

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

C.C.C.A.No.327 of 2006

JUDGMENT:

This appeal, under Section 96 of the Code of Civil Procedure, 1908 ('the Code' for brevity) by the unsuccessful plaintiff is directed against the decree and judgment, dated 31.07.2006, of the learned VIII Additional Senior Civil Judge (Judge, Fast Track Court), City Civil Court, Hyderabad, in OS.No.461 of 2003, whereby the suit seeking the reliefs of specific performance, cancellation of a sale deed and damages was dismissed.

2. I have heard the submissions of Sri V.L.N.G.K. Murthy, learned senior counsel representing Sri S. Ganesh, learned counsel for the appellant/ plaintiff; of Ms. K.N. Laxmi, learned counsel appearing for the 3rd respondent/ 3rd defendant; and of Sri K. Sarvabhouna Rao, learned counsel appearing for the respondents 1 & 2/ defendants 1 & 2. I have perused the material record.

3. The parties in this appeal shall hereinafter be referred to as the plaintiff and the defendants as arraigned in the Original Suit for convenience and clarity.

4. Since this is a first appeal and as this Court is the last Court of fact, it is necessary to refer to the pleadings of the parties.

5. The plaint averments, in brief, are as follows:

The defendants 1 & 2 are the owners of the premises bearing Municipal No.3-6-532/ 1 situate at Street No.7, Hardikarbagh, Himayatnagar, Hyderabad. The 3rd defendant and the Proprietor of the plaintiff concern were members of a voluntary organization called 'Junior Chamber (Jaycees)' and were close friends. The proprietor of the plaintiff, who is an architect, is taking up development projects. In view of the friendship, the 3rd defendant earlier

approached the plaintiff for professional advice for his friends. The plaintiff obliged and in that regard the 3rd defendant received some commission from the plaintiff. The 3rd defendant and the wife of the 2nd defendant are co-employees in the Office of Accountant General. Defendants 1 & 2 intended to develop their property. Wife of the 2nd defendant approached 3rd defendant for guidance and advice. In turn, 3rd defendant contacted the proprietor of the plaintiff for planning and development of the property of the defendants 1 & 2. Defendants 1 to 3 met the proprietor of the plaintiff and requested for development of the property of the defendants 1 & 2 and construction of an apartment complex. In view of the friendship between the proprietor of the plaintiff and the 3rd defendant and the trust and confidence which the proprietor of the plaintiff had in the 3rd defendant, the plaintiff accepted the offer made by the defendants for development of the property of defendants 1 & 2. A development agreement, dated 01.12.1995, was executed between the plaintiff and the defendants 1 & 2. In the said agreement, it was mentioned that the 3rd defendant would act as the agent of defendants 1 & 2 and would interact with the plaintiff for the smooth completion of the project and implementation of the terms and conditions of the development agreement. The 3rd defendant was alone representing the defendants 1 & 2 and actively assisted in the completion of the project. As per the development agreement, the plaintiff developed the property after obtaining permission, dated 31.08.1995, from the Municipal Corporation of Hyderabad. The plaintiff constructed stilt plus four floors in the above said premises of the defendants 1 & 2. As per the agreement originally entered into between the plaintiff and the defendants 1 & 2, the flats, G1 & G2, in the ground floor were to fall to the share of the defendants 1 & 2 and the remaining flats were to fall to the share of the plaintiff. However, as per an *inter se* arrangement between the said parties, Flat No. S2 on the second floor was made available towards the share of

the defendants 1 & 2 instead of Flat No.G2. Thus, Flat No.G1 and Flat No.S2 were handed over respectively to the defendants 1 & 2 on 15.12.1997 and 27.04.1997. The remaining flats, F1 & F2 on first floor, G2 on the ground floor and S1 on the second floor along with the pent houses, P1 & P2 constructed on the fourth floor have fallen to the share of the plaintiff alone. Though registered sale deeds were executed in respect of other flats, no sale deed was executed in respect of Flat No.P1 on 3rd floor of Rangaswamy Mansion of a plinth area of 1150 Square Feet along with undivided share of 10 Square Yards with one car parking space admeasuring 100 Square Feet in the property bearing Municipal No.3-6-532/1 situate at Street No.7, Hardikarbagh, Himayatnagar, Hyderabad, morefully described in the schedule and marked in red colour in the sketch appended to the plaint. Defendant no.3 pleaded with the proprietor of the plaintiff that he was residing in a house at Nagole Village, which is a suburb of Hyderabad, and that he was finding it difficult to commute to the city for attending his job and in providing schooling to his children and requested the proprietor of the plaintiff to permit him to occupy the plaint schedule pent house as a licensee. Out of friendship and sympathy, the proprietor of the plaintiff agreed for the said proposal of the 3rd defendant subject to the condition that the 3rd defendant shall vacate the property as and when desired by the plaintiff. Accordingly, the 3rd defendant occupied the suit schedule pent house. The defendants 1 & 2 and the plaintiff agreed that the sale deed shall be executed in favour of the plaintiff or its nominee in respect of the suit schedule pent house as and when desired by the plaintiff. The 3rd defendant abused the trust and confidence reposed upon him by the proprietor of the plaintiff. The 3rd defendant in collusion with defendants 1 & 2 got a registered sale deed, bearing document No.941 of 2000 dated 03.04.2000, in his name in respect of the suit schedule pent house. A reading of the said document shows that it is an independent transaction for due consideration.

The said fact was not within the knowledge of the plaintiff. The plaintiff came to know of the same when the proprietor of the plaintiff applied for and received the certified copy of the said registered sale deed on 14.03.2002. The plaintiff thought of obtaining a copy of the sale deed on being alarmed when the 3rd defendant gave evasive replies to the enquiries made in February, 2002, about his vacating the suit schedule pent house. Thus, defendants 1 to 3 played fraud on the plaintiff and completed the above sale transaction clandestinely with a view to not to abide by the terms of the development agreement, dated 01.12.1995. On coming to know of the same, the plaintiff tried to contact the defendants. But, the defendants gave evasive replies. Defendants 1 & 2 have no right to transfer the said schedule pent house in favour of the 3rd defendant. As per the development agreement, dated 01.12.1995, defendants 1 & 2 have no right, title and interest over any flats/pent houses other than Flat Nos.S2 and G1. So, they could not have conveyed valid title in law to the 3rd defendant in respect of the suit schedule pent house. The 3rd defendant has no right to continue in possession of the said pent house and is liable to vacate and deliver vacant possession of the same to the plaintiff and pay damages for illegal use and occupation of the same. The 3rd defendant had not paid any consideration to the defendants 1 & 2 under the sham and nominal transaction under the sale deed, which was executed by indulgence in fraud. On this ground also, the 3rd defendant did not get any title to the suit schedule pent house under the said sale deed. The plaintiff got issued a legal notice, dated 03.04.2002, calling upon the defendants to re-transfer the suit schedule pent house in favour of the plaintiff and deliver possession thereof within seven days of receipt of the said notice. The defendants have not chosen to issue any reply. The suit schedule pent house is a spacious residential flat in a prestigious locality of Hyderabad. It would have easily fetched a rent of more than Rs.6,000/- per month had it

been leased out on the date of the sale deed. Hence, plaintiff is entitled to recover Rs.6,000/- per month as damages for use and occupation from the said date, 03.04.2000, till the date of the filing of the suit and at such rate as may be determined by the Court from the date of the suit till date of delivery of possession. Hence, the suit is filed for specific performance of the development agreement, dated 01.12.1995, and to direct the defendants 1 & 2 along with the 3rd defendant to execute a registered sale deed in respect of the plaint schedule pent house in the name of the plaintiff or its nominee and deliver possession of the suit schedule pent house to the plaintiff and cancel the sale deed, dated 03.04.2000, as it is vitiated by fraud and for damages and costs.

6. The defendants 1 & 2 remained *ex parte*.

7. The defence of the 3rd defendant, in brief, is as follows:

The material allegations in the plaint are false. Hence, the same are specifically denied. The suit which is not maintainable is liable to be dismissed *in limine*. G. Ramana is the proprietor of the plaintiff is denied for lack of knowledge. The plaintiff suppressed the fact that the defendants 1 & 2 are residents of Tanzania of South Africa; and, to obtain an *ex parte* decree, the plaintiff had sent summons to their local addresses knowing fully well their correct addresses. The ownership of the defendants 1 & 2 of the premises is not disputed. Proprietor of the plaintiff and this defendant are close friends and were members of Jaycees organization is true. The averment that this defendant earlier approached the proprietor of the plaintiff for professional advice for his friends and received commission in that regard is denied. Wife of the 2nd defendant and defendant no.3 were co-employees in the office of Accountant General is true. The defendants 1 & 2 intended to develop their

property is true. As this defendant knows the proprietor of the plaintiff, he intervened and assisted the defendants 1 & 2 and the plaintiff in entering into the development agreement. As this defendant knows both parties, he only assisted in smooth completion of the venture. The averment that this defendant alone represented on behalf of defendants 1 & 2 is incorrect. The averment that the plaintiff constructed stilt plus four floors is emphatically denied. In fact, permission was obtained for only stilt plus three floors and, later on, the fourth floor was constructed unauthorisedly and later the said construction was regularized. The averments in the plaint that remaining flats, F1 & F2, G2 & S1 along with two pent houses, P1 & P2, had fallen to the share of the plaintiff alone and that though sale deeds were executed in respect of other flats, no sale deed was executed in respect of the suit schedule pent house are false. The allegations that as this defendant was a friend of the proprietor of the plaintiff, he pleaded with the proprietor of the plaintiff as alleged in the plaint and that he permitted this defendant to occupy the plaint schedule pent house as a licensee for the said reasons and subject to the condition alleged in the plaint are all false and concocted. Pent house, P2, has fallen to the share of the builder/ plaintiff as per *inter se* arrangement between the owners, defendants 1 & 2, and the builder, the plaintiff, and a sale deed was registered by the 1st defendant, on 15.09.2001, in respect of the said pent house, P2. In-fact, sale agreements in favour of this defendant in respect of suit schedule pent house and in respect of pent house, P2, in favour of Mohammad Abbas were executed on the same day, that is, 27.07.1998 by the owner of the premises in the presence of the proprietor of the plaintiff. Since the date of the said agreement, this defendant has been in peaceful possession of the suit schedule pent house and he leased out the same till May, 2000. The contrary allegations and the further allegations that appropriate sale deed shall be executed in favour of plaintiff or its nominee in respect of the suit schedule

pent house are false and denied. All the allegations in the plaint about the sale deed in respect of the suit schedule pent house executed in favour of this defendant and that this defendant abused the trust and confidence reposed upon him by the proprietor of the plaintiff and that this defendant colluded with the other defendants and the defendants played fraud and that a trick was played by the 1st defendant and a document was executed in favour of this defendant in respect of the plaint schedule pent house and that the plaintiff had no knowledge of the same till he obtained a certified copy after the alleged evasive replies given by the 3rd defendant when an alleged enquiry was made as to when the 3rd defendant would vacate the same are all false. The further allegations in the plaint that the plaintiff tried to contact the defendants and that they gave evasive replies and that the defendants 1 & 2 have no right to transfer the suit schedule pent house in favour of this defendant as per the development agreement and that no consideration has passed under the sale deed and that this defendant has no right to continue in possession of the suit schedule pent house and that it would have fetched the alleged rent if it were leased out on the date of the sale deed and that this defendant is liable to pay damages for use and occupation and that this defendant, along with defendants 1 & 2, shall jointly execute a sale deed in favour of the plaintiff and that this defendant's sale deed is liable for cancellation being vitiated by fraud are all false. The permission for construction of the complex was obtained even prior to the entering into of the development agreement. The said permission was obtained by the owners, defendants 1 & 2. The permission was granted for construction of stilt plus three floors. Owners retained for themselves few flats and the remaining flats were to go to the builder. The annexure to the development agreement makes it clear that the terrace rights have to be enjoyed by both parties. The builder thereafter constructed two pent houses on the terrace. It was specifically

agreed to that one pent house shall go to the builder and the other to the owners. It is incorrect to say that both pent houses shall belong to the builder. The owners by sale deed, dated 03.04.2000, sold suit schedule pent house to this defendant for valuable consideration. The plaintiff suppressed the fact that sale agreements in respect of both the pent houses were executed by the owners, on 27.07.1998, in the presence of proprietor of the plaintiff and that in respect of the suit schedule pent house, sale consideration was received by the 1st defendant and that sale consideration was received by plaintiff in respect of the other pent house, P2, as per their inter se agreement and as per clause 15 of the annexure. The plaintiff is fully aware of the sale of the suit schedule pent house in favour of this defendant. Later, this defendant purchased the suit schedule pent house and subsequently applied for regularization of the unauthorized constructions and paid Rs.10,000/- as penal amount and obtained regularization for suit schedule pent house. The proprietor of the plaintiff even attended this defendant's *gruhapravesam* function of the suit schedule pent house. All sale deeds in respect of the flats and the other pent house, which have fallen to the share of the plaintiff, were executed by the owners and the builder fully received sale consideration in respect of his share of flats and pent house, P1. The plaintiff is not entitled to the reliefs claimed in the plaint. The suit is liable to be dismissed.

8. Taking into consideration the above pleadings, the trial Court framed the following issues:

1. Whether the suit flat is sold to defendant no.3 by defendant no.1 fall to the share of the plaintiff in the agreement between the plaintiff and defendant no.1 and 2?
2. Whether the defendant no.1 fraudulently sold the suit flat to defendant no.3?
3. Whether the plaintiff is entitled for the cancellation of the sale deed executed in favour of the defendant no.3 by defendant no.1?

4. Whether the plaintiff is entitled for specific performance by defendant no.1 and 2 to execute registered sale deed in his favour with regard to the suit flat?
5. Whether the plaintiff is entitled for damages at the rate of Rs.6,000/- per month from defendant no.3 for the period of occupation of the suit flat by him?
6. To what relief?

9. At trial, the proprietor of the plaintiff and the 3rd defendant were examined as PW1 & DW1 and exhibits A1 to A7 & B1 to B4 and B5 were marked.

10. As noted, on merits and by the judgment impugned in this appeal, the trial Court dismissed the suit without costs. Hence, the plaintiff is before this Court.

11. Learned senior counsel contended as follows:

The trial Court ought to have seen that the suit schedule pent house and the other pent house have both fallen to the share of the builder/ the plaintiff and the suit schedule pent house has not fallen to the share of the 1st defendant. The trial Court erred in holding to the contra. The trial Court was in error in holding that the sale transaction in favour of the 3rd defendant in respect of the suit schedule pent house is not fraudulent and that the plaintiff is not entitled to seek the reliefs of specific performance, cancellation of the sale deed and damages. The trial Court did not properly consider and appreciate clauses 4, 6 & 7 and other clauses in the development agreement and its annexure. The trial Court ought to have seen that there is no dispute about the execution of exhibit A1, development agreement, and the binding nature of its terms and conditions and failed to note that as per clause 6, the defendants 1 & 2 specifically confirmed that they do not have any other claims in respect of any other area constructed by the plaintiff and that the defendants further confirmed that it is the prerogative of the plaintiff to increase or reduce the quantum of total built in area as it deems fit and

convenient. In the circumstances, the trial Court ought not to have come to the conclusion that the pent houses, P1 & P2, are to be shared equally at the ratio of 50:50 between the plaintiff and the defendants 1 & 2. The finding that the suit schedule pent house shall belong to the owners and the other pent house shall belong to the builder recorded on the basis that there is a mention in the agreement that the terrace shall be shared equally between the plaintiff and the 1st defendant is perverse and erroneous as the terrace exists above the pent houses even otherwise. Since the 3rd defendant occupied the suit schedule pent house admittedly even before the sale deed, exhibit A3, in his favour, the trial Court ought to have seen that his possession of the suit schedule pent house is admittedly permissive possession all along since 1997 itself. The trial Court ought to have seen that the 3rd defendant and the proprietor of the plaintiff are friends and were on friendly terms and, therefore, the contention that the plaintiff permitted the 3rd defendant to occupy the suit schedule pent house with the condition to vacate as and when desired by the plaintiff is probable. The trial Court ought to have seen that the 3rd defendant failed to establish that the sale deed in his favour is supported by consideration and that he failed to show the source from which he paid consideration under his sale deed. The trial Court ought to have seen that the 3rd defendant is not a *bona fide* purchaser of the suit schedule pent house and that the first defendant had no right, title and interest over the same to alienate the same to the 3rd defendant and that, therefore, no valid title in respect of the same was conveyed to the 3rd defendant under the said sale deed and that the said sale deed is vitiated by fraud. The trial Court ignored the basic admissions in the cross examination of DW1 and failed to take note of the true purport of the terms and conditions of exhibit A1 and further failed to appreciate the agreement between the parties and arrived at incorrect findings

on all the issues. The trial Court ought to have seen that the defendants 1 & 2 have remained *ex parte* and did not support the 3rd defendant.

12. Learned counsel for the defendants 1 to 3, supported the decree and judgment of the trial Court. Learned counsel for the 3rd defendant further contended as follows:

The owners obtained building permission for construction of stilt plus three floors. Thereafter, the development agreement was entered into between the plaintiff and the defendants 1 & 2 for construction of the complex as per the approved plan. The 3rd defendant is a well wisher and friend of the proprietor of the plaintiff as well as the defendants 1 & 2 and he witnessed and participated in every transaction (oral and written) between the parties. He is also aware of the sharing of the constructed property and also the sharing of the subsequent construction of the 4th floor consisting of pent houses 1 & 2 and the further fact that one pent house fell to the share of the plaintiff and the suit schedule pent house fell to the share of the defendants 1 & 2. The 3rd defendant purchased the same for a consideration of Rs.3,00,000/- in the year 1997 and occupied it in the year 1997 after entering into a sale agreement with the 1st defendant. The 3rd defendant also performed grihapravesam, on 08.10.1997, and the name of the proprietor of the plaintiff was also printed at the bottom of the invitation card by mentioning 'best wishes from Jayasimha and Ramana Gudipati'. The proprietor of the plaintiff also attended the said function, on 08.10.1997. Making of further constructions beyond the approved plan was not under contemplation when the development agreement was entered into. The construction was to be made as far as possible according to exigencies and requirements of the parties. Therefore, for construction of further floors, consent of the owners and an agreement between both parties in that regard is mandatory. 1st defendant and the plaintiff subsequently

constructed, over the 3rd floor, the 4th floor consisting of two pent houses and have taken one pent house each. The pent house, P2, went to the plaintiff and the suit schedule pent house which fell to the share of the owners was sold to the 3rd defendant. As per clause 4, the developer is entitled to alter, change, increase or decrease the quantum of the built up area as per annexure only. But, the developer is not entitled to go for more number of floors. And, construction must be made according to building permit. The said clause (4) does not mean that the plaintiff is entitled to go for construction of any number of floors. And, it only meant that the plaintiff is entitled to modify the flat structures within the parameters of building permit. 1st defendant got 200 Square feet of the built up area apart from his share and an amount of Rs.2.50 lakhs apart from three flats out of six flats in stilt plus three floors which comes to 55% of the built up area. The same went to the share of the 1st defendant/ owner. The rest of the building constructed as per MCH plan only shall be the share of the plaintiff. However, the plaintiff cannot go for further floors beyond sanctioned plan and sell the same without consent of the defendants 1 & 2. As per clause 15, terrace rights shall be enjoyed proportionately by both parties. The pent houses were constructed subsequently on the terrace of the third floor as the Government announced permissions for fourth floor under a GO. Plaintiff has not even produced the purchaser of his pent house as a witness to corroborate his self serving version. There is no written agreement for construction of the pent houses in the fourth floor. The regularization order, exhibit B3, in respect of suit schedule pent house is in the name of the 3rd defendant. The plaintiff suppressed the said fact with a fraudulent motive and deposed falsely and contrary to the record. The plaintiff admits that regularization was done for the entire building and not for pent houses, P1 & P2, and that he applied for regularization in or about the year 1997 and obtained orders in the year 2000 for the entire building

including fourth floor. If really the said pent house belonged to the plaintiff, the plaintiff ought to have made a regularization application for the same in his name but not in the name of the 3rd defendant. No explanation is forthcoming as to why the regularization order in respect of the suit schedule pent house was obtained in the name of the 3rd defendant. The plaintiff also knows that the 3rd defendant purchased the suit schedule pent house from the 1st defendant in the year 1997 and occupied the same and later obtained a sale deed after regularization orders. Therefore, the allegations with regard to permissive possession and liability to pay damages for use and occupation are false. All the sale deeds including that of the 3rd defendant were executed by the owners. The plaintiff failed to prove that the suit schedule pent house fell to its share and the alleged collusion between the defendants and fraud. The trial Court appreciated the facts correctly and the evidence (oral and documentary) in proper perspective and arrived at correct findings. The well considered and well reasoned findings of the trial Court are sustainable under facts and in law. The appeal, which is devoid of merit, is liable to be dismissed.

13. I have given earnest consideration to the facts and submissions. I have carefully gone through the pleadings and evidence.

14. Now the points that fall for determination are-

1. In the facts and circumstances, whether the plaintiff is entitled to the reliefs viz., (i) cancellation of the sale deed, dated 03.04.2000, in respect of the suit schedule pent house executed by the 1st defendant in favour of the 3rd defendant; (ii) specific performance directing the defendants 1 to 3 to execute a sale deed in respect of the suit schedule pent house in favour of the plaintiff; and, (iii) damages for use and occupation of the suit schedule pent house @ Rs.6,000/- per month from 03.04.2000 till the date of the filing of the suit and at such rate as may be determined by the Court from the date of the suit till date of delivery of possession of the same by the defendants to the plaintiff?

2. Whether the decree and judgment of the trial Court are unsustainable in the light of the contentions of the plaintiff?
3. To what relief?

15. POINT No.1:

15.1 To begin with, the admitted facts may be stated as follows: - 'The plaintiff is a developer and its proprietor is an architect. The defendants 1 & 2 are the owners of the premises over which they intended to construct an apartment complex. The 3rd defendant is known to them as the wife of the 2nd defendant is his co-employee. The 3rd defendant is a friend of the proprietor of the plaintiff. The defendants 1 & 2 approached the 3rd defendant and expressed their above intention. The 3rd defendant who is known to the said defendants and the proprietor of the plaintiff intervened and contacted the proprietor of the plaintiff and eventually the development agreement, dated 01.12.1995, exhibit A1, was executed between the defendants 1 & 2 and the plaintiff. Even before this agreement was entered into, the defendants 1 & 2/ owners obtained the building permit, dated 04.09.1995, under the original of exhibit B5 for construction of stilt plus three floors.'

15.2 It is apt to note that as per the terms of exhibit A1, development agreement, the party of the first part/ owners having already obtained the building permit for construction of stilt plus three floors and not being in a position to provide necessary funds and not being able to carry on the construction over their premises requested the party of the second part/ developer to develop and construct the building as far as possible as per sanctioned plan on sharing basis in consideration of construction of the super structure by the party of the second part. Further, the construction of the building shall be made as far as possible according to the exigencies and requirement of the parties and the Party of the Second Part/ developer shall

arrange funds on its own in the manner as it deems fit and proper and the construction shall be completed with all amenities within eighteen months from the day of obtaining sanctioned plan and permit.

15.3 In this backdrop, it is also further admitted that instead of constructing the building as per sanctioned building permit, two pent houses were also constructed in the 4th floor (i.e., over the terrace of the 3rd floor). There is no dispute with the sharing of the flats constructed and the area insofar as the building up to the 3rd floor. In-fact, the owners were allotted their respective flats as per altered arrangement and the owners executed sale deeds in respect of the flats that fell to the share of the builder/ plaintiff upto the third floor. The only dispute is with regard to the two pent houses constructed in the 4th floor. Nevertheless, there is no dispute even with regard to the pent house, P2, as the defendants 1 & 2 remained *ex parte*, and the 3rd defendant is admitting that the same fell to the share of the plaintiff as per inter se arrangement between the defendants 1 & 2 and the plaintiff. However, the builder/ plaintiff claims that he is entitled to both the pent houses and that the defendants 1 & 2 have no right, title and interest over the pent houses as per the exhibit A1, development agreement. The owners obviously claimed that the other pent house, that is, the suit schedule pent house fell to their share and eventually the 1st defendant sold it to the 3rd defendant under a registered sale deed, dated 03.04.2000. The copy of the said sale deed is exhibit A3. Therefore, the dispute now is confined to suit schedule pent house. Therefore, the crux of the *lis* is with regard to the core question as to whether the plaintiff is entitled to claim the relief of specific performance in respect of the suit schedule pent house.

15.4 It is to be noted that a sale deed was executed by the owners in favour of the nominee of the plaintiff in respect of the other pent house, P2, as

desired by the plaintiff. Further, the 1st defendant executed a registered sale deed in favour of the 3rd defendant in respect of the suit schedule pent house, which is in dispute. The defendants 1 & 2 remained *ex parte*. However, the defendants 1 & 2 having put in appearance in this appeal quietly supported the case of the 3rd defendant. The 3rd defendant contends that as he knew both the defendants 1 & 2 and the proprietor of the plaintiff, he intervened and assisted the defendants 1 & 2 and the plaintiff in entering into the development agreement and in smooth completion of the venture. Though in one of the clauses of exhibit A1, it is specifically stated that the Party of the First Part appointed the 3rd defendant as their GPA to enable him to implement the terms and conditions of the development agreement as well as to sell, convey and transfer the built in area including parking and proportionate share in the land after development after due consultation with Party of the Second Part; yet, no such power of attorney, if any, appointing the 3rd defendant as the agent of the defendants 1 & 2 is filed into Court by any of the parties. Further, the fact that the 3rd defendant has not executed any sale deeds as an agent of the defendants 1 & 2 and that the owners alone executed the sale deeds in respect of the flats in the apartment complex that were sold is admitted. Nevertheless, the 3rd defendant is not disputing that he is having full knowledge of the whole matter between the defendants 1 & 2 on one hand and the plaintiff on the other, that is, with regard to the parties entering into the development agreement and construction of the apartment complex including the pent houses in the fourth floor. It is the specific case of the plaintiff that the 3rd defendant acted as an agent of the defendants 1 & 2 and interacted throughout with the plaintiff and that he alone represented on behalf of the defendants 1 & 2 during the progress of the project and actively assisted for the smooth completion of the project. Nonetheless, the 3rd defendant also contends that there was an arrangement between the two parties (the owners

and the builder) that, out of the two pent houses that were later constructed by the builder, one shall be allotted to the owners and the other to the builder. He further contends that two agreements were simultaneously executed in the presence of the plaintiff in respect of the two pent houses and that one such agreement was executed in favour of one Mohammad Abbas, the nominee of the plaintiff, in respect of pent house, P2, and the other in respect of the suit schedule pent house in favour of the 3rd defendant and that at that time the plaintiff received consideration in respect of pent house, P2, and thus the plaintiff is having knowledge of the claim of the owners in respect of the suit schedule pent house and that the plaintiff is also having knowledge that the 3rd defendant later obtained registered sale deed under the original of exhibit A3 and that the defendant thus purchased the said pent house for valuable consideration. However, according to the plaintiff, there was no further agreement either written or oral between the owners and the builder/plaintiff in regard to the said pent houses constructed in the fourth floor. Hence, the basis for the claim of the plaintiff to both the pent houses on the fourth floor including the suit schedule pent house is exhibit A1, the development agreement.

15.5 It is necessary to now refer to the relevant clauses in the said exhibit A1 agreement which were relied upon by both sides.

The said clauses verbatim read as under:

4. The specifications for construction of the building are described in the annexure enclosed hereto. However it shall be the absolute descretion of the Party of the Second Part to change or alter, increase or reduce the quantum of the total built in area as the Party of the Second part deem fit and proper and convenient.
6. The Party of the Second Part shall give to the Party of the First Part one Three Bed Room flat and one Two Bed Room Flat measuring 1150 sq.feet each in the floor above the parking i.e., Ground Floor (Flat Nos.G1 and G2) and 200

sq.feet built up area in the parking place, and shall pay Rs.3,700/- per month till the above area is handed over, and Rs.1.5 lakhs after the construction is over.

7. The Party of the First Part has no right or claim apart from the above said area. The Party of the Second Part has liberty and right to construct and sell the rest of the Building to suit its own need and convenience.

8. That the Party of the First Part and Second Part shall execute the sale deed or deeds either in whole or in portions jointly in favour of the prospective purchaser or purchasers of flats including the undivided share of land in respect of rest of the built in area inclusive of parking.

9. The Party of the First Part for the purpose of convenience smooth construction, development, sale of built in area, including proportionate share in the land in favour of the prospective purchaser or purchasers, and smooth completion of the venture, has appointed Sri P.V.N. Srinivasa Rao, S/o.Sri P.V. Chalapathi R/o 4-50, Satsang Kutir, New Nagole, Hyderabad, as their G.P.A to enable him to implement the terms and conditions of the development agreement and as well as to sell convey and transfer the built in area including parking and proportionate share in the land after development, after due consultation with Party of the Second part.

Further, there is an annexure to the said exhibit A1-agreement and the term 15 of the said annexure reads as under: - 'The terrace shall be proportionately enjoyed by both the parties.'

15.6 I have carefully gone through the entire development agreement as harmonious construction of all clauses with the terms in the annexure is necessary.

15.7 The building approved plan/permit under the original of exhibit B5 for construction of stilt plus three floors, that is, for the complex intended to be constructed was got approved by the defendants 1 & 2, on 04.09.1995, that is even before exhibit A1 was entered into with the plaintiff. And, exhibit A1, development agreement, was entered into between the defendants 1 & 2 and the plaintiff, on 01.12.1995. The parties to exhibit A1 are thus aware that the construction to be made was an apartment complex of stilt + three floors.

Therefore, it is *ex facie* clear that at the inception there is no explicit agreement as regards the further floors, if any, beyond the third floor and in deviation of the sanctioned plan. Therefore, the construction of two pent houses on the fourth floor was not at all under contemplation by the date of exhibit A1. In-fact and as already noted, the Party of the Second Part/developer was required to develop and construct the building as far as possible as per sanctioned plan on sharing basis in consideration of construction of the super structure by the party of the second part. This clause deals with “sharing basis” in consideration of construction of super structure, which was to be made as far as possible as per building sanctioned plan. Further, the construction of the building shall be made as far as possible according to the exigencies and requirement of the parties. In this term of exhibit A1, the emphasis is on the ‘requirement of parties’ and not one party. The flats were agreed to be constructed as per the approved building plan and as per the specifications in the annexure to exhibit A1 and such to be constructed flats and the area were agreed to be shared under exhibit A1. Therefore, the sharing was confined to the construction to be made as per the building permit. Hence, at that time of reducing the agreed terms into writing in the form of exhibit A1, the question of sharing any constructions in the further floors did not arise as any further construction beyond third floor in deviation of the approved plan was not under contemplation by that time. However, the two pent houses were constructed in the fourth floor though the building permit was given for stilt plus three floors. Any contention that this construction could be made without the consent of the owners and for the exclusive benefit of the builder does not deserve acceptance unless a strong unimpeachable case is made out by the plaintiff. In support of the contention that the plaintiff is exclusively entitled to the suit schedule pent house also along with the other pent house, the plaintiff mainly relies only upon clauses 4 & 7 of exhibit A1

wherein it is stated that the plaintiff is entitled and is having absolute discretion to change or alter, increase or reduce the quantum of total built in area as it deemed fit, proper & convenient and that the party of the first part (owners) have no right or claim to any part in respect of any area except that was agreed to be given under exhibit A1 and that the plaintiff is at liberty and has a right to construct and sell the rest of the building to suit its own need and convenience. The 3rd defendant contends that the clauses shall be interpreted keeping in view the construction that was in contemplation at the time of exhibit A1 as the plaintiff has no right to make construction of any number of floors and claim the said floors to the detriment of the owners. A plain reading of all the clauses, keeping in view the building permit and the construction that was in contemplation at the time of execution of exhibit A1, makes it manifest that the liberty and discretion conferred to change or alter, increase or reduce the total built in area and the liberty and right to construct and sell the rest of the building to suit plaintiff's own need and convenience and that the first party has no right or claim any construction apart from the agreed area under exhibit A1 shall be with reference to only the stilt plus three floors, which were under contemplation at the time of exhibit A1; but, these clauses cannot be given a wide interpretation to cover the pent houses constructed in the fourth floor which construction is a later development and which was not under contemplation at the time of exhibit A1. In-fact, it appears from the facts and circumstances of the case that there was no agreement in writing with regard to additional constructions in additional floors, that is, constructions, if any, in floors beyond third floor. It is also trite to note that from the facts and circumstances of the case it emerges that there is no *consensus ad idem* with regard to the sharing of the two pent houses in the fourth floor as there was no permission obtained for construction of the same and as there was also no specific reference to the said constructions in

exhibit A1 and as the parties to exhibit A1, particularly the owners/ defendants 1 & 2, obviously proceeded on the belief and understanding that only stilt and three floors would be constructed as per the building permit. In the absence of *consensus ad idem*, it is well settled that no contract emerges. It is undisputed that but for the development agreement, the plaintiff will not get any right, title and interest in respect of any part of the apartment complex that was constructed pursuant to the development agreement. As rightly contended, the defendants 1 & 2 are the owners of the property over which the complex was constructed by the plaintiff. According to the plaintiff, as per exhibit A1 agreement only, the plaintiff got rights over the flats/ share allotted to him in consideration of the construction to be made by him. In the said agreement, there was no whisper about the pent houses obviously for the reason that any construction of the pent houses in the fourth floor was not under contemplation by then. Therefore, no right to seek specific performance accrues to the plaintiff over the pent houses in the absence of an agreement. In fact in the present context it can aptly be noted that under law the plaintiff had not got any absolute right, title and interest in the flats (immovable property) allotted to his share under exhibit A1 as in the absence of a registered deed of conveyance in favour of the plaintiff no such right, title and interest accrues to the plaintiff even over the Flats allotted to the plaintiff under exhibit A1 development agreement. That is the reason why the sale deeds in respect of the flats that fell to the share of the plaintiff were also executed by the owners and not the plaintiff. According to the plaintiff's case there is no written or oral agreement subsequent to exhibit A1 and hence, the plaintiff relies upon the exhibit A1 only in this suit for specific performance in respect of the suit schedule pent house and other reliefs. This Court already held that the clauses in exhibit A1 cannot be interpreted to cover constructions later made in the fourth floor, i.e., the pent houses, as the interpretation of

the clauses in exhibit A1 shall be confined to the construction that was agreed to be made and the construction that was under contemplation under exhibit A1 as per the approved building plan/ permit. This Court also held that there was no *consensus ad idem* and that no contract emerged in respect of the pent houses. In that view of the matter also the plaintiff has no legal right to seek specific performance in respect of the suit schedule pent house and the other pent house, P2. However, the owners fairly and by an equitable gesture allotted one pent house, P2, to the plaintiff while keeping the other one (suit schedule pent house) for them as obviously the plaintiff incurred the cost of construction. For the said pent house, P2, allotted to the plaintiff, the owners already executed a registered sale deed in favour of the plaintiff's nominee and the plaintiff received consideration in respect of the said pent house is admitted. In so far as the suit schedule pent house, which was retained towards the share of the defendants 1 & 2, the 1st defendant executed a registered sale deed in favour of the 3rd defendant. Therefore, it follows that the claims of the plaintiff in respect of the suit schedule pent house are without any factual or legal basis and hence, the same cannot be countenanced under facts and in law. The contentions that are advanced by the plaintiff and the 3rd defendants apart, a plain and harmonious consideration of all the clauses in exhibit A1 along with the evidence, particularly documentary evidence adverted to supra, would clearly and unambiguously demonstrate that claims of the plaintiff in respect of the suit schedule pent house are untenable and that the plaintiff is not entitled to the equitable relief of specific performance, in the facts and circumstances of the case. Having regard to the facts and circumstances of the case, this Court finds that the even handed course adopted by the owners in the matter of sharing equally the two pent houses in the fourth floor between the owners and the plaintiff/builder deserves approval of a Court of equity, the said course being not only just,

equitable and fair but also as it gels well with righteous as well as morally right action as per the law of equity. Hence, for all the reasons assigned, this Court finds that the plaintiff cannot claim the relief of specific performance in respect of the suit schedule pent house.

15.8 The plaintiff also relies upon clause 15 in the annexure which says 'the terrace area shall be proportionately enjoyed by both parties' and contends that even otherwise the terrace exists above the pent houses. This contention that a terrace exists over the pent houses constructed in the fourth floor and that this clause is relatable to the said terrace cannot be countenanced for the same reason that a construction up to 3rd floor was only under contemplation at the inception and as the said clause is referable to the terrace on the 3rd floor. In the considered view of this Court, in the light of the findings in the preceding paragraphs, this clause is of no avail to the plaintiff, more particularly in isolation. Further, according to the defence, the defendants 1 & 2 are entitled to 55% share in the built in area. Be that as it may, the terrace shall be proportionately enjoyed is undisputed. Admittedly, the builder is only entitled to enjoy a proportionate share in the terraced area but not the whole of the terraced area. The said clause in-fact is more favourable to the defence, as the builder cannot make any constructions on the proportionately enjoyable terraced area of the third floor without the consent of the owners. Hence, the builder who is required to make construction, viz., stilt plus three floors, as per building permit is not entitled to proceed to make construction of additional flats/ pent houses on the 3rd floor and make exclusive claims in respect of such constructions as the rights related to terrace did not exclusively belong to the builder.

15.9 Admittedly, the 3rd defendant was in possession of the suit schedule pent house even before a sale deed was executed by the 1st defendant in his favour

in respect of the same. To explain away the said prior possession of the 3rd defendant over the same, the plaintiff relies upon an arrangement and contends that the proprietor of the plaintiff out of friendship and on a request made by the 3rd defendant permitted the 3rd defendant to occupy the suit schedule pent house as a licensee subject to the condition that he shall vacate it as and when desired by the plaintiff. However, the evidence on record does not support the said plea of the plaintiff. On the other hand, the defence that the 3rd defendant was a prior agreement holder and that two sale agreements one in respect of the other pent house, P2, in favour of the nominee of the plaintiff and the other in respect of the suit schedule pent house in favour of the 3rd defendant were simultaneously executed in the presence of the plaintiff and that the 3rd defendant took possession of the suit schedule pent house in the year 1997 having paid consideration to the owners and that he later obtained the registered sale deed under the original of exhibit A3, dated 03.04.2000, from the 1st defendant and thus, he purchased the same for valuable consideration and that later regularization orders were obtained in his name on payment of penal charges by him is more probable firstly for the reason that the plaintiff is admitting the sale of the other pent house, P2, in favour of his nominee under a sale deed besides receipt of consideration for the same; and, secondly for the reason that it could not establish permissive possession of the 3rd defendant over suit schedule pent house and could not explain the mutation of the said property in the name of the 3rd defendant and payment of taxes by the 3rd defendant. It is borne out by record that the said property was also recorded in the name of the 3rd defendant in the municipal records and that he paid municipal taxes in his name and that the plaintiff is having knowledge of the same. Thirdly, a plain perusal of exhibit B1 shows that it is an invitation issued by the 3rd defendant in the name of his parents for grihapravesam of the suit schedule pent house, on 08.10.1997 at 00.42 hours,

and that the same was issued by mentioning at its foot as follows: 'With Complements from: Smt & Sri B.R.Jaisimha; Smt and Sri Ramana Gudipati". Thus, the names of the proprietor of the plaintiff and that of the 2nd defendant were mentioned in exhibit B1. Though the said aspects do not by themselves clinch the issue, they are certainly sturdy circumstances in favour of the 3rd defendant.

15.10 There is one more vital aspect that needs to be adverted to. The apartment complex, including the pent houses in the additional fourth floor, required regularization in view of the constructions made in deviation of the approved building plan/building permit. PW1, the proprietor of the plaintiff, admitted in his evidence that he applied for regularization of the entire building including pent houses and further stated that regularization was granted in the year 2000. Whereas the 3rd defendant claims that he paid penal charges of Rs.10,000/- and that regularization orders were obtained in his name and in his favour in respect of the suit schedule pent house. Further, exhibit B3 regularization order issued by the municipal corporation reflects that the same was issued to the 3rd defendant, on 01.05.2000, after collecting a penal amount of Rs.10,000/- in respect of Flat No.P1 i.e., the suit schedule pent house. Even if the contention that the plaintiff obtained regularization order in respect of the suit schedule pent house is to be assumed to be true, the said contention of the plaintiff would be of no avail to the plaintiff as no explanation is forthcoming as to why the regularization order in respect of the suit schedule pent house was obtained in the name of the 3rd defendant when he has nothing do with the ownership of the said pent house and when he is in permissive possession as per the case of the plaintiff. The possession of the said regularization order, exhibit B3, which was produced by the 3rd defendant into Court, also, could not be explained by PW1, the proprietor of the plaintiff.

Exhibit B3 regularization order belies the contentions of the plaintiff and probablises the defence that there was an agreement or arrangement between the owners and the builder that out of the two pent houses one shall belong to the owner and the other to the builder. The further fact that the owners through the first defendant executed the sale deed in favour of the 3rd defendant in respect of the suit schedule pent house and received consideration as per the recital in the sale deed would also show that the contention that the sale transaction is not supported by consideration needs no countenance. In fact the defendants 1 and 2 are not disputing the said sale in favour of the 3rd defendant.

15.11 On the above analysis, this Court holds that the plaintiff is not entitled to the relief of specific performance. For all the reasons afore-stated, this Court further holds that the contention of the plaintiff that the registered sale deed in respect of the suit schedule pent house executed by the 1st defendant in favour of the 3rd defendant is sham & collusive and is vitiated by fraud does not deserve acceptance and that the plaintiff, therefore, is not entitled to the reliefs of cancellation of the said sale deed and damages.

16. POINT No. 2:

For the reasons assigned and findings recorded on point no.1, this Court is satisfied that the findings recorded by the Court below on all the issues were based on appreciation of the facts correctly and the evidence in proper perspective and that there was no error or illegality or irregularity in those findings and, therefore, the said findings do not require to be upset and that the court below is justified in dismissing the suit of the plaintiff. Viewed thus, this Court finds that that there is no merit in the contentions raised and that therefore, the appeal, which is devoid of merit and is liable to be dismissed.

17. POINT No.3:

In the result, the appeal is dismissed. There shall be no order as to costs.

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

21.02.2018
Vjl

M. SEETHARAMA MURTI, J

