HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HONOURABLE SRI JUSTICE N. BALAYOGI

APPEAL SUIT No. 681 OF 2011

JUDGMENT: (per HON'BLE SRI JUSTICE N. BALAYOGI)

1. The appellant/plaintiff preferred suit in O.S.No.38 of 2006 on the file of learned I Additional District Judge, Nellore, seeking specific performance of agreement of sale-Ex.A.1 dated 19.08.2004 directing respondents/defendants to execute regular sale deed in her favour regarding item Nos. 1 to 6 of plaint schedule properties respectively by receiving balance consideration and in case of respondents/defendants failed to do so, the same may be done through the process of Court.

2. The trial Court negatived the plea of specific performance of agreement of sale, but directed to refund part consideration of Rs.5.00 lakhs and Rs.3.00 lakhs received, with interest at 12% from the date of receiving the consideration to the plaintiff and ordered each party to bear their own costs while dismissing the suit against respondents 1 to 4/defendants 1 to 4 with costs.

3. Aggrieved by the said judgment and decree, the plaintiff preferred this appeal.

4. The case of the appellant/plaintiff is that the respondents/defendants are the absolute owners of the plaint schedule items 1 to 6. Respondents 1 to 4/defendants 1 to 4 on their behalf and on behalf of respondents 5 and 6/defendants 5 and 6 executed the agreement of sale in favour of appellant/plaintiff in respect of the plaint schedule items of property. The total consideration is Rs.66,51,730/- at the rate of Rs.29,000/- per acre.

5. Out of the total consideration, the plaintiff/P.W.1 paid Rs.5.00 lakhs on 19.08.2004, i.e. on the date of agreement. The appellant/plaintiff should pay balance consideration at the rate of Rs.29,000/- per acre for the total extent of Ac.229.37 cents within three months from the date of agreement and the respondents/defendants should execute the regular sale deeds with their respective extents at the expenses of the appellant/plaintiff. Respondent No.2/Defendant No.2 on her behalf and on behalf of other defendants received another Rs.3.00 lakhs on 10.09.2004 and the same was endorsed on the reverse of the agreement of sale Ex.A.1. Thus, in all, Rs.8.00 lakhs towards part sale consideration was paid by the plaintiff under Ex.A.1. At the time of Ex.A.1, the respondents/defendants delivered xerox copies of their original title deeds to the bank advocate for the purpose of legal opinion. As the bank advocate required the original title deeds, the plaintiff telephoned to D2 and approached her brother Kondandarami Reddy requesting them to supply original title deeds, but the defendants could not

supply the same. The appellant/plaintiff issued Ex.A.2 letter dated 17.11.2004 and Ex.A.3 letter dated 2.5.2005 to D.2 requesting supply of original title deeds intimating importance of original title deeds, but in vain. Hence, the appellant/plaintiff issued Ex.A.4 legal notice dated 16.6.2005 to all the defendants for the same purpose. The defendants received the said notices under Exs.A.5 to A.10 postal acknowledgments.

6. The appellant/plaintiff having came to know that the defendants are trying to alienate the schedule property to third parties, got issued paper publication under Ex.A.11 in Eenadu Telugu daily newspaper on 21.6.2005. Thereafter, the defendants issued Ex.A.12 reply notice dated 1.7.2005 to the advocate of the appellant/plaintiff with false and frivolous allegations.

7. Non-performance of contract in pursuance of agreement of sale was due to the non cooperation of respondents/defendants 1 to 6 with a view to sell away the suit property by inflated rates to enrich themselves unlawfully. The appellant/plaintiff is always ready and willing to perform her part of contract.

8. Respondents 1 to 4/Defendants 1 to 4 filed their common written statement and Respondent No.5/Defendant No.5 filed separate written statement. Respondents 1 to 4/Defendants 1 to 4 in their common written statement took the defence that they are the absolute owners of the plaint schedule properties. On a offer made by

defendants 1 to 4 for the sale of items 1 to 4 of the plaint schedule properties, the appellant/plaintiff agreed to purchase the same at the rate of Rs.29,000/- per acre and paid Rs.5.00 lakhs as advance to Defendants 2 to 4 and obtained Ex.A.1 agreement of sale agreeing to pay the balance sale consideration within three months therefrom. Later, D1 to D4 received Rs.3.00 lakhs on 10.09.2004 and D2 made an endorsement on the back of Ex.A.1 - agreement of sale. Denied the pleadings that Respondents 2 to 4/Defendants 2 to 4 agreed to facilitate the appellant/plaintiff to get finance from the bank before execution of registered sale deed and in that behalf to supply the original title deeds to facilitate her (appellant/plaintiff) to obtain loan and pay the same to respondents 1 to 4 towards balance consideration. Admits receipt of letter dated 17.11.2004—Ex.A.2 and letter dated 2.5.2005—Ex.A.3 requesting to send original title deeds as they require for the bank officials for grant of loan.

9. It is the specific plea of D1 to D4 that the appellant/plaintiff had no money to pay balance sale consideration, as such, the plaintiff failed to perform her part of contract. As plaintiff had no money and having offered to pay balance consideration, failed to perform her part of contract, therefore, she is not entitled to seek specific performance of agreement of sale, Ex.A.1.

10. They also admit receipt of Ex.A.4 legal notice which is with false and frivolous stories. The time stipulated under Ex.A.1 to pay balance sale consideration to D.1 to D.4 is three months. Time is

the essence of contract and the attitude of the appellant/plaintiff in calling upon D1 to D4 to facilitate her with original title deeds to obtain loan from the bank shows that the appellant/plaintiff had no money to perform her part of contract by paying balance sale consideration.

11. There is no privity of contract between the plaintiff & defendants 5 and 6 in respect of Items 5 and 6 of plaint schedule properties. Hence, the suit against Defendants 5 and 6 is not maintainable.

12. Further, the defence is that having gone through Ex.A.11 paper publication on 21.6.2005, they have issued reply notice dated 1.7.2005 vide Ex.A.12 to the advocate of the plaintiff. The contention of the plaintiff that non-performance of the contract is due to the non-cooperation of the respondents/defendants with a view to sell away the suit property at inflated rates to enrich themselves unlawfully in order to discard the terms of the agreement of sale deed, Ex.A1, dated 19.8.2004 is totally false. It is false to say that the plaintiff is always ready and willing to perform her part of contract. Lastly, the respondents/defendants contended that the appellant/plaintiff failed to perform her part of contract within the time stipulated. Therefore, respondents 1 to 4 issued notice dated 1.7.2005 under Ex.A.12 revoking the agreement of sale thereby forfeiting the advance amount.

13. The trial Court, having regard to the pleadings and contra pleadings, framed the following issues for settlement:

1. Whether the plaintiff is entitled for the specific performance of the agreement of sale dated 19.08.2004 from the defendants as prayed for?
2. Whether there is no cause of action for filing the suit?
3. To what relief, the plaintiff is entitled to?

During the trial, the appellant/plaintiff examined P.Ws.1 to 4 and got marked Exs.A.1 to A.22 and Exs.X.1 to X.3. On behalf of the respondents/defendants, D.W.1 was examined, however, no documents were marked on their behalf.

14. The plaintiff herself examined as P.W.1, besides examining the neighbouring landlord and also 2nd witness to the Ex.A1 – agreement of sale as P.W.2. Since the 1st witness of Ex.A1 is no more, his son V.Muralidhar is examined as P.W.3, besides examining Sri Abraham Issac Raj, the Chartered Accountant, as P.W.4 to prove Exs.A13 to A21 and Exs.X1 to X3. On behalf of the respondents-defendants, the 3rd defendant himself is examined as D.W.1, but no documents are marked. In the evidence, D.W.1 reiterated their plea in the written statement. In his evidence he deposed that he is the son of D1 and D2. D4 and D5 are his brother and sister respectively.

15. The trial Court, having marshalling the facts, appreciation of both oral and documentary evidence on record and after elaborate discussions, came to the conclusion that Ex.A1 –

agreement of sale was executed by D1 to D4. At the time of agreement of sale, P.W.1 was supplied with the xerox copies of the title deeds and they have received Rs.5,00,000/- as advance, which was mentioned in the agreement of sale itself. There is no doubt with regard to D1 to D6's title over the scheduled property. The plaintiff-P.W.1's seeking for production of original title deeds during course of evidence is not supported by pleading, but it is also contra to the earlier request that was made to the defendants for production of the original title deeds. On that aspect, the finding of the trial Court is that plaintiff failed to establish from the terms of Ex.A1 about defendants' agreeing to supply the original title deeds to enable the plaintiff to raise bank loan and to pay the balance consideration before obtaining registered sale deed.

16. With regard to the readiness, the finding of the trial Court that P.W.1 admitted during the cross-examination that she has not mentioned in Ex.A2 that she was having balance consideration ready, she further admitted that the balance consideration was not paid as per terms of Ex.A1 by 18.11.2004, she further admitted that she has not informed the defendants by getting ready balance consideration, fixing date and asking the defendants to appear to receive balance consideration and execute registered sale deed and also she was having ready cash by 18.11.2004. As per Ex.A19, she was having cash of Rs.16,142/- by 31.3.2004 and as per Ex.A15 she was having cash of Rs.60,160/- by 31.3.2004. She did not produce any document

showing that she has ready cash to pay the balance consideration. According to Exs.A15 and A19 the cash available to the credit of her account is only in thousands. As per P.W.1 she is wife and property holder, but P.W.4 deposed and shown the properties of both wife and husband in the statements and issued the certificate. The balance consideration should be paid by a particular date. As per Ex.A2 – office copy of letter dated 17.11.2004, Ex.A3 office copy of letter, dated 2.5.2005, Ex.A4 – notice dated 16.6.2005 and also pleadings in the plaint, the plaintiff was willing to obtain the registered sale deed, but she has not mentioned that she has got ready cash and on the other hand, she wants bank loan to be obtained to pay the balance consideration.

17. Besides that, the trial Court considered the fact that Ex.A1 was executed by D1 to D4 to which D5 and D6 are not parties. In Ex.A1 there is no reference that D1 to D4 are authorised to execute agreement on their behalf and they were abide by the same. Accordingly, there is no privity of contract between plaintiff & D5 and D6, therefore, plaintiff is not entitled to specific performance against D5 and D6. Ultimately, the trial Court finds that the plaintiff failed to prove that she was always ready and willing to perform her part of contract in terms of Ex.A1.

18. As per the evidence of D.W.1 and also evidence of P.W.1, the defendants did not give reply to Exs.A2 to A4. The reply under Ex.A12 is in response to Ex.A11 paper publication. The trial

Court, came to the conclusion that the defendants 1 to 4 executed Ex.A1 and received Rs.5,00,000/- as advance, subsequently, D2 received Rs.3,00,000/- under Ex.A22 towards part of consideration and in the absence of any penal clause in Ex.A1 – agreement that in case of plaintiff failed to pay the balance amount, the defendants are entitled to forfeit the advance amount, further, as the defendants failed to prove any loss due to failure of the plaintiff to perform her part of contract, the defendants are not entitled to forfeit the advance amount and more so, the plaintiff is entitled to refund of the said amount with the reasonable interest. Accordingly, while dismissing the suit for specific performance, ordered refund of Rs.8,00,000/- received as advance under Ex.A1 and A22 with interest at 12% from the date of receiving the consideration. Aggrieved by the same, the present appeal is filed by the plaintiff/appellant.

19. Now, the points that arise for determination are :

> (i) Whether the plaintiff was ready and willing to perform the contract and due to lapse on the part of defendants in non-supplying the original title deeds, the contract could not be performed?; and
>
> (ii) Whether the judgment and decree suffer from any legal infirmities warranting interference in the appeal?

The contention of the plaintiff is that she is always ready and willing to perform her part of contract, but as the defendants failed to produce original registered sale deeds, she could not obtain the sale deed within the stipulated period of three months.

Per contra, the respondents' contention is that the plaintiff/appellant never ready with the cash and willing to obtain regular sale deed. The defendants never refused to produce title deeds. The plea of the plaintiff that the defendants did not produce their title deeds, which caused the delay, is only for the sake of a plea. More so, there is no privity of contract between the plaintiff & D5 and D6. The defendants, having issued notice, cancelled the Ex.A1, agreement of sale.

20. In ***Silvey Vs. Arun Varghese*** ((2008) 11 SCC 45) the Apex Court held that the plaintiff intended buyers were always ready and willing to perform their part of contract. The High Court rightly noted that the case of plaintiff was that the defendants were not ready with the documents "as contemplated with the terms of agreement" which resulted in the delay. The plea of the defendants in the written statement about the plaintiffs having told them to have abandoned the agreement was abandoned in the evidence. After analysing the factual position, the High Court rightly came to the conclusion that the defendants were really not ready to perform their obligation in terms of the contract and had taken a false plea in the written statement.

21. *Per contra*, the respondents relied on a decision in the case of ***Saradamani Kandappan Vs. Rajalakshmi*** ((2011) 12 SCC 18) wherein their Lordships' held that if the vendors did not satisfy the purchaser in regard to the title, the amounts received would be

refunded and the consistent case of the plaintiff is that the defendants failed to satisfy about the title.

22. In the instant case, there is no dispute about the title of the suit schedule property items 1 to 6 with D1 to D6 and D1 to D4 agreed to sell items 1 to 6, a total extent of Acs.229.37 cents at the rate of Rs.29,000/- per acre and D1 to D4 executed and signed on Ex.A1 in the presence of P.W.2 and late Meeraiah, father of P.W.3, who are 2nd and 1st witnesses to the Ex.A1 agreement dated 19.8.2004 having received Rs.5,00,000/- as advance, which was mentioned in Ex.A1 itself. It is also evident from the corroborative evidence of P.W.2 and P.W.3 that later Meeraiah died on 2.3.2009, therefore, his son, who is well versed with the signature of his father, was examined and he identified the signature of his father Meeraiah on Ex.A1 – agreement of sale. The 3rd defendant, who is examined as D.W.1, also admitted the facts deposed by P.W.1 corroborated by P.W.2 that under Ex.A1, defendants 1 to 4 entered into Ex.A1 agreement of sale on 19.8.2004 at the rate of Rs.29,000/- per acre for the entire extent of Acs.229.37 cents and received Rs.5,00,000/- as advance on the same day and also on 10.9.2004 the 2nd defendant received Rs.3,00,000/-, which was endorsed on the reverse of the agreement of sale marked as Ex.A22. D.W.1 admits the Ex.A1 transaction, but his contention is that there is no privity of contract between D5 and D6 & plaintiff and more particularly, the plaintiff was not ready and willing to pay the balance

consideration and obtain regular sale deed before the stipulated time of three months i.e., on 18.11.2004.

23. In the contract relating to immovable property, time cannot be the essence of the contract. The intention to make time stipulation for payment of balance consideration will be considered to be essence of the contract, where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement. If for example, the vendors - respondents disclose in the Ex.A1 - agreement of sale, the reason for the sale and the reason for stipulating that time prescribed for payment to be the essence of the contract, that is, say, need to repay a particular loan before a particular date, or to meet an urgent time bound need, time stipulated for payment will be considered to be the essence. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract. Normally, in respect of immovable properties, time is not the essence of the contract. In the agreement under Ex.A1 the recital is "we have arranged today to sell the said property at the rate of Rs.29,000/- per acre and as you paid the advance Rs.5,00,000/- to us and on receiving the balance of amount from you within three months from today, we would effect the sale either in your favour or in favour of desired persons with your own expenses".

24. It is further contended that in Ex.A1 agreement, respondents/defendants have not expressed their intention or expressed any terms and circumstances necessitating the sale. Further, even in Ex.A1 the urgent need for the money within the stipulated time is not set out. A clear perusal of Ex.A1 - agreement of sale deed and the terms of it make it clear that payment of the sale price did not depend on execution of sale deed. Sale deed was not required to be executed within any specific period. Only thing is that the purchaser has to fulfil her obligation in regard to payment of price as provided in the agreement of sale and thereafter the vendors were required to perform their reciprocal promise of executing the sale deed. Whenever she paid the balance amount within three months from the date, the respondents/defendants can execute the sale deed either in her name or in the name of her nominees. The sale deed had to be executed only after payment of balance sale consideration within time of three months stipulated in Ex.A1.

25. As the evidence of P.W.1 corroborated with the evidence of D.W.1 and admissions therein and the contents of the Ex.A1 agreement show that the plaintiff has to pay the balance consideration within three months and the defendants have to execute the registered sale deed either in her name or in the name of her nominees. The plaintiff - P.W.1 did not issue any notice mentioning that she was ready with the cash, willing to pay and get the sale deed registered in

her name. As already discussed, three months period stipulated in Ex.A1 expires on 18.11.2004.

26. Admittedly, the plaintiff wrote Ex.A2 letter dated 17.11.2004 to the 2nd defendant i.e., one day before the expiry of third month stating with regard to the payment of balance amount. It is further stated that P.W.1 arranged to execute lease deed for 100 acres or total extent of land at the first instance and immediately after obtaining bank loan, P.W.1 should pay you the total amount within three months. Thereafter, when defendants for their official needs asked to pay Rs.3,00,000/-, P.W.1 paid the same under Ex.A22. The plaintiff has talked to the bankers and got sanctioned the loan and submitted xerox copies of the documents, as received from the defendants at the time of Ex.A1, to the advocate for legal opinion. They have asked for original documents to check with the xerox copies, so they have telephoned to defendants and they were told to come one evening to see the documents, then the plaintiff with advocate went to the house of defendants, but due to ill-health D2 could not talk to them. With a view to not to cause inconvenience to the 2nd defendant, the plaintiff has gone to his younger brother Kodanda Rami Reddy at Naidupet twice i.e., on 15.10.2004 and 31.10.2004 and reported that much money was spent towards the expenses of bank officers, advocates for legal opinion and asked them not to waste time. Later, issued Ex.A3 letter dated 2.5.2005 wherein also the plaintiff mentioned that they have requested the defendants to

show the original documents, but so far the defendants did not show them. Since the plaintiff could not submit documents for legal opinion, further proceedings were stalled and the plaintiff was ready to get the lease registration or sale registration as soon as receiving the documents from the defendants. When the defendants are ready, plaintiff bring bank lawyer and after verification she get the deed registered. Again on 16.6.2005, another letter – Ex.A4 was addressed by registered post with acknowledgment due narrating all the facts which are stated in the plaint reporting that items 1 to 6 belong to D1 to D6 respectively and the agreement - Ex.A1 is with regard to sale of Acs.229.37 cents for a total consideration of Rs.66,51,730/- @ Rs.29,000/- per acre and an amount of Rs.5,00,000/- was taken on the date of the agreement, while another sum of Rs.3,00,000/- was received by D2 under Ex.A22 endorsement on the reverse of the same and further stated in the said letter that D2 agreed to cooperate with the plaintiff to get bank finance and cooperate in this regard by producing original title deeds in respect of item Nos.1 to 6. So far, defendants are not cooperating with the plaintiff in producing the original title deeds and to perform their part of the contract and plaintiff is always ready and willing to perform her part of the contract in paying the balance consideration and to obtain the sale deed.

27. As stated above, P.W.1, during cross-examination, admitted that she has not mentioned in Ex.A2 that she was having

balance consideration ready, but mentioned that she was ready to obtain registered sale deed on showing the original documents.

28. As already discussed above, in Ex.A2 it was mentioned with regard to payment of the balance amount, the plaintiff has arranged to execute the lease deed for Ac.100.00 cents or total extent of land at the first instance and immediately after obtaining loan, she would pay the total amount within three months. In Exs.A2 to A4 there is no mention that she was ready with cash and also pay the same and obtain regular sale deed, which is very clear from her own admission that they have not paid the balance consideration by 18.11.2004 excluding the amount already paid. Under Ex.A2, no date was fixed informing the defendants to attend the Registrar Office to take the balance consideration and execute registered sale deed. Similarly, in Ex.A3 admittedly it was not mentioned that she was ready to pay the balance consideration and fixed the date requesting the defendants to come to the Registrar Office by a particular date to execute registered sale deed. In the cross-examination P.W.1 clearly further admitted that while executing Ex.A1, xerox copies of the original title deeds relating to the plaint schedule property were given to her. She has approached the bank advocate with xerox copies of the title deeds for legal opinion to avail loan after registration of the document, then the bank advocate requested to show the original documents. So, in clear terms, absolutely in Exs.A2 to A4, there is no specific mention that the plaintiff was ready with cash to obtain

registered sale deed. More so, from the notices and pleadings it is clear that she required the original title deeds of the property from the defendants to avail the loan, pay the consideration and obtain regular sale deed or lease deed in her favour.

29. More so, P.W.4 – Auditor deposed that P.W.1 is his client. He brought the provisional balance sheet of profit and loss account of the plaintiff and her husband up to 31.8.2004. He supplied Exs.A13 to 21 to the plaintiff and he brought the balance sheet of profit and loss account of the plaintiff and her husband for the period from 1.4.2004 to 31.8.2004, which are marked as Exs.X1 to X3 and his further evidence is that P.W.1 and her husband are doing business, whereas in the plaint P.W.1 has admitted that she is housewife and property holder. During cross-examination, P.W.4 admitted that she has not produced the bills, vouchers, bank statements, account books basing on which Ex.A13 to A21 were issued. There is well suggestion to P.W.4 that Exs.A13 to A21 were based on hypothetical figures and not based on any material substance. To substantiate the same, plaintiff has not produced bills, vouchers, bank statements, account books, basing on which Exs.A13 to A21 were issued.

30. A perusal of Exs.A13 to A21 goes to suggest that Ex.A13 is income tax return form No.2D standing in the name of P.W.1, according to which, her gross total income for the assessment year 2004-2005 was Rs.1,50,100/- and the tax payable was Rs.14,030/-. P.W.4 issued Ex.A14-certificate showing that the capital account

balance of P.W.1 as on 31.3.2004 was Rs.45,22,322/- and during the period of four months up to August, 2004 she has mobilized further amount of Rs.22,00,000/-. The said amount mentioned in Ex.A14 is reflected in Ex.A15 balance sheet as on 31.3.2004. The balance was only Rs.60,160/- as on 31.3.2004. Corresponding trading and profit and loss account for the year ended 31.3.2004 - Ex.A16 would show net profit of Rs.1,50,100/- as shown in Ex.A13 - income tax returns for the year 2004-2005. Ex.A17 is declaration showing plant & machinery, heavy vehicle, furniture, electricals, land & building, value of which as on 31.3.2004 is Rs.36,87,139.69 ps.

31. Ex.A18 is the certificate issued to C.H.S. Gopi, husband of P.W.1, according to which, capital account balance is Rs.3,84,91,322/- and the total receivables is Rs.8,30,25,945/-. Ex.A19 is the account of C.H.S. Gopi, husband of P.W.1, according to which, capital is Rs.2,68,03,431.90 (Vinay Heavy Equipment) and the capital as per the balance sheet as on 31.3.2004 is Rs.38,05,213.00 (Indian Oil Dealer). All these documents show capital investments, but not liquid cash. There is no evidence that the plaintiff had sufficient liquid cash in hand to obtain regular sale deed on or before the date of 18.11.2004. Basing on which, the trial Court came to the conclusion that the plaintiff was never ready with cash to pay the same and obtain regular sale deed at any time. Had she been in possession of the cash, she would have mentioned the same in Exs.A2 and A3 - letters and

A4- notice addressed to D2, which clearly established that the plaintiff was not ready with cash at any point of time.

32. In the case of ***J.P. Builders Vs. A.Ramadas Rao*** ((2011) 1 SCC 429) the Apex Court held that readiness and willingness has to be established through out the relevant point of time. In the said case during the six months period appellants made several attempts to reach a one time settlement with the bank, but could not succeed and the bank ultimately rejected their OTS offer and approached the Debts Recovery Tribunal for recovery of its dues. Three months thereafter the respondent by a notice required the appellants to liquidate the loans and retrieve the original documents from the bank in order to execute the sale deed. However, alleging default on the part of the respondent in paying the balance sale consideration, the appellants instead demanded a certain sum from the respondent as liquidated damages. In such circumstances, the Apex Court held that the plaintiff did keep the required money in his savings bank account for the purpose of meeting the demand of defendants, even otherwise, merely because the contract insist settlement of a loan of the bank and handover the title deeds to the plaintiff from the bank are not impossible events in the light of the performance made by the plaintiff, the contract in question did not come to an end on this ground and such contract is not a contingent contract and undoubtedly, the Court has jurisdiction to grant relief in terms of the contract.

33. In the instant case, as contended by the plaintiff/appellant, there is no such clause in Ex.A1 agreement or in the subsequent letters - Exs.A2 and A3 and notice-A4. The plaintiff never asserted that the defendants promised to return the title deeds at a later date enabling the plaintiff/appellant to obtain a loan. It is the clear case of the plaintiff that to obtain a loan, xerox copies which were supplied at the time of Ex.A1 were handed over to the advocate of the bank, which itself shows that the plaintiff was not ready. It is also an admitted fact that at no point of time bank balance of the plaintiff is sufficient to pay the balance consideration. More so, the bank balance as per Ex.A15 was Rs.60,160/- by 31.3.2004 and as per Ex.A19, bank balance was Rs.16,142/- by 31.3.2004, which clearly shows that the plaintiff was never ready with cash. More so, P.W.1 has categorically admitted that she failed to produce any document to show that she is having ready cash to pay the balance consideration and she also admits that as per Exs.A15 and A19, she was having cash only in thousands. The evidence of P.W.4 pertains to the properties of P.W.1 and her husband. According to P.W.4, as per Exs.A13 to A21, the plaintiff was doing business. As per Ex.A1 the plaintiff has to pay balance consideration within three months from the date of Ex.A1, but she failed to show ready cash within the above said period. The payment of balance consideration is condition precedent to obtain registered sale deed. It is a fact that original title deeds will be handed over to the purchaser only at the time of registration of the regular sale deed, which she also admits during the course of cross-examination.

34. The trial Court rightly held that the plaintiff failed to show that she was having ready cash with her to pay the balance consideration at any point of time. It is the plaintiff to prove that the plaintiff was always ready and willing to perform her part of contract right from the beginning of Ex.A1 till date of hearing of the suit. So, payment of balance consideration is to be paid by a particular date, the payment is essential part of contract and without fulfilling the same, the plaintiff is not entitled for specific performance of agreement of sale. The trial Court rightly held that she is not entitled for specific performance of the agreement. With regard to the privity of contract, admittedly even as per the evidence of P.W.1 and as deposed by D.W.1, defendants 5 and 6 are not parties to Ex.A1. Items 5 and 6 belong to D5 and D6. There is no recital in Ex.A1 that defendants 1 to 4 are executing Ex.A1 on their behalf as well as on behalf of D5 and D6. In the absence of any such reference in Ex.A1, the trial Court came to the conclusion that there is no privity of contract between the plaintiff & D5 and D6, therefore, Ex.A1 - agreement of sale is not binding on D5 and D6. The plaintiff twisted her version only in the evidence that she wanted to see original documents on account of suspicion that the defendants might have pledged the original documents to avail loan, which was not referred even in the plaint or letters in Exs.A2 and 3 and notice in Ex.A4. From time to time, the plaintiff has changed her version and failed to establish her readiness and willingness to pay balance consideration to obtain registered sale deed.

35. In the case of ***Killamsetty Eswari Vs. Pedada Tulasi Rao (died) per LRs*** (2017 (3) ALD 573 (DB)) it was held that willingness can be established through oral evidence. Readiness is a factor that should be established by something more than oral evidence, which is not proved by the plaintiff.

36. The further contention of the plaintiff is that the defendants did not issue reply to Exs.A2 and A3 letters and Ex.A4-notice.

37. In the case of ***Manepalli Udaya Bhaskara Rao Vs. Kanuboyina Dharmaraju*** (2004(1) ALD 269 (DB)) it was held that admission has to be spell out only from the positive acts on the part of the party, but cannot be culled out or cannot be based on any presumptions. Even failure to issue notice cannot be said to be an absence of demand, nor failure to reply would amount to an admission of the claim. D.W.1 in the evidence clearly stated that they have not issued any reply to Exs.A2 to A4. Only on seeing notification in the Eenadu they have issued Ex.A12 reply on 1.7.2005, wherein respondents clearly stated that in Ex.A1 - agreement the plaintiff has to pay the balance amount within three months in respect of item Nos.1 to 4 and D1 to D4 can execute the registered sale deed in favour of the plaintiff. In the 2nd page of the reply notice the defendants clearly stated that defendants 1 to 4 have prepared to sell out their properties in question to repay their debts in the Muthailpet Benefit Fund Limited vide reference No.EMI Loan on property : R 0870. Due

to the non-implementing of the terms and conditions of the agreement by the plaintiff, it caused huge loss to defendants for the default in repayment of their debts in time. The time is the essence of the contract. While cancelling the agreement of sale under Ex.A1, they forfeited Rs.8,00,000/- paid as advance, since the plaintiff failed to pay the amounts in full regarding the sale on or before 18.11.2004.

38. The trial Court considered all these facts that D1 to D4, having received Rs.5,00.000/- as advance, executed Ex.A1 - agreement of sale, thereafter, D2 received Rs.3,00,000/- under Ex.A22, in total defendants have received an amount of Rs.8,00,000/-. There is no clause in Ex.A1 that in case plaintiff failed to pay the balance consideration, defendants are entitled to forfeit the advance. Therefore, defendants are not entitled to forfeit the amount and they have to refund the same with interest. Accordingly ordered to pay Rs.8,00,000/- with interest at 12% from the date of receiving the said amounts.

39. In view of the elaborate discussions above and findings therein, we are of the considered view that the defendants 1 to 4, having received an advance of Rs.5,00,000/-, executed Ex.A1 agreement of sale in favour of the plaintiff and the plaintiff agreed to pay the balance consideration within three months and obtain regular sale deed. There is no clause in Ex.A1 for handing over of the original title deeds to the plaintiff. It is a fact that the plaintiff was not ready with the cash at any point of time and she has not issued any

notice fixing the date to the defendants to receive the balance consideration, to come to the Registrar Office and execute the registered sale deed. Any admission has to be spell out only from the positive acts on the part of the party, but cannot be culled out or cannot be based on any presumptions. Issuing of Exs.A2 and A3 - letters and ExA4 - notice to the defendants and defendants not responding to them would only at the most constitute demand, but not constitute an admission of the contents in Exs.A2 to A4. More so, after gone through Ex.A11 notification in Eenadu, they have given proper reply in Ex.A12. Accordingly, non-issuance of reply to Exs.A2 to A4 does not amount to an admission.

40. We are of the further opinion that it is the plaintiff to establish the readiness and willingness by adducing oral and documentary evidence. There is no lapse on the part of the respondents in executing the registered sale deed. From the very plea and evidence, the plaintiff wants the original documents to obtain loan from a bank and to obtain either a lease deed or a registered sale deed from the respondents. The documents in Exs.A13 to 21 and Exs.X1 to X3 do not show that at any point of time the plaintiff had sufficient cash to pay the balance consideration and obtain regular sale deed. Total sale consideration is Rs.66,51,730/-, but the plaintiff paid Rs.5,00,000/- on the date of Ex.A1 and Rs.3,00,000/- under Ex.A22. The balance sale consideration is Rs.58,51,730/-. As admitted by P.W.1 she did not file any document showing that by 18.11.2004 she

was having ready cash of the said balance consideration of Rs.58,51,730/-. As per Ex.A19, she was having cash of Rs.16,142/- by 31.3.2004 and as per Ex.A15 she was having cash of Rs.60,160/- by 31.3.2004. P.W.1 clearly admitted that she failed to produce any documents showing that she was having ready cash to pay the balance consideration. She further admitted that as per Exs.A15 and A19, she was having cash to the credit of her account in thousands, but not in lakhs. The capital investments and shares shown in the profit and loss accounts and the balance sheets were investments, but not liquid cash available to pay the balance consideration. P.W.4 failed to prove Exs.A13 to A21 by producing vouchers, balance sheets, bank statements, account books basing on which Ex.A13 to A21 were issued. It is a fact that payment of balance consideration is condition precedent for execution of registered sale deed, but the plaintiff failed to pay the balance consideration and obtain regular sale deed and more so, original title deeds will be handed over at the time of registration, but not earlier. At the time of agreement of sale, defendants handed over the xerox copies of the title deeds and there is no dispute that items 1 to 4 belong to D1 to D4, who executed Ex.A1. When there is no dispute with regard to title of D1 to D4 over items 1 to 4, the plaintiff ought to have paid the balance consideration or at least ought to have issued notice showing her readiness and cash in hand and fixing the date informing the defendants to attend the Registrar Office by a particular date to take the balance consideration and execute registered sale deed. More so, the plea of the plaintiff in the plaint as well as in the evidence that she wants to obtain loan from the bank by depositing the title deeds of the schedule properties that itself speaks volumes that she has no cash in hand to pay the balance consideration and obtain regular sale deed. Absolutely there is no material to establish that the plaintiff was ready and wiling through out. Balance sheets adduced show plaintiff's and her husbands' capital investments in business, but that is not liquid cash. Granting of specific performance is a discretion which should be exercised on sound and reasonable judicial principles. It is not necessary for the plaintiff to show jingling coins, but it is sufficient to show sufficient resources to pay the balance consideration, which the plaintiff failed by not showing the availability of sufficient funds, more so, as per Exs.A15 and A19 the cash available to the credit of her account is only in thousands, but not lakhs, so as to sufficient to pay the balance sale consideration. There is no suppression of material on the part of the defendants. It is the plaintiff who took different plea that in spite of requests, defendants failed to produce original title deeds, which they were contemplated to hand over at the time of registration, but not earlier. The plaintiff failed to establish readiness and willingness and the amount available by way of investments and capital are not liquid cash for readiness and willingness, more so, they are the assets of her husband in the name of her husband.

41. Accordingly, we are of the considered view that the findings of the trial Court and the dismissal of the suit ordering refund

of the advance paid with interest at 12% from the date of receiving the consideration, are legal and do not suffer from any legal infirmities warranting interference in the appeal.

42. In the result, the appeal fails and is dismissed with costs, while confirming the judgment and decree dated 30.5.2011 in O.S. No.38 of 2006 on the file of the I Additional District Judge, Nellore.

43. Consequently, miscellaneous petitions pending, if any, shall stand closed.

JUSTICE V.RAMASUBRAMANIAN

JUSTICE N.BALAYOGI

28.09.2018

Msnr/Skmr