HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No. 202 OF 1997

JUDGMENT:

The unsuccessful plaintiff in Original Suit No.39 of 1987 on the file of the Court of Additional Subordinate Judge, Ranga Reddy District at Saroornagar, Hyderabad (for short, 'the trial Court'), preferred this Appeal challenging the decree and judgment dated 20.03.1995; wherein the suit filed by the plaintiff, for the primary relief of specific performance of agreement of sale dated 30.04.1985 and the alternative relief of refund of advance sale consideration of Rs.20,000/- with future interest at 18% *p.a.* from the date of suit till the date of realisation, was decreed in part, granting alternative relief while declining primary relief.

2. The appellant herein was the plaintiff and the respondents herein were the defendants before the trial Court. During pendency of the Appeal, 2nd respondent herein died and, accordingly, A.S.M.P. No.1113 of 2015 filed, by the petitioner-appellant, to bring on record respondents 9 and 10 as his legal heirs is ordered.

3. For convenience of reference, the ranks given to the parties in O.S. No.39 of 1987, before the trial Court, will be adopted throughout this judgment.

4. The plaintiff filed the suit, for the aforesaid reliefs, alleging that the 1st defendant is absolute owner of Plot No.1 to an extent of 516 Sq. yards in Survey No.52 of Miyapur village and Taluq, West Hyderabad, which is more fully described in the schedule annexed to the plaint, agreed to sell the schedule property for Rs.40,000/-; on 30.04.1985, the plaintiff paid Rs.20,000/- to the 1st defendant towards advance sale consideration and obtained delivery of possession of the plot. As per the terms of agreement of sale, Ex.A-1, the plaintiff has to pay balance

sale consideration of Rs.20,000/- on the date of execution of registered sale deed, in the presence of Sub-Registrar, Mehdipatnam. It is further agreed that, prior to execution of registered sale deed, the 1st defendant has to produce nil encumbrance certificates for a period of 12 years, property tax clearance certificate and handover the same with all title deeds of the Plot to the plaintiff within a stipulated period of 3 months.

It is further contended that there is a conclusive agreement between the parties and time was never intended to be the essence of the contract and, in fact, no time was fixed for performance; however, the 1st defendant failed to perform his part of obligation *i.e.,* furnishing nil encumbrance certificates, property tax clearance certificate and other documents relating to title before registration within the stipulated period. Thus, the 1st defendant failed to perform his part of obligation.

The plaintiff was always ready and willing to perform her part of obligation under the agreement of sale, by paying balance sale consideration of Rs.20,000/- and obtain registered sale deed from the 1st defendant, but the 1st defendant refused to execute registered sale deed. Since the 1st defendant did not come forward to execute registered sale deed, the plaintiff got issued a legal notice dated 21.08.1986, Ex.A-3, through her counsel, calling upon the 1st defendant to execute registered sale deed, receiving balance of sale consideration; on receipt of legal notice, the 1st defendant got issued a reply dated 10.09.1986, marked as Ex.A-4, admitting execution of the agreement of sale while contending that time is the essence of contract and that the 1st defendant terminated the contract, forfeiting the advance of sale consideration; hence, the suit.

5. The 1st defendant filed written statement denying material allegations of the plaint while admitting that he is the absolute owner of

the plot and agreed to sell the same to the plaintiff for Rs.40,000/- on condition that she gets the sale deed executed within the time stipulated by the parties. Subsequently, as the plaintiff failed to perform her part of obligation, the 1st defendant addressed a letter dated 15.09.1985 to the plaintiff stating that the sale deed be executed on or before 15.10.1985 and as such the 1st defendant never delivered possession of the plot to the plaintiff, at any point of time but has been in continuous possession of the same, spent money for obtaining necessary permissions wherever and whenever required by him. As the plaintiff was never ready and willing to perform her part of contract, in spite of registered correspondence, the 1st defendant forfeited the advance sale consideration; hence, there is no cause of action for the plaintiff to file the suit for the aforesaid reliefs and hence prayed to dismiss the suit.

6. During pendency of the suit, 1st defendant died and his legal heirs *i.e.,* defendants 2 to 8, who were brought on record as per order in I.A. No.172 of 1992, dated 16.03.1992, filed common written statement denying material allegations of the plaint while admitting the ownership and execution of agreement of sale but denied receipt of Rs.20,000/- as advance of sale consideration, while agreeing to receive the balance at the time of execution of regular registered sale deed, in the presence of Sub-Registrar. The suit is barred by limitation and that the Court fees paid thereon is not correct.

The specific contention of the defendants is that the transaction shall be completed within 3 months from the date of agreement of sale dated 30.04.1985 and clause-2 of Ex.A-1 discloses the intention of the parties thereto and, thus, time is essence of the contract. It is further contended that the agreement of sale was got drafted by the plaintiff at her choice either to insist for execution of sale deed or refund of earnest money at 2% *p.m.* However, the 1st defendant was kartha of the joint family, purchased the schedule property from the joint family funds for the benefit of joint family. Thus, the 1st defendant had no absolute and exclusive right or title to sell the property and agreement is not enforceable against the defendants and prayed for dismissal of the suit.

7. The defendants 2 to 8 filed additional written statement raising different pleas that the plaintiff was never ready and willing to perform her part of obligation under the agreement of sale by paying balance of sale consideration and she never demanded the 1st defendant or his legal heirs to receive balance of sale consideration to obtain registered sale deed. The 1st defendant issued notice dated 15.09.1985, marked as Ex.B-1, demanding the plaintiff to pay balance of sale consideration and obtain registered sale deed within 1 month from the date of receipt of notice, which expired by 15.10.1985 but the plaintiff did not turn up, not even responded to the notice expressing her readiness and willingness to obtain registered sale deed by paying balance of sale consideration. Therefore, the plaintiff has no right to claim specific performance of agreement of sale since she failed to perform her part of obligation and prayed to dismiss the suit.

8. On the strength of above pleadings, the trial Court framed the following issues, including an additional issue:

1. Whether the plaintiff is entitled to a decree for specific performance in pursuance of the agreement of sale dated 30.04.1985 in respect of the plaint schedule property or in the alternative whether the plaintiff is entitled for a decree against the defendants for refund of the amount of Rs.20,000/- together with interest thereof at 18% *p.a.* from the date of suit till the date of realisation, as prayed for?

2. Whether the plaintiff failed to perform her part of

contract and whether the contract is *void* and cannot be enforceable as contended by the 1st defendant in his written statement?

3. Whether the 1st defendant never delivered possession of the plot to the plaintiff, at any point of time, as alleged by the plaintiff, and whether the 1st defendant spent money for obtaining necessary permission wherever and whenever as contended by him in his written statement?

4. Whether there is no cause of action for initiating the legal proceedings on 30.09.1986 and such a cause of action does not arise as alleged by the plaintiff and as contended by the 1st defendant in his written statement?

5. To what relief?

6. Whether the plaintiff was ready with the balance of sale consideration and willing to perform her part of the contract?

9. During course of trial, on behalf of the plaintiff, PWs.1 and 2 were examined and Exs.A-1 to A-10 were marked. On behalf of the defendants, DWs.1 and 2 were examined and Exs.B-1 and B-2 were marked.

10. Upon hearing argument of both the counsel, considering oral and documentary evidence available on record, the trial Court while observing that the plaintiff failed to establish her readiness and willingness to perform her part of obligation under the agreement of sale, declined the primary relief of specific performance of agreement of sale; however, granted the alternative relief of refund of advance sale consideration of Rs.20,000/- together with interest at 6% *p.a.* from the date of suit till the date of realisation.

11. The plaintiff, being dissatisfied with the decree and judgment of

the trial Court, preferred this Appeal raising the following contentions:

a) Execution of agreement of sale, Ex.A-1 is not in dispute but the trial Court placing reliance on the alleged notice marked as Ex.B-1 and acknowledgment marked as Ex.B-2 disbelieved the readiness and willingness of the plaintiff to pay balance sale consideration and obtain registered sale deed. Therefore, the alleged termination of agreement of sale and forfeiture of advance sale consideration by the 1st defendant basing on Exs.B-1 and B-2 is illegal but the trial Court by placing much reliance on them, declined to grant the primary relief and committed an error;

b) The reason assigned by the trial Court for dismissal of the suit is that the plaintiff did not enter into the witness box to enable the defendants to cross-examine her to elicit truth but PW.1, who is the husband of plaintiff and, who was looking after her affairs from the beginning, as admitted by the defendants, testified that he was posted with the facts of the case. Therefore, dismissal of the suit for non-examination of the plaintiff, as witness before the trial Court, is an apparent error and finally prayed to allow the Appeal, granting the primary relief, as prayed for.

12. During course of hearing, Sri Vedula Srinivas, learned counsel, appearing for the plaintiff-appellant, would contend that the notice marked as Ex.B-1 and acknowledgment marked as Ex.B-2 were not seen the light of the day till filing of additional written statement by defendants 2 to 8, after amendment of the plaint, appropriately; non-disclosure of the alleged notice in the written statement filed before the trial Court is sufficient to disbelieve the notice marked as Ex.B-1 and acknowledgment marked as Ex.B-2. On this ground alone, the alleged

termination or cancellation of agreement of sale between the plaintiff and 1st defendant is to be disbelieved since it is an after thought, subsequent to filing of written statement, but the trial Court on erroneous appreciation, declined to grant the primary relief.

13. It is further contended that time was not the essence of contract and intention of the 1st defendant from the recitals of Ex.A-1 is clear that he never intended to make time as essence of the contract, however, the agreement of sale is a reciprocal agreement and performance of obligation by one party depends upon the performance of obligation by the other party. Here, the order of performance is fixed in clause-2 of agreement of sale and the 1st defendant agreed to furnish nil encumbrance certificates for 12 years, property tax clearance certificate and title deeds before the execution of registered sale deed within 3 months from the date of execution of Ex.A-1. Further, clause-1 of Ex.A-1 discloses that the plaintiff has to pay balance of sale consideration at the time of registration before the Sub-Registrar. Even if these two conditions are read together, the 1st defendant has to perform his obligation imposed on him and then only the question of payment of balance of sale consideration would arise. Till then, the plaintiff need not pay balance of sale consideration and obtain registered sale deed. Therefore, non payment of balance of sale consideration within 3 months, to obtain registered sale deed, does not amount to breach of terms and conditions of agreement of sale; that apart, in the agreement of sale of immovable property, time can never be the essence of the contract unless there is a specific condition to terminate or cancel the agreement, if the balance was not paid within the fixed period but here there was no such term for termination or cancellation of the agreement of sale Ex.A-1, thereby time cannot be construed as essence of agreement of sale.

14. Finally, it is contended that non-examination of the plaintiff

before the trial Court is not fatal for the reason that, even according to the allegations made in the written statement and registered correspondence between the parties, husband of the plaintiff, PW.1 alone is looking after the affairs of the plaintiff and thereby he is posted with the facts of the case and competent witness according to Section 120 of Indian Evidence Act, 1872; consequently, non-examination of the plaintiff itself is not a ground to decline the relief of specific performance if the facts are proved; otherwise, by adducing cogent and satisfactory evidence. In support of his contention, he placed reliance on a judgment of the Apex Court in ***Man Kaur (dead) by L.Rs Vs. Hartar Singh Sangha***[1] and ***Saradamani Kandappan Vs. S. Rajalakshmi and others***[2].

15. *Per contra*, Sri J. Prabhakar, learned counsel for the defendants-respondents, reiterating the contentions in the plaint mainly made a stress on the conduct of the plaintiff and making false allegation in the plaint that the agreement is non-possessory agreement and subsequently it is averred that the possession of the property was delivered. Therefore, the plaintiff approached the Court with unclean hands, on this ground alone the suit is liable to be dismissed. He further contended that the conduct of the parties is relevant since the relief of specific performance is purely discretionary under Section 20 of the Specific Relief Act, 1963. That too, in the present case, the plaintiff did not come forward to pay balance of sale consideration within the time stipulated under clause-2 of Ex.A-1 *i.e.,* 3 months from the date of execution of Ex.A-1, but the contention of plaintiff's counsel that the 1st defendant failed to discharge his obligation is not justifiable for postponement of payment of balance of sale consideration for the reason that any person can obtain encumbrance certificates within a day or two, similarly tax clearance certificate; therefore, it is only a lame excuse to avoid payment of balance of sale consideration within the stipulated time and, on this

ground, the suit cannot be decreed. It is contended that the trial Court exercised its discretion based on material and unless there is perversity in the judgment of the trial Court and the Court exceeded its power in exercising discretion to dismiss the suit, the appellate Courts' shall not interfere while exercising such discretion and prayed to dismiss the Appeal confirming the decree and judgment of the trial Court.

16. Considering rival contentions, perusing oral and documentary evidence including the decree and judgment under challenge, the points that arise for consideration are:

1) Whether time is the essence of agreement of sale, Ex.A-1? If so, failure to pay balance of sale consideration within 3 months from the date of execution of Ex.A-1 disentitles the plaintiff to claim the relief of specific performance?

2) Whether the plaintiff has always been ready and willing to perform her part of obligation under Ex.A-1?

3) Whether non-examination of the plaintiff as witness before the trial Court is a ground to disbelieve the case set-up by the plaintiff? If so, whether the suit is liable for dismissal on this sole ground?

17. **POINT No.1**: The undisputed fact is that the plaintiff's husband PW.1 settled the bargain with 1st defendant; when 1st defendant offered to sell the property and incorporated certain terms, Ex.A-1, agreement of sale was entered into by the plaintiff with 1st defendant for purchase of schedule property for Rs.40,000/-; paid Rs.20,000/- as advance on the date of execution of Ex.A-1 itself. As per Clause-1 of Ex.A-1, the plaintiff has to pay "balance of sale consideration at the time of registration of sale deed, in the presence of Sub-Registrar"; Whereas, clause-2 obligated the 1st defendant to furnish nil

encumbrance certificates for a period of 12 years, property tax clearance certificate and handing over of those documents with all title deeds of the Plot to the vendee before execution of the sale deed within the stipulated period of 3 months. The 1st clause is silent as to period fixed for payment of the amount; whereas 2nd clause discloses that the plaintiff has to pay balance of sale consideration within 3 months from the date of execution subject to fulfilling the obligation by the 1st defendant like furnishing of encumbrance certificates, property tax clearance certificate and other title deeds to the plaintiff. Therefore, the obligation of the plaintiff to pay balance of sale consideration within 3 months as per 2nd clause would arise only when the 1st defendant furnished nil encumbrance certificates, property tax clearance certificate and other title deeds to the plaintiff. Therefore, the obligation of plaintiff to pay balance of sale consideration within 3 months, as per 2nd clause, would arise only when the 1st defendant furnished nil encumbrance certificates, property tax clearance certificate and all title deeds pertaining to the schedule property.

18. Undisputedly, the agreement of sale of immovable property is a reciprocal agreement; both the parties are under obligation to perform their part of obligation imposed under the agreement. Here, the 1st defendant has to perform his obligation first and on performing his obligation the plaintiff's obligation would arise *i.e.,* payment of balance of sale consideration. Undisputedly, the 1st defendant did not furnish the certificates and title deeds, as mentioned in 2nd clause of the agreement, within the stipulated period, enabling the plaintiff to pay balance of sale consideration to obtain registered sale deed. As per the 4th clause, if the vendor (1st defendant) fail to execute registered sale deed in favour of the vendee (plaintiff), the vendee shall be entitled to claim specific performance of agreement of sale against the vendor or for refund the earnest money together with interest thereon at

the rate of Rs.2/- *per* Rs.100 *per mensum* but no condition was imposed against the plaintiff (vendee) for payment of interest, if, for any reason, there is delay in payment of balance of sale consideration. On close analysis of the terms and conditions of Ex.A-1, more particularly, clauses 1 and 2 of agreement, it is evident that both the parties have to perform their obligations under Ex.A-1 in the order of performance fixed therein.

19. In the present case, as per 2nd clause of Ex.A-1, the 1st defendant has to perform his part of obligation before execution of registered sale deed; whereas, 1st clause says that the plaintiff has to pay balance of sale consideration at the time of execution of registered sale deed in the presence of Sub-Registrar. In such case, payment of balance of sale consideration is not de-linked with the obligation imposed on 1st defendant for furnishing certain documents and his obligation precedes to the payment of balance of sale consideration by the plaintiff.

20. Sri J. Prabhakar, learned counsel for the defendants-respondents, contended that the nil encumbrance certificates and property tax clearance certificate can be obtained by anybody within a day or two but failure to furnish those two documents by the 1st defendant is not an excuse to pay balance of sale consideration within the stipulated period, as mentioned in 2nd clause.

21. There is justification in the contention of learned counsel for the defendants-respondents to the extent of obtaining nil encumbrance certificates and property tax clearance certificate but the clause further obligated the 1st defendant to hand over all title deeds pertaining to the schedule property *i.e.,* plot; which obligation is bound to be discharged only by the 1st defendant and it is impossible for the plaintiff to obtain title deeds pertaining to the schedule property; if payment is de-linked

with handing over of title deeds, there is justification in the contention that the plaintiff failed to pay balance of sale consideration within the stipulated period. But in the instant case, it is difficult to conclude that the plaintiff failed to discharge her obligation within the time stipulated under 2nd clause of Ex.A-1. If the 1st defendant discharged his initial obligation under 2nd clause, despite it the plaintiff failed to pay balance of sale consideration then the conduct of the plaintiff is blameworthy and disentitles her to claim specific performance of agreement of sale. Interpretation of various clauses contained in Ex.A-1 by the learned counsel for the defendants-respondents, would conclude that time is essence of the contract is not acceptable. Even if the contents of the documents are accepted, as it is, that would not lead to an irresistible conclusion that time is essence of the contract.

22. It is settled law that normally in a agreement of sale of immovable property, time cannot be presumed to be the essence of contract unless there is specific term to terminate or cancel the agreement of sale and failure to perform the part of obligation by any of the parties but, here there is no clause permitting the 1st defendant to terminate the agreement or put an end or cancel the agreement in case the plaintiff failed to pay balance of sale consideration within the time fixed under 2nd clause of Ex.A-1. Therefore, time cannot be construed as essence of the contract.

23. In ***Saradamani Kandappan***[2], the Apex Court had an occasion to deal with similar issue and 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 de-linked from execution of sale deed. The purchaser had to fulfil 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 properly is not subject of any encumbrance; precedes clause requiring payment of balance consideration in three instalments, the satisfaction of the purchaser in regard to the vendor's title to the land and encumbrance, was a condition precedent for payment of the balance consideration cannot be accepted. Since section 52 cannot 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."

24. Earlier, in ***Chand Rani Vs. Kamal Rani***[3], 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"

25. Similar view was expressed by the Apex Court in ***K.S. Vidyanadham and others Vs. Vairavan***[4], wherein it was held as follows:

> "We are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties evolved in times when prices and values were stable and inflation was unknown requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. Learned Counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time limit would have been prescribed.
> Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time limit for taking steps by one or the other party, it must have some significance and that the said time limit cannot be ignored altogether on the ground that time has not been made the essence of the contract."

26. In ***Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and***

another[5], the Apex Court held as follows:

> "The fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances, which should be sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract. "

27. In a decision of this Court in ***K. Mahadeva Rao Vs. Vaztha Tabassum Ghouse***[6], it was held as follows:

> "Time is not the essence of the contract, when there is no default clause in the agreement."

28. In another decision of this Court in ***Sk. Mahaboob Saheb Vs. K. Nageswara Rao***[7], it was held as follows:

> "Time is not essence of contract, where the party agreed to receive balance of sale consideration within a specific time, but no consequential clause is provided in the event of default, therefore, the time cannot be said to be essence of contract."

29. In view of the principles laid down by the Apex Court and this Court, unless there is a term terminating or putting an end to the agreement, in case of failure to pay balance of sale consideration, time can not be said to be the essence of contract; otherwise, it is difficult to hold that time is the essence of contract. In the present case, there was no term to terminate or cancel the agreement of sale in the event of the plaintiff's failure to pay balance of sale consideration within 3 months. Therefore, the parties to the agreement Ex.A-1 never intended that time should be the essence of contract; consequently, failure to pay balance of sale consideration, as per 2nd clause, within 3 months is not a ground to decline the primary relief of specific performance of agreement. When the terms of Ex.A-1 imposed an obligation on the 1st

defendant to furnish nil encumbrance certificates and property tax clearance certificate and hand over title deeds pertaining to the schedule property within 3 months, without performing the obligation by the 1st defendant, compelling the plaintiff to perform her obligation of payment of balance of sale consideration is most unreasonable and not justifiable. Hence, I am of the considered view that time is not the essence of the contract and failure to pay balance of sale consideration within 3 months, as mentioned in 2nd clause of Ex.A-1, without insisting upon the 1st defendant to hand over the title deeds pertaining to the schedule property, the relief of specific performance cannot be denied. Accordingly, the point is answered in favour of the plaintiff-appellant.

30. **POINT Nos.2 & 3**: As both these points are interconnected, they are answered by way of common discussion. The plaintiff pleaded that he is always ready and willing to perform her part of obligation under the agreement of sale, Ex.A-1. However, the defendants denied the readiness and willingness pleaded by the plaintiff in the plaint. The plea and proof of readiness and willingness is a mandate under Section 16(c) of the Specific Relief Act to claim specific performance of agreement of sale. The trial Court disbelieved the evidence of PW.1, husband of the plaintiff, that he is not competent to testify on behalf of his wife and declined the relief of specific performance.

31. Learned counsel for the plaintiff-appellant drawn the attention of this Court to a decision of the Apex Court in ***Hartar Singh Sangha***[1], wherein the Apex Court discussed about the legal position as to who should give evidence in regard to matters involving personal knowledge and summarised as follows:

> "12. We may now summarize for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and

> willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

32. In the present case, the undisputed fact is that on behalf of the plaintiff, her husband, PW.1, settled the bargain and there are specific admissions as to who negotiated the transaction covered by the original of Ex.A-1. In the evidence of PW.1, he testified that he negotiated the transaction and aware about the entire transaction. In the evidence of DW.1, 1st page, he testified that when his father proposed to dispose of the suit property, obtained permission from the Urban land Ceiling Authorities in January, 1985 for sale of the suit land. He also admitted that they came into contact with PW.1, who by that time agreed to purchase the property and met them in the month of February, 1985 and later in the month of March, 1985 expressed his intention to purchase the suit plot and in the last week of April, 1985, PW.1 approached the defendants for settlement of the terms of the agreement and it was agreed that registration has to be effected within the stipulated period by paying balance of sale consideration. These admissions clearly go to show that PW.1 alone settled the bargain and himself expressed his intention to purchase the property and purchased the property but obtained Ex.A-1 in the name of his wife. Thus, PW.1 alone is competent to testify on behalf of his wife, the plaintiff herein, for the reason that he is the man who posted with the facts of the case. Even as per clause (g) of the decision of the Apex Court in ***Hartar Singh Sangha***[1] referred *supra*, it was specifically held that where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member) it may be possible to accept the evidence of such attorney even with reference to *bona-fides* or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively

managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

33. Thus, in view of the decision referred *supra*, PW.1, who is the husband of plaintiff, obtained the document in the name of plaintiff. Undisputedly, PW.1 is the person who intended to purchase the property, paid consideration but obtained document in the name of his wife. Therefore, he is competent witness to testify about the transaction including the readiness and willingness. The trial Court only on the ground that PW.1 is not competent to testify on behalf of the plaintiff, thrown his evidence overboard, which reasoning does not stand to any legal scrutiny and it is against the law laid down by the Apex Court. On the other hand, the spouse is competent to testify on behalf of the other partner in civil cases under Section 120 of Indian Evidence Act, 1872. By applying the principle contained in Section 120 of Indian Evidence Act, PW.1 can be held to be a competent witness to testify on behalf of the plaintiff in whose name Ex.A-1 was obtained. Hence, the finding of the trial Court that PW.1 is incompetent to testify on behalf of the plaintiff is hereby set-aside.

34. One of the major contentions raised before this Court is that the plaintiff did not pay balance of sale consideration within the stipulated period from the date of execution of the deed based as per clause-2 of Ex.A-1. As per my finding on Point No.1, time is not the essence of the contract; however, clause-1 makes it clear that the plaintiff has to pay balance of sale consideration in the presence of Sub-Registrar on the date of registration but clause-2 obligated the 1st defendants to furnish nil encumbrance certificates for the period of 12 years, property tax clearance certificate and the 1st defendant also agreed to hand over the title deeds of the said plot to the vendee before execution of the said deed within the stipulated period. Taking advantage of this clause, learned counsel for the defendants-respondents would

contend that time fixed for payment is 3 months. No doubt, clauses 1 and 2 of Ex.A-1 are inconsistent with each another but both the clauses indicate the order of performance of reciprocal promises under Ex.A-1. Undisputedly, Ex.A-1 is a reciprocal agreement or contract and when the order of performance is fixed the parties have to perform their obligations in the order of performance specified in the agreement. Section 52 of the Indian Contract Act, 1872 deals with performance of reciprocal promises and it says where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

35. In Paragraphs 54 and 55 of the decision of the Apex Court ***Saradamani Kandappan***[2], the Apex Court considered the effect of fixing order of performance and discussed about the clauses contained in the agreement which was subject matter therein. In the facts of the above decision, the parties agreed to certain terms and clause-3 imposed an obligation on the vendors and the purchaser will have to perform her obligation under clause-4. As there was no such express fixation of the order in which the reciprocal promises are to be performed, the appellant's contention was liable to be rejected. It was further observed that when the contract contains two different streams of provisions for performance. One relevant to payment of balance of sale consideration by the purchaser in the manner provided, which is not dependent upon any performance of obligation by the vendors.

36. In the present facts of the case, it is significant to note that as per clause-1, the plaintiff has to pay balance of sale consideration in the presence of Sub-Registrar that means at the time of registration but whereas clause-2 though imposed obligation on the vendor to produce certain documents before execution of the sale deed within the stipulated period, is de-linked with the payment of balance of sale

consideration. Even if both the clauses are read together the 1st defendant has to furnish the documents mentioned in clause-2 before execution of the registered sale deed and the plaintiff has to pay balance of sale consideration in the presence of Sub-Registrar on the date of execution of registered sale deed. Thus, it is clear that furnishing of encumbrance certificates, property tax clearance certificate and handing over of title deeds is a precondition for obtaining registered sale deed and as such, payment of balance of sale consideration is linked with furnishing of documents referred supra by the 1st defendant. In such case, non-payment of balance of sale consideration within the stipulated period as mentioned in clause-2 does not amount to breach of terms of agreement to attract Section 16(b) of the Specific Relief Act. On close analysis of the recitals of Ex.A-1 and expressing intention of the plaintiff to obtain registered sale deed by issuance of Ex.A-3 notice would indicate that the plaintiff is always ready and willing to perform her part of obligation. However, in Ex.A-4 notice dated 10.09.1986, the 1st defendant denied readiness and willingness of the plaintiff and specifically contended that the sale deed has to be obtained within 3 months but curiously the 1st defendant allegedly issued notice dated 15.09.1985 contending therein that the 1st defendant fixed time as essence of the contract calling upon the plaintiff to pay balance of sale consideration and obtain registered sale deed on or before 15.10.1985 with a threat to forfeit the advance sale consideration, which was alleged to have been served on the plaintiff and produced postal acknowledgment, Ex.B-2. Moreover, DW.1 in his evidence admitted that the property being joint family was not referred in the written statement filed by the 1st defendant and for the first time it was disclosed in the additional written statement filed by the legal heirs of 1st defendant. If really, the 1st defendant had issued notice dated 15.09.1985 calling upon the plaintiff to pay balance of sale consideration and execute registered sale deed, certainly he would have disclosed about the factum of issuing notice, fixing time as essence of the contract but in the absence of such disclosure, the notice dated 15.09.1985 cannot be believed. In fact, in Para 3 of the written statement filed by the 1st defendant, he disclosed about issuance of notice dated 15.09.1985 acknowledging the receipt of the same by the plaintiff. However, such demand by the 1st defendant is not justifiable for the reason that the 1st defendant himself agreed to furnish nil encumbrance certificates for 12 years, property tax clearance certificate and title deeds of the schedule property before registration but the plaintiff agreed to pay balance of sale consideration in the presence of Sub-Registrar. When Ex.A-1 contained such clauses, the 1st defendant cannot unilaterally make time as essence of the contract without discharging his obligation under clause-2 of Ex.A-1. Hence, the plaintiff cannot be found fault for non payment of balance of sale consideration and it is not breach of contract, under Section 16(b) of the Specific Relief Act, which disentitled the plaintiff to claim equitable and discretionary relief of specific performance.

37. One of the major contentions raised by learned counsel for the defendants-respondents is that Ex.A-1, agreement of sale is non-possessory agreement but the plaintiff pleaded that possession of the property was delivered to the plaintiff and she is in possession and enjoyment of the property. This plea is *prima-facie* false in view of the recitals of Ex.A-1 and when the plaintiff approached the Court seeking an equitable and discretionary relief of specific performance, the plaintiff has to approach the Court with clean hands and the conduct of the plaintiff and defendants plays vital role to exercise discretion in favour of either of the parties.

38. As seen from the terms of Ex.A-1, the agreement of sale is silent as to whether it is possessory or non-possessory agreement and

there was nothing to suggest that the 1st defendant has to deliver vacant possession of the property but it was executed on a stamp paper worth Rs.10/-, styling it as an agreement of sale. In the registered correspondence, Ex.A-3, the plaintiff did not disclose anything about the delivery of vacant possession of the property to her but just called upon the 1st defendant to be present at the Sub-Registrar's office at 11.00 a.m. on 13.09.1986 to receive balance of sale consideration and execute registered sale deed; whereas, in Para 2 of the plaint, PW.1 specifically pleaded that possession of the property was delivered on 30.04.1985 *i.e.,* on the date of execution of the agreement of sale. In Para 7 of the plaint, the plaintiff did not seek delivery of possession of the property.

39. In the written statement filed by the 1st defendant, he denied the material allegations without specifically denying delivery of possession of the property. Even in the additional written statement filed by defendants 2 to 8, after they were brought on record as legal heirs of 1st defendant, they did not specifically deny delivery of possession of the property to the plaintiff. Turning to the evidence of last line in Para 2 of PW.1, PW.1 asserted that possession was delivered to the plaintiff on the date of execution of Ex.A-1 but in the cross-examination at page 5, learned counsel for the defendants-respondents made a vain attempt to disprove delivery of possession of the property and elicited that in Ex.A-1, it is not mentioned that possession of the suit property was delivered to the plaintiff as admitted by her. This fact is not in dispute because Ex.A-1 is totally silent as to the delivery of possession but no suggestion was put to PW.1 that the possession of the property was not delivered on the date of execution of the agreement of sale to the plaintiff. Therefore, the defendants did not specifically put-forth the plea of non-delivery of possession of the property at any stage but for the first time it is contended that the plaintiff did not approach the Court with clean

hands because he pleaded that the possession of the property was delivered which is in fact not correct thereby disentitled the relief of specific performance under Section 20 of the Specific Relief Act. No doubt, as discussed *supra*, the relief of specific performance is purely a discretionary and equitable relief and such discretion has to be exercised in favour of the plaintiff only when the plaintiff approached the Court with clean hands. Here, the agreement is not specific whether it is possessory or non-possessory and the registered correspondence between the parties did not disclose anything about the delivery of possession of the property to the plaintiff or the plaintiff ever demanded the defendants to put her in possession of the property on execution of registered sale deed. In the absence of any such details, the delivery pleaded by the plaintiff cannot be said to be a false statement which disentitled her to claim specific performance of agreement of sale.

40. Learned counsel for the defendants-respodnents contended that conduct of the parties is relevant to grant the relief of specific performance. There is substance in the argument advanced by learned counsel for the defendants; however, in the present case the conduct of the defendants and the plaintiff is doubtful for the reason that the plaintiff made an allegation that the possession of the property was delivered on the date of execution of Ex.A-1, though, no such recital was incorporated in Ex.A-1. Similarly, the defendants took a specific plea that the 1st defendant terminated Ex.A-1 by issuing notice dated 15.09.1985. In other words, both the parties are not fair in dealing with the transaction.

41. As the plaintiff expressed her readiness and willingness called upon the defendants to appear before the Sub-Registrar on 13.09.1986 at 11.00 a.m. to execute registered sale deed by receiving balance of sale consideration indicates that the plaintiff is ready and

willing but the only contention of the defendants is that it was 2nd Saturday and thereby question of defendants appearing before the Sub-Registrar to execute registered sale deed does not arise. To disprove such contention, the plaintiff-appellant filed A.S.M.P. No.222 of 2015 under Order XLI Rule 27 of C.P.C. to receive the document set-out in the list as additional evidence and the letter enclosed to the petition discloses that though it was 2nd Saturday, it is a working day for the Registrar Office, Ranga Reddy District. In such case, when the Registrar's Office is working, it is the duty of the defendants to attend the office to show their *bona-fides*. The letter dated 01.02.2011, issued by the Joint-Sub-Registrar, Registration and Stamp Department, Ranga Reddy District, Balanagar, would go to show that 13.09.1986 was a working day for the District Registrar Office, Ranga Reddy District. Hence, A.S.M.P. No.222 of 2015 is ordered receiving the letter dated 01.02.2011 and marked the same as Ex.A-11. Thus, the contention of the defendants that 13.09.1986 is 2nd Saturday and it is a holiday is false. Hence, non-appearance of the 1st defendant before the Sub-Registrar on the date fixed by the plaintiff to receive balance of sale consideration and execute registered sale deed is another strong reason to conclude that the 1st defendant with a *mala fide* intention avoided to appear before the Sub-Registrar to execute registered sale deed, receiving balance of sale consideration.

42. The cumulative effect of entire material available on record would clinchingly established that the 1st defendant failed to discharge his initial obligation to produce encumbrance certificates, property tax clearance certificate and hand over title deeds to the plaintiff before execution of registered sale deed and also failed to appear before the Sub-Registrar on 13.09.1986 at 11.00 a.m., as demanded by the plaintiff by registered notice marked as Ex.A-3. Therefore, the conduct of the 1st defendant would clinchingly go to show that the 1st defendant is not willing to perform his part of obligation; on the other

hand, conduct of the plaintiff throughout established that she is ready and willing to perform her part of obligation under Ex.A-1.

43. The learned counsel for the defendants-respondents contended that the relief of specific performance is purely discretionary and equitable under Section 20 of the Specific Relief Act. There is no dispute about it, but as per Section 20(2), the discretion cannot be exercised to grant specific performance in the circumstances as contemplated in clauses (a) to (c) therein but none of those grounds are available to the defendants to deny the relief of specific performance; that apart, no issue was framed before the trial Court as to the grounds contained under Section 20(2) and no issue was framed by the trial Court. Therefore, at this stage, it is difficult to accept the contention of the defendants to deny the relief of specific performance in view of the principle laid down by the Apex Court in ***Prakash Chandra Vs. Narayan***[8].

44. On close analysis of the entire material available on record, the plaintiff proved her readiness and willingness which is a *sine-qua-non* under Section 16(c) of the Specific Relief Act and the conduct of the 1st defendant is blameworthy. Therefore, denial of relief of specific performance by the trial Court on different grounds is erroneous and the same is liable to be *set-aside*. Accordingly, the finding of the trial Court is hereby *set-aside* holding these two points in favour of the plaintiff-appellant and against the defendants-respondents.

In the result, the Appeal Suit is allowed, setting-aside the decree and judgment dated 20.03.1995 passed in O.S. No.39 of 1987, granting decree for the relief of specific performance of agreement of sale dated 30.04.1985.

Accordingly, the plaintiff is directed to deposit balance of sale consideration to the credit of the suit in O.S. No.39 of 1987, before the trial Court, within a period of 3 months from today; and on such deposit, defendants 2 to 10, are directed to execute regular registered sale deed in favour of the plaintiff, within one month from the date of deposit of balance of sale consideration, and in the event of failure to do so, the plaintiff is at liberty to obtain regular registered sale deed through process of the Court. However, in the event of plaintiff's failure to deposit balance of sale consideration, as mentioned herein above, the agreement stands cancelled automatically.

In consequence, miscellaneous petitions, if any, pending in this Appeal, shall stand closed. No order as to costs.

M. SATYANARAYANA MURTHY, J

Date: 02-09-2015.
Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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APPEAL SUIT No. 202 OF 1997

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Date. 02-09-2015

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[1] 2010 (10) SCC 512

[2] 2011 (12) SCC 18

[3] AIR 1993 SC 1742

[4] AIR 1997 SC 1751

[5] AIR 1977 SC 1005

[6] 2008 (4) ALD 781

[7] 2008 (3) ALT 144

[8] 2012 (5) SCC 403