

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	27/02/2020
Delivered on	20/03/2020

CORAM:

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

S.A.No.847 of 2018 &
C.M.P.Nos.23158 of 2018 & 27834 of 2019

1.K.Palani
2.P.Savithiri
3.Nagaraj
4.Gunasekaran

... Appellants/Defendants

Versus

R.Madana Gopal (Died)

Mrs.Sumathi .. Respondent LR of the Plaintiff

Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and Decree, dated 25.10.2018 made in A.S.No.21 of 2011, on the file of IV Additional District Judge, Ponneri as confirmed the Judgment and Decree dated 10.08.2009 made in O.S.No.63 of 2001, on the file of the Sub Court, Ponneri.

For Appellants : Mr.T.N.Rajagopalan

For Respondent : Mr.T.R.Rajagopalan
Senior Counsel

For Mrs.K.Asmini Devi

JUDGMENT

This appeal is directed against the Judgment and Decree made in A.S.No.21 of 2011 by the IV Additional District Judge, Ponneri, confirming the Judgment and Decree passed by the Sub Court, Ponneri in O.S.No.63 of 2001. The unsuccessful defendants in the suit are the appellants herein. The suit was filed by the respondents for specific performance of the agreement of sale, dated 20.03.1995.

2. The case of the plaintiff, in brief, is that the defendants 1 and 2 are the absolute owners of the suit property and under an agreement of sale, dated 30.03.1995, they agreed to sell the property at Rs.1,150/- per cent and Rs.50,000/- was paid as earnest money. It is further averred in the plaint that the defendants received a sum of

Rs.15,000/- on 09.07.1995; Rs.35,000/- on 24.03.1996 and Rs.50,000/- on 28.03.1996 and made endorsement in the sale agreement. The plaintiff also paid Rs.3,000/- on 15.10.1996 and Rs.15,000/- on 29.10.1996; Rs.3,000/- on 20.11.1996 and Rs.1,000/- on 11.09.1997 to meet out urgent needs of the defendants, but they avoided to make endorsement under some pretext or other. The plaintiff further stated that when he approached the defendants for payments of the balance sale consideration and to complete the sale, they postponed the same offering some lame excuses.

3. It is the case of the plaintiff that he was always ready and willing to perform his part of the contract under agreement of sale dated 30.03.1995. It is the further case of the plaintiff that when the plaintiff insisted the defendants in the 2nd week of November 1997 to receive the balance sale consideration and to complete the sale, they demanded a sum of Rs.1,750/- per cent, but the plaintiff refused to pay. Hence, a notice dated 29.11.1997 was issued calling upon the defendants to complete the contract. Though the defendants received the notice on 15.12.1997, but failed to comply the demand and hence, the suit.

4. In the written statement filed by the first defendant and adopted by the second defendant, execution of the agreement of sale is admitted. However, the suit was resisted contending that the agreement was entered into on 30.03.1995 to meet out the urgent medical expenses of the first defendant. It is further stated that the plaintiff had no sufficient fund and he was postponing the payment of balance of sale consideration and getting the sale deed executed in his favour. The plaintiff was not ready and willing to perform his part of contract and that if really plaintiff had sufficient funds and was ready and willing, he could have paid the entire amount, even as early as 09.07.1995 or 24.03.1996 or 28.03.1996, when the payments and endorsement were made.

5. According to the defendants, they have been persistent with their demand and getting the sale deed executed by receiving the balance sale consideration, as the first defendant needed money for his medical expenses. The plaintiff by his conduct and wanton delay has indicated unwillingness to proceed further and now to take unfair advantage, has filed the present suit. The conduct of the plaintiff in not depositing the balance sale consideration at the time of filing the suit is a clear indication that the plaintiff was not always ready and willing. As the agreement dated 30.03.1995 has already been abandoned, there was no necessity for the defendants to issue any reply and they have specifically denied the allegation that they insisted payment of Rs.1,750/- per cent for execution of the sale deed and prayed for dismissal of the suit.

6. The third defendant filed the written statement contending that the suit property was purchased out of the sale proceeds from ancestral property and in respect of a share, a settlement was executed by the first defendant in respect of 40 cents in S.No.69/20 at Vijayanalur Village, Ponneri Taluk and the third defendant was not a signatory to the agreement and hence, it would not bind him.

7. On the basis of the above pleadings, necessary issues were framed by the trial Court. On the side of the plaintiff, he examined himself as P.W.1 and marked Exs.A1 to A9. On the side of the defendants, D.W.1 was examined and Ex.B1 was marked. Upon consideration of the evidence adduced by the parties, the trial Court decreed the suit. On appeal, the appellate Court confirmed the Judgment and Decree of the trial Court. Assailing the concurrent findings, the present appeal has been filed.

8. The Second Appeal was admitted on the following substantial questions of law:-

"(a) Whether the Courts below was right in granting the equitable relief of specific performance when the plaintiff has not come to the Court with clean hands and delayed the process of enforcing the agreement.

(b) Whether the plaintiff proved that he was always ready and willing to perform his part of the essential terms of the contractual obligation which are to be performed by him as per mandatory statutory requirement under Section 16 (c) of the Specific Relief Act to enforce specific performance.

(c) Whether the plaintiff is entitled to the discretionary relief of specific performance of the facts and circumstances of the case."

9. Mr.T.N.Rajagopalan, learned counsel for the appellants would submit that the Judgments and Decrees of both the Courts below are contrary to law, weight of evidence, materially irregular and against the probabilities of the case. It is the submission of the learned counsel that the Courts below failed to note that the respondent / plaintiff had set up a false case regarding the payments alleged to have made on 29.10.1996, 29.11.1996 and on 11.09.1997 and it was also not proved through reliable evidence. The Courts below failed to see that time for performance of the agreement expired on 28.02.1996, but the pre-suit notice was issued after lapse of one year and 9 months, the suit was instituted after four months and at that point of time, no step was taken to deposit the balance consideration, which would show that the plaintiff was not ready and willing to perform his obligation under the agreement.

10. It is further contended by the learned counsel that possession was never handed over to the plaintiff and the agreement permits the plaintiff to lay stones to form a lay out and that there is no material evidence or clause in the agreement to show that the possession has been handed over to the plaintiff, but the Courts below came to the conclusion that the plaintiffs were put in possession of the property in pursuance of the agreement. According to the learned counsel, despite readiness and willingness on the part of the plaintiff was categorically denied in the written statement, no material was forthcoming to prove the same and on the other hand, the meager part payments made on various occasions, admissions of the plaintiff and non-compliance of the direction of the trial Court to pay the balance sale consideration in thirty days and deposit made after more than one and half years would establish beyond doubt that the plaintiff did not have sufficient fund to get the sale deed executed in his name as per the agreement.

11. It is also argued by the learned counsel that the suit property was agreed to be sold only to meet out the medical expenses of the first defendant and the time is essence of the contract and there was absolutely no delay on the part of the defendants and violation of the agreement is only due to deliberate inaction of the plaintiff and therefore, he is not entitled for the equitable relief of specific performance. He further added that after abandonment of the agreement and before institution of the suit, the suit property has been settled in favour of the defendants 3 and 4, unless the documents are set-aside, decree for specific performance cannot be granted. In support of his submissions, the learned counsel relied on the following decisions:-

- (i) B.Vijaya Bharathi Vs. P.Savitri and others
[2018 (11) SCC 761]
- (ii) S.M.Jayasaravanan Vs. Palaniammal and another
[2020 (1) LW 317]
- (iii) Soundarrajan V. Vettobai
[2017 (4) CTC 225]
- (iv) S.Sakthivel vs. R.Velusamy

[<http://indiankanoon.org/doc/8381808/>]

12. Per contra Mr.T.R.Rajagopalan, learned Senior Counsel for the respondent/plaintiff would submit that the execution of agreement of sale is not disputed by the appellants / defendants and readiness and willingness has been pleaded and proved by the plaintiff and that issue was decided in favour of the plaintiff by the Courts below and it was also found that possession was handed over to the plaintiff pursuant to the sale agreement and he laid roads and stones to form a layout. So, the contention that the plaintiff has not proved his readiness and willingness cannot be accepted and to

prove himself readiness and willingness, the purchaser need not show the money or vouch a concluded scheme for financing the transaction. Further, nothing is mentioned in the agreement about the illness of the first defendant and no document was produced to show that he was suffering from illness, but such contention is raised without any basis.

13. The learned Senior Counsel further contended that there is no direction in the decree to deposit the balance sale consideration in thirty days, and the trial Court only directs the defendants to execute sale deed in favour of the plaintiff and there was no delay in depositing the balance sale consideration. It is contended that admittedly even after expiry of the stipulated period of 11 months, payments have been received by the defendants. It is the submission of the learned Senior Counsel that the defendants have left the appeal to be dismissed for non prosecution in the year 2014 and the same was restored in the year 2018 with a direction to dispose of the appeal within a period of two months and hence, the delay cannot be attributed to the plaintiff and escalation of the cost cannot be a ground to non-suit the plaintiff.

14. Heard the rival submissions and perused the materials available on record.

15. In the instant case, the suit was filed for specific performance of the agreement of sale, dated 30.03.1995 marked as Ex.A1. It is not in dispute that on the date of agreement, a sum of Rs.50,000/- was paid as earnest money and the plaintiff agreed to purchase the property at the rate of Rs.1,150/- per cent of the total extent of 2.42 within 11 months. It is seen that before expiry of the time i.e., on 28.02.1996, the plaintiff paid Rs.15,000/- on 09.07.1995 and after a period of 8 months, Rs.35,000/- was paid on 24.03.1996, and on 28.03.1996 another Rs.50,000/- was paid and endorsed in Ex.A1 and were marked as Exs.A2 to A4.

16. It is the case of the plaintiff that on four subsequent occasions, i.e., on 15.10.1996, 29.10.1996, 20.11.1996 and 11.09.1997, further sum of Rs.3,000/-, Rs.15,000/-, Rs.3,000/-, and Rs.1,000/- were paid, but no endorsement was made in Ex.A1-agreement. In the written statement, the defendants admitted receipt of Rs.3,000/- on 15.10.1996, while denying the other payments. It is the further case of the plaintiff that from the date of agreement, he was always ready and willing to perform his obligations under the agreement, but it was postponed for some reason or other by the defendants and eventually in the month November 1997, they demanded Rs.1,750/- per cent, and hence, Ex.A5-pre-suit notice was issued on 29.11.1997.

17. It is contended by the defendants that the plaintiff was not ready and willing to perform his part of agreement and they never demanded higher price as alleged by the plaintiff. It is relevant to point out at this juncture that the defendants 1 and 2 executed two settlement deeds marked as Exs.A8 and A9 in favour of the defendants 3 and 4 on 23.12.1997. Admittedly, the suit came to be filed only on 09.03.1998.

18. The learned Senior Counsel Mr.T.R.Rajagopalan appearing on behalf of the respondent / plaintiff relied on the decisions of the Apex Court and this Court referred infra for the proposition that the time is not essence of the contract, especially, when the defendants received part of sale consideration after expiry of 11 months, the plaintiff cannot be non suited on the ground of delay and escalation of the price and that if the suit is filed as per Article 54 of the Limitation Act, the question of limitation does not arise for consideration:-

(i) Madhukar Nivrutti Jagtap and Ors. vs. Pramila Bai Chandulal Parandekar [2019 SCC OnLine SC 1026]

"41. The question as to whether the Plaintiff seeking specific performance has been ready and willing to perform his part of the contract is required to be examined with reference to all the facts and the surrounding factors of the given case. The requirement is not that the Plaintiff should continuously approach the Defendant with payment or make incessant requests for performance. For the relief of specific performance, which is essentially a species of equity but has got statutory recognition in terms of the Specific Relief Act, 1963, the Plaintiff must be found standing with the contract and the Plaintiff's conduct should not be carrying any such blameworthiness so as to be considered inequitable. The requirement of readiness and willingness of the Plaintiff is not theoretical in nature but is essentially a question of fact, which needs to be determined with reference to the pleadings and evidence of parties as also to all the material circumstances having bearing on the conduct of parties, the Plaintiff in particular. In view of the contentions urged, we have scanned through the record to examine if the finding of the High Court in this regard calls for any interference."

44. So far the period between the year 1966 to the year 1968 is concerned, when the Plaintiffs had the limitation of three years for filing the suit for specific performance, it cannot be said that during the aforesaid period, the Plaintiffs were required to show overt act by them in

furtherance of the agreement in question. The principles stated in the decisions in Azhar Sultana, Veerayee Ammal and Pushparani S. Sundaram (supra), as relied upon by the learned Counsel for the Appellants, are not of any doubt or debate but each of the said cases had proceeded on its own facts. We may also observe that in the case of Azhar Sultana, the Court found that as against the agreement dated 04.12.1978, the suit for specific performance was filed on 07.12.1981, after the property was sold on 31.10.1981; and that the Plaintiff failed to show that she was not having notice of the subsequent sale. However, in the said case, the Court directed monetary payment to the tune of twice the amount advanced by the Plaintiff. In Veerayee Ammal, this Court pointed out that the expression 'reasonable time' for performance on the part of Plaintiff would depend on the circumstances of the case, including the terms of contract. In Pushparani S. Sundaram, the basic requirements of Section 16 of the Act of 1963 were reiterated. In contrast to what is suggested on behalf of the Appellants, we may point out that recently, in the case of R. Lakshmikantham v. Devaraji Civil Appeal No. 2420 of 2018, decided on 10.07.2019, this Court has again explained that when the suit for specific performance is filed within the period of limitation, delay cannot be put against the Plaintiff. This Court has said:

'In the aforesaid circumstances, the High Court was also incorrect in putting a short delay in filing the Suit against the Plaintiff to state that he was not ready and willing. In India, it is well settled that the Rule of equity that exists in England, does not apply, and so long as a Suit for specific performance is filed within the period of limitation, delay cannot be put against the Plaintiff-See Mademsetty Satyanarayana v. G. Yelloji Rao and Ors. MANU/SC/0310/1964 : AIR 1965 Supreme Court 1405 (paragraph 7) which reads as under:

'(7) Mr. Lakshmaiah cited a long catena of English decisions to define the scope of a Court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems-English and Indian-qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay - the

time lag depending upon circumstances - may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; if it is beyond time, the suit will be dismissed as barred by time; in either case, no question of equity arises.'

45. In the present case too, when the Plaintiffs had the limitation of three years for filing the suit and have indeed filed the suit well within limitation; and looking to the overall circumstances of the case, no aspect of delay operates against them.

(ii) Narinderjit Singh vs. North Star Estate Promoters Ltd. [(2012) 5 SCC 712]

"25. We are also inclined to agree with the lower appellate Court that escalation in the price of the land cannot, by itself, be a ground for denying relief of specific performance. In K. Narendra v. Riviera Apartments (P) Ltd. (supra), this Court interpreted Section 20 of the Act and laid down the following propositions:

Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the Defendant which he did not foresee while non-performance involving no such hardship on the Plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the Defendant or improvident in its nature, shall not constitute an unfair advantage to the Plaintiff over the Defendant or unforeseeable hardship on the Defendant.

26. In the present case, the Appellant had neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement. Rather, the important plea taken by the Appellant was that the agreement was fictitious and fabricated and his father had neither executed the same nor received the earnest money and, as mentioned above, all the Courts have found this plea to be wholly untenable."

(iii) R. Lakshmikantham vs. Devaraji [(2019) 8 SCC 62]

"11. The High Court order is not correct in stating that readiness and willingness cannot be inferred because the letters dated 18.12.2002 and 19.12.2002 had not been sent to the Defendant. The High Court also erred in holding that despite having the necessary funds, the Plaintiff could not be said to be ready and willing. In the aforesaid circumstances, the High Court was also incorrect in putting a short delay in filing the Suit against the Plaintiff to state that he was not ready and willing. In India, it is well settled that the Rule of equity that exists in England, does not apply, and so long as a Suit for specific performance is filed within the period of limitation, delay cannot be put against the Plaintiff - See Madamsetty Satyanarayana v. G. Yelloji Rao and Ors. MANU/SC/0310/1964 : AIR 1965 Supreme Court 1405 (paragraph 7) which reads as under:

(7) Mr. Lakshmaiah cited a long catena of English decisions to define the scope of a Court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems-English and Indian-qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay - the time lag depending upon circumstances - may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; if it is beyond time, the suit will be dismissed as barred by time; in either case, no question of equity arises.

(iv) Beemaneni Maha Lakshmi vs. Gangumalla Appa Rao
(Since Dead) by L.Rs. [(2019) 6 SCC 233]

"14. Therefore, on conjoint reading of Ex. A1 and the reply to the notice by the Defendant dated 14.04.1987 and the cross-examination of the Defendant - vendor, both the learned trial Court and the High Court have rightly observed and held that it was the Appellant - vendor that did not perform her part of the contract. Once, the finding is recorded that it was the Appellant - vendor that did not perform her part of the contract, thereafter as rightly observed by the High Court, the failure on the part of the vendee to demonstrate that he was having sufficient money with him to pay the balance sale consideration under Ex. A1 by the date of his evidence is not much of consequence. Even otherwise, it is required to be noted that the Plaintiff deposited the entire balance sale consideration as directed by the learned trial Court within the extended period of time. It is required to be noted that as it was submitted on behalf of the Defendant before the learned trial Court that the Plaintiff does not have any capacity to pay the balance sale consideration, to test his bonafides the learned trial Court directed the Plaintiff to deposit the balance sale consideration which the Plaintiff did deposit. Merely because the said amount was deposited out of the fund/amount received by him by selling the property in the year 1993, by that itself cannot be presumed and/or inferred that at the time of execution of the agreement to sell and/or thereafter even at the time of the notice, the Plaintiff was not having sufficient fund to pay the balance sale consideration. It is required to be noted that an agreement to sell is dated 30.12.1985 and the Plaintiff was directed to deposit the amount in the year 1993. It is not expected from the Plaintiff that he would continue to deposit the same with the bank all these years. What is required to be considered is as and when he is called upon to make the deposit, he has deposited the amount to show his bonafides or not? Therefore, as such, both the learned trial Court as well as the High Court have rightly passed a decree for specific performance.

15. Now so far as the submission on behalf of the Appellant that if the decree for specific performance of the contract is passed after number of years, it would cause undue hardship to the Defendant - vendor and the reliance placed upon the decision of this Court in the case of P.R. Deb (supra) is concerned, it is required to be noted that in the written statement the Defendant has not

pleaded any hardship to be caused if the decree of specific performance of the contract is passed against the Defendant - vendor.

16. At this stage, the decision of this Court in the case of A. Maria Angelena v. A.G. Balkis Bee, reported in MANU/SC/1255/2001 : AIR 2002 SC 2385 is required to be referred to. In the aforesaid case, the vendor sought to raise the plea of hardship for the first time before this Court and this Court did not permit the vendor to raise such a plea of hardship by observing that as no plea as to hardship if relief for specific performance is granted was raised by the Defendant - vendor in written statement nor any issue was framed that the Plaintiff - purchaser could be compensated in terms of the money in lieu of decree for specific performance, such plea cannot be entertained for the first time in appeal by way of SLP, more so, when there are concurrent findings that the Plaintiff was ready and willing to perform his part of the contract has been recorded by the lower courts. Therefore, the plea raised on behalf of the vendor on hardship cannot be permitted to be raised now, more particularly when no such plea was raised/taken in the written statement."

751] (v) K.C. Rajabathar vs. B. Purushothaman [2019 4 LW

"29. The question of readiness and willingness cannot be put in a straight jacket. The factum of readiness and willingness has to be gathered from the circumstances prevailing in each case. In the case on hand, the agreement was entered into on 02.08.2003, it provided certain obligations to be performed by the parties to the agreement. The defendant was required to discharge the loan borrowed by him and also to have the property measured at his cost. The plaintiff was also required to pay the balance of sale consideration within three months period. It is in evidence that the defendant did not perform either of the two obligations imposed on him. On the other hand, the defendant has been receiving monies from the plaintiff, even after the expiry of the three months period. He had received a sum of Rs. 20,000/- on 27.03.2004 and further a sum of Rs. 60,000/- on 22.06.2004, totaling to Rs. 80,000/- which is almost 1/3rd of the sale consideration after the expiry of the three months period. Apart from the said sum of Rs. 80,000/-, the defendant has received a sum of Rs. 50,000/- on the date of the agreement dated 02.08.2003 and another Rs. 50,000/- on 11.08.2003. Thus it could be seen that the plaintiff has parted with a sum of Rs. 1,80,000/- which is nearly 2/3rd

of sale consideration agreement.

(vi) K. Prakash vs. B.R. Sampath Kumar [(2015) 1 SCC 597]

"18. Subsequent rise in price will not be treated as a hardship entailing refusal of the decree for specific performance. Rise in price is a normal change of circumstances and, therefore, on that ground a decree for specific performance cannot be reversed.

19. However, the court may take notice of the fact that there has been an increase in the price of the property and considering the other facts and circumstances of the case, this Court while granting decree for specific performance can impose such condition which may to some extent compensate the Defendant-owner of the property. ..."

(vii) Zarina Siddiqui vs. A. Ramalingam [(2015) 1 SCC 705]

"33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the Plaintiff so that discretion would be exercised judiciously in favour of the Plaintiff. At the same time, if the Defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance."

(viii) Nadiminti Suryanarayan Murthy (Dead) through L.Rs. vs. Kothurthi Krishna Bhaskara Rao and Ors. [(2017) 9 SCC 622]

"29. The question, in this case, arises this way. The effect of the decree now is that the Plaintiff is required to pay the balance sale consideration to Defendant Nos. 1 to 5 in terms of agreement dated 18.01.1983 and, in turn, Defendant Nos. 1 to 5 have to execute the sale deed of the suit house in Plaintiff's favour and give possession of the suit house to the Plaintiff. Since, in the meantime, Defendant Nos. 1 to 5 have sold the suit house to Defendant No. 6, vide sale deed dated 09.02.1983 for Rs. 45,000/- such sale would not bind the Plaintiff. Indeed the sale deed dated 09.02.1983 now has become bad in law and the transaction of sale between Defendant Nos. 1 to 5 and Defendant No. 6 has failed. In such circumstances, the seller, i.e., (Defendant Nos. 1 to 5) has no right to retain

the sale consideration of Rs. 45,000/- which they received from Defendant No. 6 or any part thereof, as the case may be, and has to, therefore, refund the same to the buyer (Defendant No. 6). In other words, whatever amount which Defendant Nos. 1-5 received from Defendant No. 6 (whether Rs. 45,000/- or any part thereof), the same has to be refunded by Defendant Nos. 1-5 to Defendant No. 6- (see Section 65 of the Contract Act). Nevertheless, Defendant No. 6 would join in execution of sale deed in Plaintiff's favour along with Defendant Nos. 1-5 as held by this Court in Durga Prasad Vs. Deep Chand [AIR 1954 SC 75] for conveying the valid title of the suit house to the Plaintiff."

(ix) Sunkara Lakshminarasamma (D) by L.Rs. vs. Sagi Subba Raju and Ors. [(2019) 11 SCC 787]

9. Shri A. Subba Rao, learned Counsel for the Appellants was however forceful in his arguments, insofar as the suit for specific performance is concerned. According to him, the Appellants herein (Defendants in the suit for specific performance) would be put to hardship if the decree for specific performance is confirmed, inasmuch as there has been a huge escalation in the price of the properties since the agreement of sale. Such plea of escalation in price cannot be accepted in view of the fact that the Appellants in the first instance do not have the right to question the agreement of sale. As mentioned supra, since Veeraswamy was the absolute owner of the properties including the property involved in the suit for specific performance, he had the right to enter into an agreement of sale also. This property was bequeathed to Veeraswamy under Exhibit B4 Will by Padmanabhudu. Hence, Veeraswamy was the sole owner of the property. Consequently, he had entered into an agreement of sale with Sagi Subba Raju, as far back as on 19.09.1974. The suit was filed in the year 1978, which was later transferred to another Court and the same was re-numbered as O.S. No. 72 of 1983. Since 1978, this litigation is being fought by the prospective vendee. The property of about three and half acres was agreed to be sold by Veeraswamy in favour of the prospective vendee in the year 1974 for a sum of Rs. 51,000/-. Such price was agreed to between the vendor as well as the prospective vendee.

10. This Court cannot imagine the value of the property as it stood in the year 1974 in the said area, i.e. at Bhimavaram village in Andhra Pradesh. Be that as it may, we find that hardship was neither pleaded nor proved by the Appellants

herein before the trial Court. No issue was raised relating to hardship before the trial Court. A plea which was not urged before the trial Court cannot be allowed to be raised for the first time before the appellate Courts. Moreover, mere escalation of price is no ground for interference at this stage (see the judgment of this Court in the case of Narinderjit Singh v. North Star Estate Promoters Limited, MANU/SC/0417/2012 : (2012) 5 SCC 712). Added to it, as mentioned supra, the Appellants do not have the locus standi to question the judgment of the Division Bench since they are not the owners of the property. As a matter of fact, Veeraswamy, the vendor of the properties, had entered the witness box before the trial Court and supported all his alienations in favour of the Defendants. Therefore, in our considered opinion, the Division Bench has rightly concluded in favour of Sagi Subba Raju and against the Appellants and granted the decree for specific performance."

19. There is no dispute with regard to the preposition suggested by the learned Senior counsel for the respondents and the principles laid down in the above decisions. However, in the case on hand, the fundamental and core issues that arise for consideration as to whether the plaintiff has satisfied the mandatory requirement of Section 16(c) of the Specific Relief Act and whether the suit framed, as such, without seeking to set-aside the settlements Exs.A8 and A9 is maintainable.

20. Section 16(c) of the Specific Relief Act reads as under:-

"16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

..
..

(c) who fails to prove]that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

21. At this juncture, it would be appropriate to refer some of the decisions of the Hon'ble Supreme Court, wherein, it has been categorically held that the plaintiff has to aver and prove his readiness and willingness from the date of the agreement and till the date of decree and a mere averment without proof would not suffice:-

(i) N.P. Thirugnanam (D) by L.Rs., vs. R. Jagan Mohan

"5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under Section 20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract."

(ii) Umabai and Ors. vs. Nilkanth Dhondiba Chavan (Dead) by Lrs. and Ors. [2005 (6) SCC 243]

"30. It is now well-settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-Respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-Respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records."

(iii) Pushparani S. Sundaram and Ors. vs. Pauline Manomani James (Deceased) and Ors. [(2002) 9 SCC 582]

"5. For this, the appellants rely on two circumstances, one that immediately after the exemption was given by the Ceiling Authorities on the 31st March, 1982, the present suit was filed in April, 1982 and the other the tendering of further sum of Rs. 5,000/- to the defendant after execution of the agreement of sale. He also reiterates with reference to Para 11 of the plaint which pleads that the appellant was and is ready and willing to perform his part of the contract. So far these are being a plea that they were ready and willing to perform their part of the contract is there in the pleading. We have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now examining first of the two circumstances, how could mere filing of this suit, after exemption was granted could be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16 (c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved.

(iv) C.S. Venkatesh vs. A.S.C. Murthy (D) by L.Rs. and Ors. [2020 3 SCALE 813]

"20. In the instant case, the Plaintiff has alleged that he was ready to pay Rs. 35,000/- to the Defendants and called upon them to execute the reconveyance deed. However, in para 11 of the plaint it is pleaded that the Plaintiff was running contract business wherein he suffered heavy loss and as such he gave up the business. It is also pleaded that at present the Plaintiff has no business or profession and has no source of income. He has no property, either movable or immovable. Mere plea that he is ready to pay the consideration, without any material to substantiate this plea, cannot be accepted. It is not necessary for the Plaintiff to produce ready money, but it is mandatory on his part to prove that he has the means to generate the consideration amount. Except the statement of PW-1, there is absolutely no evidence to show that the Plaintiff has the means to make arrangements for payment of consideration under the reconveyance agreement."

22. In terms of the above mentioned decisions, it is incumbent upon the plaintiff to aver and prove that he had all along been ready and willing to perform the essential terms of contract, which require to be performed by him. It has been consistently held in the above decisions to adjudge, whether the plaintiff is ready and willing to perform his part of the contract, the Court must consider the contention of the plaintiff prior to filing of the suit along with attending circumstances and a bare averment in the plaint or a statement made in the chief-examination would not suffice.

23. In the matter on hand, admittedly, the defendants received payments after expiry of 11 months, as stipulated in Ex.A1 agreement. Though it is contended that the defendants agreed to sell the property for urgent needs and to meet out the medical expenses of the first defendant, as rightly contended by the learned Senior Counsel, no materials available on record to substantiate the same. But, it must be seen that the plaintiff himself has admitted that the defendants received the amount to meet out their urgent expenses.

24. It is relevant to look into the recitals in the agreement of sale and the conduct of the plaintiff to arrive at a conclusion, whether the mandatory requirements of Section 16(c) of the Specific Relief Act, have been fulfilled by the plaintiff. It must be noted that under the agreement no obligation is cast upon the defendants except to receive the balance sale consideration and to execute the sale deed. It is not the case of the plaintiff that to complete the contract, the defendants were required to perform some other obligations and due to non-fulfillment of the obligations, sale was postponed. It has been admitted by P.W.1 in the course of cross-examination that part of the amounts were paid for the emergent expenses of the defendants and no material is placed on record to show that the plaintiff offered the entire sale consideration before expiry of 11 months, however it was avoided by the defendants. P.W.1 also admitted in his evidence that he has no bank account on his own and he was a land broker. He further admitted that though he had sufficient money, he did not complete the sale for the reason that he totally purchased 10 acres to form a lay out. It is also contended that only in November 1997, the defendants demanded higher price of Rs.1,750/- per cent instead of agreed amount of Rs.1,150/- per cent and hence, he issued pre-suit notice under Ex.A5, dated 29.11.1997.

25. A perusal of the records would reveal that the suit was instituted after expiry of four months from the date of Ex.A5-notice and no application was taken out seeking permission to deposit the balance sale consideration during the pendency of the suit. It is true that the defendants received the Ex.A5-notice, but no reply was sent till the filing of the suit, however, in the written statement, it has

been categorically stated that the plaintiff was not ready and willing and he did not possess sufficient money to perform his obligations under Ex.A1-sale agreement. In the decisions relied on by the learned Senior Counsel for the respondent, it is stated that, to prove the readiness and willingness, the purchaser need not necessarily produce money or exhibit that every day he has finance on his hand, but when the defendants disputed the case of the plaintiff, burden of proof lies heavily upon the plaintiff to prove that he was having sufficient money or source to mobilize the funds.

26. It is pertinent to mention that indisputably Rs.65,000/- was paid out of the total consideration of Rs.2,78,300/- within the time stated in the agreement. Subsequently, the following amounts are said to have been received by the defendants. Rs.35,000/- on 24.03.1996; Rs.50,000/- on 28.03.1996; Rs.3,000/- on 15.10.1996; Rs.15,000/- on 29.10.1996; Rs.3,000/- on 29.11.1996 and Rs.1,000/- on 11.09.1997. The last three payments are disputed by the defendants and no proof is available to establish the same. The averments in the written statement that the first defendant has been persistent within his demand to pay the balance sale consideration to meet out the medical expenses and the evidence of D.W.1 would show that the defendants were in need of money. However, no explanation was offered by the plaintiff for non-payment of the balance sale consideration in time and payments made in piecemeal.

27. From the perusal of the records, it is found that the suit came to be decreed on 10.08.2009. The trial Court directed the defendants to execute the sale deed within a period of 30 days and it is implied such direction was issued to avoid the plaintiff to put the decree in execution. Indisputably, no step was taken by the plaintiff to pay the balance sale consideration to enable the defendants to execute the sale deed and the balance sale consideration was deposited only on 31.01.2011. In the written argument, it has been stated that there was no delay in depositing the balance sale consideration due to the reason that the plaintiff applied for amendment of the decree and amended copy was supplied only on 18.01.2011. Disputing the above statement, the learned counsel for the appellant contended that there was no need or necessity for the plaintiff to wait for the supply of the amended copy, since an Interlocutory Application was filed only to include the cost in the decree. The learned Single Judge of this Court in the case of S.Sakthivel vs. R.Velusamy [<http://indiankanoon.org/doc/8381808/>] had an occasion to consider a similar issue and in that case, the balance sale consideration was deposited with a delay of 17 days. Even though the trial Court condoned the delay, the learned Judge held that the deposit of the money will not have effect of culling want of readiness and willingness on the part of the plaintiff.

28. The Courts below, without framing proper issue and subjective discussion and also overlooking the pleading and evidence of the parties, referred supra, arrived at the conclusion that the plaintiff proved his readiness and willingness mainly on the ground that no reply was sent to the pre-suit notice Ex.A5. It is evident from the pleading and evidence of the plaintiff that except the vague statement that he was ready and willing to perform his part of contract and it was delayed by the defendants claiming Rs.1,750/- per cent, no other evidence was produced in support of the said contentions. Therefore, in my considered opinion, the principles laid down in the decisions referred above, would squarely apply to the case on hand and the irresistible conclusion is that the plaintiff has not proved his readiness and willingness to perform his part of contract and has approached the Court with unclean hands, hence, he is not entitled for decree for specific performance.

29. The next issue that arises for consideration in this appeal is whether the plaintiff is entitled for a decree of specific performance without seeking to set-aside the settlement deeds, which are marked as Exs.A8 and A9.

30. In the case on hand, Ex.A1-sale agreement was entered into between the parties on 30.03.1995 and a period of 11 months was fixed to perform the contract. The time got lapsed on 28.02.1996 and thereafter, the defendants 1 and 2 have executed settlement deeds, which were marked as Exs.A8 and A9, dated 23.12.1997 and the suit came to be filed only on 09.03.1998. It is the case of the plaintiff that the defendants 3 and 4 are the children of the defendants 1 and 2 and the settlement deeds were executed to defeat the right of the plaintiff under Ex.A1-sale agreement. Even though, there was no pleading or evidence, the Courts below came to the conclusion that the transfers were made only to defeat the right of the plaintiff and therefore, the plaintiff is entitled for decree for specific performance.

31. In similar facts, in B.Vijaya Bharathi V. P.Savitri [(2018) 11 SCC 761], the Hon'ble Apex Court in categorical terms has held as follows:-

"17. It must also be noted that though aware of two conveyances of the same property, the plaintiff did not ask for their cancellation. This again, would stand in the way of a decree of specific performance for unless the sale made by the defendant 1 to defendant 2, and thereafter by defendant 2 to defendant 3 are set-aside, no decree for specific performance could be possibly follow. ... "

title of the defendants 1 and 2 have been transferred even before institution of the suit either by way of sale or settlement and the transferees were also brought on record. They may be the children of the original owners, but once right is conveyed, law requires that the conveyance deed is to be set aside. Keeping in view of the decision of the Apex Court and the facts of this case, in my opinion, unless the settlements Exs.B8 and B9 are set aside, no decree of specific performance could be granted in favour of the plaintiff.

33. It is settled proposition of law that if the finding is recorded based on no evidence or non-consideration of material evidence or misreading of the evidence, it raises a substantial question of law under Section 100 of C.P.C., and the High Court is entitled to set-aside the concurrent findings of the Courts below. In this regard, it is relevant to refer the following decisions of the Hon'ble Apex Court:-

(i) Yadarao Dajiba Shrawane (Dead) by Lrs. vs. Nanilal Harakchand Shah (Dead) and Ors. [AIR 2002 SC 2849]

"32. From the discussions in the judgment it is clear that the High Court has based its findings on the documentary evidence placed on record and statements made by some witnesses which can be construed as admissions or conclusions. The position is well settled that when the judgment of the final Court of fact is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence the High Court in second appeal is entitled to interfere with the judgment. The position is also well settled that admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by Courts. A finding of fact ignoring such admissions or concessions is vitiated in law and can be interfered with by the High Court in second appeal. Since the parties have been in litigating terms for several decades the records are voluminous. The High Court as it appears from judgment has discussed the documentary evidence threadbare in the light of law relating to their admissibility and relevance."

(ii) Ramlal and Ors. vs. Phagua and Ors. [AIR 2006 SC 623]

"13. In the instant case, the High Court has rightly exercised its right and discharged its duty to reverse the error and removed the injustice done by the courts below. The High Court is right in exercising its duty, rightly so in interfering with an unreasonable and unjust findings by both the Courts below.

14. On a careful perusal of the materials on record, it will be clear that both the courts below

did not appreciate the evidence on record both oral and documentary and, therefore, the findings arrived at by the High Court, in our opinion, does not call for any interference under Article 136 of the Constitution of India and the civil appeal deserves to be dismissed."

34. In view of the above discussion and finding, the questions of law are answered in favour of the appellants / defendants and in consequence, the Judgment and Decree of the Courts below are set-aside. However, the plaintiff is entitled to alternate relief of return of advance amount of Rs.1,53,000/- along with interest at the rate of 12% per annum from the date of filing of the plaint till the actual date of realization of the above amount.

35. The Second Appeal is disposed of accordingly. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

r n s

To

1. The IV Additional District Judge,
Ponneri.

2. The Sub Court,
Ponneri.

Copy To

The Section Officer,
VR Section, High Court, Madras.

+1cc to Mrs.K.Aswini Devi, Advocate SR.No.24426

+1cc to Mr.T.N.Rajagopalan, Advocate SR.No.24404

S.A.No.847 of 2018 &
C.M.P.Nos.23158 of 2018 & 27834 of 2019

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