 09.11.1985. Again defendant No.1 issued Ex.A.7-notice, dated 14.12.1985, terminating the contract/agreement between defendant No.1 and defendant Nos.3 and 4. In none of the documents i.e., Exs.A.5 and A.7, there was no whisper about allotment of the schedule property of defendant No.1 and his minor son Prasad in the partition. As per the material available on record, the property was allotted to defendant No.1 in the partition among his brothers and it is only an ancestral property. When the property is ancestral, the son of defendant No.1, who was minor by then, is also entitled to a share in the schedule property as per Ex.B.1. Thus, defendant No.1 and his son Prasad are entitled to equal share in the property covered by Ex.B.1. But, curiously Exs.A.5 and A.7-notices were issued by defendant No.1 alone calling upon defendant Nos.3 and 4 to pay balance of sale consideration under Ex.B.1 within specific date with a threat to terminate the agreement in the event of failure and terminated by issuing Ex.A.7 without joining his son Prasad, who was minor by then, and not even issued the same on behalf of minor represented by his natural guardian and father defendant No.1 to terminate the contract/agreement between defendant No.1 and

defendant Nos.3 and 4. When the agreement is joint, both defendant No.1 and his son are jointly liable to perform their obligation and jointly entitled to terminate the contract.

33. According to Section 42 of the Indian Contract Act, 1872, when two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfill the promise. Similarly, if the joint liabilities are devolved on the joint promise, defendant No.1 and his son Prasad, the then minor, defendant No.1 alone is incompetent to terminate the contract for the entire property by issuing Ex.A.5 or Ex.A.7. Therefore, the termination of contract/agreement under Ex.B.1 by defendant No.1 alone is invalid. Consequently, the termination is not legal and such termination at best may limit to the undivided, unspecified share of defendant No.1 in the property of defendant No.1 and his son, the then minor. But, the trial Court, without considering the legality and validity of the termination of agreement, concluded that the contract between defendant No.1 and defendant Nos.3 and 4 came to an end due to termination of agreement under Ex.B.1 by issuing Exs.A.5 and A.7.

34. As seen from Ex.B.1, dated 12.02.1984, a specific

period was fixed for performance of obligation by defendant Nos.3 and 4 i.e., on or before 01.05.1984. But, there was no clause to terminate the contract in the event of failure to perform the obligation of defendant Nos.3 and 4 under Ex.B.1 within the stipulated time. Therefore, time cannot be construed as essence of the contract. However, time can be made as essence of the contract by issuing notice. Therefore, Ex.A.5 was got issued by defendant No.1 alone calling upon defendant Nos.3 and 4 to pay balance of sale consideration and obtain registered sale deed within the specific time. But, defendant Nos.3 and 4 in stead of complying the legitimate demand, issued reply which is marked as Ex.A.6. Defendant No.1 allegedly terminated the contract/agreement without terminating the contract entered into with defendant Nos.3 and 4 representing Prasad, who was minor by then. The defendant No.1 alone executed agreement-Ex.A.1 in favour the plaintiff, and his son Prasad the then minor was not a party to Ex.A.1. If the property is jointly belonging to defendant No.1 and his son, defendant No.1 is not competent to execute Ex.A.1, dated 01.09.1985. Curiously, by the date of Ex.A.1, dated 01.09.1985, notice under Ex.A.5, dated 07.10.1985, was not even issued. Thus, by the date of Ex.A.1, dated 01.09.1985, the contract between defendant No.1 and defendant Nos.3 and 4 was subsisting and even if the termination is true it is deemed to have terminated on 14.12.1985. Therefore,

by the date of Ex.A.1, dated 01.09.1985, the contractual relationship between defendant No.1 and defendant Nos.3 and 4 under Ex.B.1 was subsisting.

35. When the contractual relationship between defendant No.1 and defendant Nos.3 and 4 was subsisting under Ex.B.1, defendant No.1 is not entitled to execute Ex.A.1 in favour of the plaintiff agreeing to sell the entire schedule property. Therefore, Ex.A.1 is a subsequent agreement entered into by defendant No.1 with the plaintiff during subsistence of contractual relationship between defendant No.1 and defendant Nos.3 and 4 under Ex.B.1.

36. On overall consideration of the material available on record, by the date of execution of Ex.A.1, dated 01.09.1985, the contract/agreement under Ex.B.1, dated 12.02.1984, was not terminated and the contractual relationship between defendant No.1 and defendant Nos.3 and 4 was subsisting. The agreement Ex.B.1 is deemed to have been terminated on 14.12.1985 to the extent of undivided share of defendant No.1 alone in the schedule property. Thereby, the contractual relationship between defendant Nos.3 and 4 and Prasad, minor son of defendant No.1, is still subsisting. Hence, Ex.A.1 executed during subsistence of contractual relationship between defendant No.1 and defendant Nos.3 and 4 is invalid and unenforceable under law to the extent of share of Prasad, son of defendant No.1, since the plaintiff is a

subsequent purchaser. Added to that, the termination is not valid, legal and consequently the plaintiff, being the subsequent purchaser during subsistence of contractual relationship between defendant No.1 and defendant Nos.3 and 4 and Prasad, minor son of defendant No.1, under Ex.B.1, is not entitled to claim relief of specific performance. Therefore, I find that the termination of Ex.B.1 by defendant No.1 alone is invalid, illegal to the extent of share of Prasad, son of defendant No.1. Accordingly, this point held in favour of defendant Nos.3 and 4.

37. The plaintiff claimed relief of specific performance under Chapter-II of the Specific Relief Act, 1963. Section 9 of the Specific Relief Act permits to raise any plea by way of defence on any ground which is available to him under any law relating to contracts. Therefore, defendant Nos.3 and 4 are entitled to raise plea of illegal termination of Ex.B.1-agreement by defendant No.1 alone. Section 17 of the Specific Relief Act, deals with contract to sell or let any immovable property by one who has no title and according to it, the vendor, who knowing himself not to have any title to the property, has contracted to sell or let the property, and who, though he entered into the contract believing that he had good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt, it is

unenforceable under law.

38. However, Section 12 of the Specific Relief Act, permits to grant a decree of specific performance of part of contract. But, the plaintiff herein is not entitled to claim a decree of specific performance of part of contract though the termination of Ex.B.1 by defendant No.1 to the extent of his share is valid for the reason that defendant No.1 and his son Prasad, is having undivided interest in the property and thereby a decree can be passed for specific performance conveying an undivided share of defendant No.1. Since, half of the property belongs to the son of defendant No.1, by name Prasad, the plaintiff is not entitled to claim any relief over the said property.

39. The relief of specific performance is purely a discretionary relief under Section 20 of the Specific Relief Act and the Court is not bound to pass a decree merely because it is lawful to do so, but such discretion cannot be exercised arbitrarily, it must be exercised on sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

40. Sub-section (2) of Section 20 of the Specific Relief Act, specifies the following are cases in which the Court may properly exercise discretion not to decree specific performance.

- (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such

that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

41. In the present case, defendant No.1, the vendor of the plaintiff, did not raise any defence against the claim of the plaintiff, but he admitted prior sale of the schedule property under Ex.B.1. Defendant Nos.3 and 4 alone raised a plea that they are prior agreement holders and they are competent to raise all the pleas that are available under the contract of sale under Section 9 of the Specific Relief Act including invalid termination of contract under Ex.B.1 by issuing Exs.A.5 and A.7 and that too the termination was not valid to the extent of share of minor. According to my finding on Point No.1, by the date of Ex.A.1, the contract/agreement between defendant No.1 and defendant Nos.3 and 4 was subsisting and at best, part of contract is deemed to have been terminated on 14.12.1985 when notice under Ex.A.7 received by defendant Nos.3 and 4. If the contention of defendant No.1 and the plaintiff at the time of entering into contract marked as Ex.A.1, dated 01.09.1985, is taken into

consideration, it is clear that the agreement was entered during subsistence of contract of Ex.B.1 and alleged termination even if true and valid, it was subsequent to the execution of Ex.A.1. Therefore, taking into consideration, totality of the circumstances, it is difficult to exercise discretion under Section 20 of the Specific Relief Act to pass a decree in favour of the plaintiff for the total extent of schedule property.

42. The trial Court did not decide the validity of the termination of contract under Ex.B.1 by competent person so also the discretion to be exercised while passing a decree conferred on the Court under Section 20 of the Specific Relief Act, but passed a decree accepting that the termination of agreement Ex.B.1 by issuing Exs.A.5 and A.7 is valid and committed an error in accepting the termination for the reason that by the date of execution of Ex.A.1 the contractual obligation between defendant No.1 and defendant Nos.3 and 4 was subsisting and that too alleged termination took place almost after three months from the date of execution of Ex.A.1. Therefore, the conduct of the plaintiff and defendant No.1 at the time of entering into Ex.A.1 agreement/contract does not permit the Court to exercise discretion conferred under this Act by virtue of Section 20 of the Specific Relief Act. But the trial Court without considering the facts of the case and validity of termination of agreement, etc., passed decree erroneously for the entire extent. In view of my

discussion, termination of part of contract is invalid, consequently decree passed by the trial Court for the undivided share of Prasad, son of defendant No.1, is liable to be set aside.

43. One of the contentions raised by the learned counsel for the plaintiff is that defendant Nos.3 and 4 are not the aggrieved parties to file the present appeal within the meaning of aggrieved person under Order XLI Rule 1 of C.P.C. This contention cannot be accepted for the reason that the plaintiff filed the suit against defendant Nos.1 to 4. Defendant Nos.3 and 4 are the prior purchasers, whose contractual obligation was subsisting with defendant No.1 by the date of execution of Ex.A.1 and on account of passing decree, the right to claim for specific performance was badly effected, thereby they are the aggrieved persons within the meaning of Order XLI Rule 1 C.P.C.

44. In view of my finding that termination of contract by defendant No.1 by issuing Ex.A.5 and Ex.A.7 is valid to the extent of his share, but such termination does not bind Prasad, a joint promisee.

I, therefore, hold that the plaintiff is entitled to a decree for specific performance of agreement/contract of sale of share of defendant No.1.

45. The plaintiff is also claimed delivery of vacant possession of property but no decree be passed for the reason, when the plaintiff's purchase is valid to the extent

of defendant No.1 share, thereby the plaintiff will become a tenant in common, so, the plaintiff is entitled to claim partition of the schedule property into two equal shares, allotment of half share to him and for delivery of possession of his share.

46. Hence, the appeal is allowed in part the decree is modified directing defendant No.1 to execute a registered sale deed, conveying his undivided half share within three months from today on receipt of balance of sale consideration, proportionate to share of defendant No.1.
No costs.

47. Miscellaneous Petitions pending, if any, shall stand closed.

M. SATYANARAYANA MURTHY, J

18th June 2015.

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