

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 255 OF 2004
WITH
CIVIL APPLICATION NO. 7582 OF 2011

Babulal Harchand Beldar
Since deceased per L.Rs.

- 1A. Jaitunbai Babulal Beldar,
Age 72 years, Occu. Household,
R/o. Sanghavi, Tal. Shirpur,
Dist. Jalgaon.
- 1B. Jagdish Babulal Beldar,
Age 55 years, Occu. Agriculture,
R/o. As above.
- 1C. Ramu Babulal Beldar,
Age 53 years, Occu. Agriculture,
R/o. As above.
- 1D. Bhadu Babulal Beldar,
Age 50 years, Occu. Agriculture,
R/o. As above.
- 1E. Ragho Babulal Beldar,
Age 45 years, Occu. Agriculture,
R/o. As above.
- 1F. Manubai Bhura Beldar,
Age 48 years, Occu. Household,
R/o. As above.

**....Appellants.
(Ori. Appellants)**

Versus

Sitaram Kathu Borse (Dhobi),
Since deceased per L.Rs.

- 1. Gopal Sitaram Borse,

Age 56 years, Occu. Agriculture,

2. Chaggan Sitaram Borse,
Age 51 years, Occu. Agriculture,
3. Katibai Digamber Dhobi,
Age 54 years, Occu. Household,
All residents of Sanghavi,
Tq. Shirpur, Dist. Dhule.
4. Jijabai Madhukar, Age about
35 years, Occu. Household,
R/o. Chalisgaon, District Jalgaon.**Respondents.**

Mr. S.C. Bora & Mr. S.S. Bora, Advocate for appellants.

Mr. S.P. Brahme, Advocate for respondent Nos. 1 to 4.

CORAM : T.V. NALAWADE, J.
DATED : 8th June, 2016.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Suit No. 77/1986, which was pending in the Court of Civil Judge, Junior Division, Shripur and against the judgment and decree of Regular Civil Appeal No. 151/1996, which was pending in District Court, Dhule. The suit filed by present appellant for relief of specific performance of contract of sale of agricultural land is dismissed by the Courts below. The Appellate Court has given direction to defendant to return back the earnest money, but the plaintiff is held to be liable to pay the mesne profit. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :-

The suit was filed in respect of 6 Acre portion of agricultural land bearing Gat No. 69/A situated at village Sangvi, Tahsil Shripur, District Dhule. The portion is eastern side of the property and on western side of this portion, there is remaining portion of Gat No. 69/A belonging to defendant. There is a well situated in the land Gat No. 69/A.

3) Defendant Sitram had agreed to sell the suit property to plaintiff for the consideration of Rs. 22,000/-. The right to take water from aforesaid well was also to be sold for this consideration. The agreement was made prior to the date of execution of document and the document was executed on 23.1.1979. Part of the consideration, Rs. 5,000/- was already paid by plaintiff to defendant and it was considered in the document dated 23.1.1979. It is the case of plaintiff that till the date of suit, plaintiff had paid the total consideration of Rs. 20,200/-. It is the case of plaintiff that he is illiterate person and in his diary, the defendant has given written acknowledgments, showing that plaintiff had paid the consideration in parts to the

defendant.

4) It is the case of plaintiff that on 15.5.1986 and even prior to that, he requested to defendant to accept the remaining consideration viz. Rs. 1800/- and to execute the sale deed, but defendant gave false notice of termination of contract dated 23.5.1986 and cause of action took place for the suit. It is the case of plaintiff that he has been ready and willing to perform his part of the contract and he is ready to pay the remaining amount of consideration and he is ready to bear the expenses of execution of sale deed. The suit was filed on 13.8.1986.

5) Defendant Sitram filed written statement on 27.2.1987 and he contested the matter. Firstly, he admitted that he had agreed to sell the suit property and he had also given possession of the suit property to plaintiff as he had agreed to sell the property to plaintiff. In alternate, he took many defences to show that he was contesting the matter.

6) Defendant contended that he and his son Chagan jointly own the land Gat No. 69/A and so, he alone cannot be ordered to sell the suit property to plaintiff and for that reason,

the suit is not tenable.

7) It is the case of defendant that as per the provisions of Prevention of Fragmentation and Consolidation of Holdings Act, it was necessary to obtain permission of authority created under that Act to sell the property to plaintiff and no such permission was obtained. It is the case of defendant that agreement dated 23.1.1979 is against the provisions of aforesaid Act and it is void. He contended that Civil Court has no jurisdiction to grant relief of specific performance in view of the provisions of the aforesaid Act and the only authority like Tahsildar can take decision on such dispute. He requested to refer the matter to Tahsildar.

8) The defendant contended that plaintiff did not show readiness and willingness to perform his part of contract. He contended that specific dates were mentioned in the agreement for making payments of installments of consideration, but the payments were not made on or before the specified dates by the plaintiff. He contended that as the consideration was not paid within the time fixed in the contract, the contract was terminated and so, the suit cannot be decreed.

9) Defendant alternatively contended that there was no agreement of sale and the aforesaid transaction was sham transaction and the document was created to enable the plaintiff to recover the amount given by him in his money lending business. It is contended that the amount mentioned in the document includes the principle amount and the interest on it, which was to be paid by the defendant. It is the case of defendant that accounts needs to be taken from the plaintiff in respect of agricultural income made by plaintiff by cultivating the land and if any amount remains due, the defendant is ready to return that amount to the plaintiff. Counter claim was made of relief of possession and mesne profit by the defendant. Plaintiff filed written statement to the counter claim. He denied that it was money lending transaction. He contended that he is agriculturist and he was working in agricultural land and so, he has right to purchase the property.

10) Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. The Trial Court on one hand held that there was agreement of sale, but gave other finding that it was money lending transaction. The Trial Court

held that there was breach of terms and conditions of the contract committed by the plaintiff as he did not make the payment of consideration in time. The Trial Court further held that the suit was not within limitation. No specific issue of readiness and willingness was framed by the Trial Court, though there is finding that the plaintiff committed breach of contract. The counter claim was allowed by the Trial Court and no relief of refund of earnest money was given to the plaintiff. Thus, the Trial Court was not sure about the nature of transaction and aforesaid inconsistent findings were given by the Trial Court.

11) The First Appellate Court has held that aforesaid transaction was not sham, it was not money lending transaction. It further held that there was agreement of sale. However, the First Appellate Court has held that readiness and willingness was not proved by the plaintiff and the suit was not filed within limitation. The First Appellate Court directed the defendant to return the earnest money, but also held that the plaintiff is liable to pay the mesne profit to defendant.

12) This Court admitted the appeal on following substantial questions of law :-

- (i) Whether the Courts below have not considered the relevant material and due to that, there is perversity in the judgments of the Courts below ?
- (ii) Whether the Courts below have committed error in holding that the suit was not within limitation ?
- (iii) Whether the District Court has committed error in holding that plaintiff has not proved readiness and willingness to perform his part of the contract ?

13) In the present matter, argument was advanced only on aforesaid points. Both the Courts below have given finding that there was no bar of provisions of Prevention of Fragmentation and Consolidation of Holdings Act, if there was agreement of sale. The District Court has given finding that it was not loan transaction, and it was agreement of sale. These findings are not challenged by the defendant. This circumstance need to be kept in mind at the time of considering the material available. This Court is considering some evidence given on loan transaction as such evidence and some circumstances can be considered to ascertain as to whether there was readiness and willingness on the part of the plaintiff to perform his part of the contract. The defence with regard to nature of transaction taken

by the defendant also needs to be discussed to some extent as due to nature of such defence, the Court is not expected to strictly consider the burden of proof of plaintiff in respect of readiness and willingness and the conduct of the defendant of denying that there was agreement of sale itself can be considered against the defendant.

14) The evidence of plaintiff is in accordance with the pleadings in the plaint. He has given evidence that many times before receipt of the notice given by defendant, he had requested the defendant to complete the sale transaction and he was always ready and willing to perform his part of the contract. The execution of the agreement of sale is not disputed and this document is at Exh. 57. The diary of plaintiff in which there are some acknowledgments in respect of the amount received by defendant in respect of the transaction in question is produced on the record and the relevant entries are at Exh. 70. Some other entries in the diary are brought on the record by the defence counsel.

15) In the cross examination of plaintiff, following evidence is brought on the record.

(i) In para No. 8, it is brought on the record that before the execution of the agreement, the suit land was in possession of the plaintiff. Suggestion was given to him that he was cultivating the land on behalf of defendant on half crop share basis. It is brought on the record that prior to execution of Exh. 57, there was agreement between the plaintiff and defendant under which area of 17 Acres was allotted to plaintiff and defendant was to sell this area at the rate of Rs. 1,000/- per Acre. The plaintiff has further stated that as the defendant changed his mind, the document at Exh. 57 was executed and the area was reduced.

(ii) In para No. 8, suggestion was given of making payments by plaintiff on different occasions to defendant like Rs. 5000/-, and then Rs. 1,000/-. It is brought on the record that the entry at Exh. 70 in the notebook of plaintiff dated 30.1.1970 is in the handwriting of defendant and it is brought on the record that most of the entries are made by the defendant and the entries are in respect of defendant and other parties.

(iii) In the cross examination of plaintiff, nothing could be brought on the record to create probability that plaintiff was not ready and willing to perform his part of the contract. On the other hand, it can be said that as and when defendant approached him, plaintiff had paid him money, not only in respect of the transaction in question, but on other occasions also.

16) The contents of Exh. 57, the agreement need to be appreciated in view of the aforesaid evidence and the nature of suggestions given to plaintiff by defence counsel. The important contents of Exh. 57 are as follows :-

(i) Prior to execution of Exh. 57, there was one written agreement between these parties and under that agreement, amount of Rs. 5,000/- was already paid by plaintiff to defendant. The said amount was adjusted in the new transaction mentioned in Exh. 57 and the previous agreement of sale was cancelled.

(ii) The amount of Rs. 4,000/- was paid to defendant under Exh. 57 on 23.1.1979, the date of

execution of Exh. 57 and thus, as on 23.1.1979 the amount of Rs. 9,000/- was paid as consideration by plaintiff to defendant out of the total amount of Rs. 22,000/-.

(iii) The amount of Rs. 6,000/- was to be paid by plaintiff to defendant on 30.3.1980.

(iv) The amount of Rs. 4,000/- was to be paid by plaintiff to defendant on 30.3.1981.

(v) The amount of Rs. 3,000/- was to be paid by plaintiff to defendant on 30.3.1982 and that was to be done at the time of registration of the sale deed. Thus, the total consideration of Rs. 22,000/- was to be paid prior to 30.3.1982.

(vi) Possession of the land was actually given to the plaintiff by defendant.

(vii) The expenses of the execution of the sale deed were to be born by the plaintiff.

(viii) The amount which was to be spent on repairs of well was to be born equally by plaintiff and defendant and the plaintiff was to have equal share in the water of well situated in aforesaid land Gat No. 69/A. There was right to plaintiff to lay pipeline in the land given to him for the purpose of irrigation.

17) The agreement of sale was written on general stamp paper of requisite value. There is one annexure of ordinary paper to Exh. 57 and this annexure is treated as part of Exh. 57. The defendant has admitted that the amounts mentioned on this annexure were paid to him by plaintiff. The amounts were paid as under :-

- (i) The amount of Rs. 1,000/- was paid on 12.9.1980,
- (ii) The amount of Rs. 200/- was paid on 12.2.1983, and
- (iii) The amount of Rs. 1000/- was paid on 13.2.1983.

18) It is already observed that the entries made in the notebook of plaintiff are admitted by the defendant. These entries are not only in respect of suit transaction, but there are entries in respect of other dealings between plaintiff and

defendant and all of them are admitted. At Exh. 99, there is one entry showing that some amount which was taken by plaintiff from defendant was returned by him. It appears that there were withdrawals from one society and those amounts were paid by defendant to plaintiff. The defendant has admitted in clear terms that the other entries appearing in the notebook have no connection with the suit transaction. The entries in respect of suit transactions made by defendant in notebook at Exh. 70 show that total amount of Rs. 20,200/- was paid by plaintiff to defendant and the particulars of payments are described as under :-

- (i) Rs. 9,000/- on 21.1.1979,
- (ii) Rs. 5,000/- on 23.1.1980,
- (iii) Rs. 3,000/- on 23.1.1981,
- (iv) Rs. 2,000/- on 23.1.1982 and
- (v) Rs. 1,200/- on 23.1.1983.

It can be said that the dates of payment mentioned in Exh. 57 in respect of some installments are different than the dates mentioned in Exh. 70, but defendant has no dispute over the discrepancies. The plaintiff was using thumb impression. He was illiterate person and it is the defendant, who was making these entries and so, it was up to him to explain the discrepancies.

19) In the cross examination, the defendant has given some admissions as follows :-

(i) He received amount of Rs. 18,000/- and some more amount from plaintiff.

(ii) The price of land per Acre at the relevant time was Rs. 2,500/- to Rs.3,000/-.

(iii) In the year 1954-55, the defendant had purchased 30 Acres of land of this Gat number for the total consideration of Rs. 3,200/-.

(iv) The plaintiff had shifted to Maharashtra from Madhya Pradesh and he had come to the aforesaid place with his cattle which include pair of bullocks. Plaintiff had worked in the field of defendant and he was making good income.

(v) In the year 1971, defendant had agreed to sell 17 Acres of land to plaintiff for total consideration of Rs. 17,000/- and the possession of area of 17 Acres was given to plaintiff. On that occasion, amount of Rs. 5,000/- was paid by plaintiff to defendant.

(vi) At the time of new agreement mentioned in Exh. 57, plaintiff had paid additional amount of Rs. 4,000/-.

20) The revenue record shows that in the year 1955, the defendant had purchased Survey Nos. 66, 67 and 68 for himself and for his minor son Chagan (Exh. 113). The school record of Chagan (Exh. 112) shows that he was born in the year 1949. Exh. 111 shows that aforesaid three survey numbers were merged in to Gat No. 69. Exhs. 110 and 111, the 7/12 extracts show that name of Sitram was entered in ownership and possession column till the year 1971. Exh. 114, copy of mutation shows that partition was effected between defendant and his sons and portion bearing Gat No. 69/A, was allotted to the share of defendant.

21) In spite of the aforesaid revenue record, false defence was taken by defendant that Chagan was joint owner with him of the suit property and due to this circumstance, the relief of specific performance cannot be given in favour of plaintiff.

22) One Shri. Tungar is examined as witness by the defendant. He has signed on Exh. 57 as a witness. But, this witness has not supported plaintiff or defendant.

23) The aforesaid record of evidence is sufficient to establish following things :-

(i) Since the year 1971, plaintiff has been in possession of the suit property.

(ii) In the past, in the year 1971 also, defendant had agreed to sell the land to plaintiff and on that occasion, some consideration was paid and possession was handed over to plaintiff. Plaintiff was cultivating the suit land and some more portion also. In the year 1979, under Exh. 57, the defendant then agreed to sell 6 Acre portion for the consideration of Rs. 22,000/- and the previous agreement was cancelled.

(iii) Plaintiff is illiterate person when defendant knows reading and writing and it is the defendant who was writing document for plaintiff and who gave acknowledgments in writing regarding receipt of installments of consideration from time to time.

(iv) In document, Exh. 57, the last date for making total consideration was mentioned as 30.3.1982, but after that day also, on two occasions like on 12.2.1983 and 13.2.1983, the defendant accepted more

consideration and gave acknowledgments in writing.

(v) In notice at Exh. 59, there was clear admission that it was contract for sale of land. First time in written statement, alternative defence was taken that there was loan transaction and other alternative defences were taken to avoid execution of sale deed.

(vi) When in notice, it was admitted that amount of Rs. 18,000/- was actually paid by plaintiff towards consideration, in reply to written statement (Exh. 21), the defendant avoided to admit the receipt of that amount also.

(vii) Inconsistent stands were taken by defendant on different times and those defences are not consistent with the aforesaid record. It is not the case of defendant that at any time, he had returned the amount of suit transaction to plaintiff and he had intention to return that amount. He accepted the amount from plaintiff even after the date fixed in Exh. 57 viz. 30.3.1982 on two occasions. If time was essence of contract, the defendant would not have accepted the consideration after aforesaid date mentioned in Exh. 57. The conduct of defendant of

accepting the amount of consideration after 30.3.1983 is sufficient to infer that the defendant had not put to an end to the contract mentioned in Exh. 57 after 30.3.1982. In view of these circumstances it can be said that the defendant first time refused to perform his part of contract when he gave notice in May 1986 to terminate the contract and not immediately after 30.3.1982. After that plaintiff filed suit for specific performance of contract. The case that it was loan transaction does not look probable also due to the reason that amount was to be paid in many installments.

24) The Trial Court had committed error in holding that it was a loan transaction and First Appellate Court has committed error in not considering the circumstance like acceptance of consideration by defendant after 30.3.1982. Other aforesaid relevant circumstances are not considered by the First Appellate Court. Due to these circumstances, inference is easy that time was not essence of the contract. These circumstances are relevant for many things. Due to these circumstances, time limit fixed by Limitation Act starts under Article 54 when there is

refusal on the part of defendant to perform his part of the contract. The suit was filed within three years from the date of such refusal and so the suit was certainly in limitation. The Courts below have committed error in holding that the suit was not filed within limitation. The aforesaid circumstances also create probability that the plaintiff was willing to perform his part of the contract. The material is sufficient to infer that he was ready and willing to perform his part of contract.

25) The case of defendant that the permission of authority was required under the Prevention of Fragmentation and Consolidation of Holdings Act and other defence that Chagan was also owner show that he was not ready to complete the sale transaction. To avoid the making of payment, he took another defence that the plaintiff is liable to give accounts of income received from agriculture. Such defence could not have been taken even if it was a loan transaction as there was no such condition in Exh. 57 and there was no such specific case in the first step like notice given by plaintiff to defendant. Thus, many false defences were taken by defendant.

26) The learned counsel for respondent, defendant

placed reliance on the case reported as **AIR 2001 SUPREME COURT 2920 [Veerayee Ammal Vs. Seeni Ammal]**. The Apex Court has laid down in the case that when there is finding of the Trial Court on readiness and willingness against the plaintiff in a suit for specific performance, in view of provision of section 100 of Civil Procedure Code, the High Court cannot take a different view as it is a decision on question of fact. There is no dispute over this proposition. The facts of the present matter are different. The findings are required to be given in view of the facts and circumstances of each case. The Trial Court had not even framed specific issue on this point and it was held that the transaction was a loan transaction. In the present case, the case of the Apex Court is of no help to the defendant.

27) The learned counsel for appellant placed reliance on the case decided by the Apex Court like **Civil Appeal No. 193 of 2015 decided on 9.1.2015 [Between Kailash Nath Associates Vs. Delhi Development Authority]**. The facts of this case show that the time for performance was extended by promisee and Supreme Court held that the promisee had right to extend the time and such act was for the benefit of other side.

28) The learned counsel for appellant placed reliance on decision given by the Apex Court in one more matter like **Civil Appeal Nos. 6302-6203 of 2004 decided on 21.10.2005 [Between S. Brahmanand and Ors. Vs. K.R. Muthugopal (D) and Ors.]**. The Apex Court has laid down in this case that the time for performance of contract can be extended and if the time is extended, the time limit starts running when there was refusal to perform and the case is then governed by section 63 of the Contract Act. Article 54 of Limitation Act is discussed in this matter and the effect the conduct of the party in view of provision of section 55 of the Contract Act is also discussed. It cannot be disputed that surrounding circumstances and the conduct of the parties need to be considered to ascertain as to who was at fault, who committed breach of contract. The learned counsel for appellant placed reliance on the case of Supreme Court bearing **Civil Appeal Nos. 9949-9950 of 2014 decided on 29.10.2014 [Between Rathnavathi Vs. Kavita Ganashamdas]**. The relevant portion is at para Nos. 41 and 42, which is as under :-

"41. The learned Judge J.C. Shah (as His Lordship then was), speaking for the bench examined this

issue in **Gomathinayagam Pillai and ors. Vs. Pallaniswami Nadar**, AIR 1967 SC 868, in the light of English authorities and Section 55 of the Contract Act and held as under :-

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In *Jamshed Khodaram*

Irani v. Burjorji Dhunjibhai MANU/PR/0015/1915 : I.L.R. 40 Bom. 289 the Judicial Committee of the privy Council observed that the principle underlying Section 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed:

Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time..... Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land.

It may be sated concisely in the language used by Lord Cairns in Tilley v. Thomas I.L.R. (1867) ch.61:

The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if

it can do Justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry* (1853) 3 De G.M.G. 284, there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds... mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case.

42. In **Govind Prasad Chaturvedi v. Hari Dutt Shastri and Anr.** MANU/SC/0010/1977: (1977) 2 SCC 539, this Court placing reliance on the law laid down in **Gomathinayagam Pillai** (supra), reiterated the aforesaid principle and held as under:

.....It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidence by circumstances which are 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.

Apart from the normal presumption that in the case of an agreement of sale of immovable property time is not the essence of the contract and the fact that the terms of the agreement do not unmistakably state that the time was understood to be the essence of the contract neither in the pleadings nor during the trial the Respondents contended that time was of the essence of the contract."

29) For respondent, reliance was placed on case reported as **AIR 2009 SUPREME COURT 2193 [Ahmmadsahab Abdul Mulla (D) by L.Rs. Vs. Bibijan and Ors.]**. The Apex Court has discussed Article 54 of the Limitation Act. It is laid down that term 'date fixed' used in Article means 'having final or crystallized or character not subject to change or fluctuation'. There is no dispute over this proposition. In view of the provision of section 55 of the Contract Act, the conduct needs to be considered and the provision of section 55 of the Contract Act runs as under :-

"55. Effect of failure to perform at fixed time, in contract in which time is essential.-

When a party to a contract promises to do a

certain thing at or before a specified time, or certain things at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.- If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.- If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

30) The burden was on the defendant to prove that time

was essence of contract as agreement was for sell of immovable property and there is provision of aforesaid nature of law, section 55 of the Contract Act. The defendant failed to discharge this burden. Thus, inference is easy that time was not essence of the contract. It is already observed that due to conduct of the defendant and due to other circumstances, there is no other alternative than to hold that plaintiff has been ready and willing to perform his part of the contract and it is the defendant who committed the breach.

31) In view of the discussion made above, this Court holds that the aforesaid points need to be answered against the defendant, respondent and they are answered accordingly. Though granting of relief of specific performance is within the discretion of the Court, when there are circumstances of aforesaid nature and property involved is immovable property, the Court is bound to give decree of specific performance of contract. Only the amount of Rs. 1,800/- is due from plaintiff to defendant. It is clear that due to conduct of defendant, this amount could not be paid and the transaction could not be completed. In any case, the amount remained with plaintiff over all the aforesaid years and so, this Court holds that 18% interest

can be given to defendant on this amount. So, the order.

ORDER

1. Second Appeal is allowed.
2. Judgments and Decree of the Trial Court and First appellate Court are hereby set aside.
3. The Suit of the plaintiff for specific performance of contract is hereby decreed in following terms :

The plaintiff do deposit an amount of Rs. 1,800/- [Rupees Eighteen Hundred] with the interest @ 18% per annum in the Trial Court for getting the relief of specific performance of contract. The interest is to be calculated from 30/03/1982. The amount is to be deposited in the trial Court within 30 days from the date of this order. If the amount is not deposited, it is to be presumed that the Suit is dismissed. If the amount is deposited, the defendant do perform his part of contract and execute the sale deed in respect of the suit property in favour of the plaintiff.

Costs to be borne by both the sides.

Decree be prepared in above terms.

Time of 8 weeks is given to the respondent/defendant to challenge the decision of this Court and till that time the defendant may not perform his part like execution of the sale deed. Earnest amount, if any, deposited by

original defendant in the Appellate Court is to be returned to him.

In view of disposal of Second Appeal, C.A. No. 7582 of 2011 does not survive and stands disposed of.

[T.V. NALAWADE, J.]

ssc/