IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :: 01.04.2021	PRONOUNCED ON :: 02.06.2021

CORAM ::

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.S.No.878 of 2005

M/s. Cordell Estates (P) Ltd.,
Represented by its Chairman and
Managing Director Mr. N.G. George
...Plaintiff

Vs.

1. Mr. Tanveer Ahmed
2. Mr. Tanseer Ahmed
3. Mr. Mohammed Fouzi
4. Ms. Shadan Simin
5. Mr. Mohammed Shazi
6. Mr. K. Fazlur Rahman
7. Mrs. Laila Rahman alias Laila Fazlur
8. Mrs. T. Zarina Begum ...Defendants

Prayer: Suit filed under Order VII Rule 1 of the Code of Civil Procedure read with Order IV Rule 1 of the Original Side Rules, High Court of Judicature, Madras to

i) to pass a decree for specific performance directing the defendants to execute the sale deeds in respect of the suit property in favour of the plaintiff or its nominee for Rs.75,00,000/- and to hand over the possession of the suit property failing which direct the Assistant Registrar (O.S.) to execute and register the sale deed in favour of the plaintiff.:

ii) include the additional relief of payment of Rs.3,75,00,000/- by the defendants 1 to 5 to the plaintiff or its nominees along with interest @ the rate of 15 % per annum till date of payment?

iii) award the costs of this suit

(Amended as per order passed in A.No.7906 of 2019 in C.S.No.878 of 2005 dated 19.11.2020)

For Plaintiff	:	Mr. George Cheriyan
For Defendants	:	Mr. M.K. Kabir, Senior Counsel for Mr. Dhiraviyarathan

JUDGMENT

This suit was originally filed for specific performance directing the defendants to execute the sale deeds in respect of the suit property in favour of the plaintiff or its nominees for Rs.1,24,60,000/- after receiving the balance consideration of Rs.75 lacs and to hand over possession of the suit property. In case the defendants fail to execute the same then direct the Assistant Registrar (O.S) to execute and register the sale deed in favour of the plaintiff.

2. Thereafter the plaintiff had filed A.No.7906 of 2019 for amending the plaint to include an alternate relief for compensation of a sum of Rs.3,75,00,000/-. This application was allowed by orders dated 19.11.2020 and thereafter the plaint was also amended and in addition to the relief for specific performance the plaintiff also sought for a direction to the defendants to pay a sum of Rs.3,75,00,000/- together

with interest @ 15 % per annum till date of payment.

3. Suit Schedule property:

All that piece and parcel of land together with all the superstructure standing thereon bearing Old Door No.16/1, New Door No.8, Pycrofts Garden Road, Nungambakkam, Chennai0 600 006, bearing part of O.S.No.418, C.C.No.138, R.S.No.87/1 (part), T.S.No.87/51 of Block No. 15 of an extent of 1 ground and 2150 (one ground and 2180 sq.ft. as per patta) and bounded on the

North By	Pycrofts Garden Road
South By	House and ground bearing Old No.16-B, New No.9, Pycrofts Garden Road (T.S.No.87/26)
East By	House and ground bearing New No.7, Pycrofts Garden Road, (T.S. No.87/6) and
West by	40 feet Road (T.S. No.87/5)

and measuring

East to West on the Northern side	61 feet
East to West on the Southern side	63 feet
North to South on the Eastern side	71 feet
North to South on the Western side:	66 feet

(with a splay in the North - West corner)

and situated within the Sub-Registration district of Thousand -lights and registration district of Central -Madras.

4. Plaintiff's case in brief:

4.1. The suit property belongs to defendants 1 to 5 and on 28.10.1995, the plaintiff had entered into separate agreement of sale with defendants 1 to 5. Defendants 1 to 5 had signed their respective deeds as vendors and defendants 6 to 8 has signed as confirming parties in all these Deeds. The total sale consideration for all the agreements put together was a sum of Rs.1,05,00,000/- . The plaintiff had paid an advance of Rs.49,60,000/- and the balance amount was payable at the time of registration.

4.2. The plaintiff would further submit that on account of the plaintiff asking for an enhanced amount and as they were not co-operating in the sale, the plaintiff had on 30.04.1999 filed a suit for specific performance but had not numbered the same. Immediately on coming to know about the suit the defendants had come forward to execute a fresh agreement with an enhanced sale consideration.

4.3. Therefore a fresh agreement styled as a supplementary agreement was entered into between the plaintiff and the defendants and since Clause 11 of the deed provided for the document to take effect on the date on which the last of the parties subscribed their hand to the document the date was fixed as 30.04.2001 which was the date on which the last signature got affixed on the deed.

4.4. The sale consideration was enhanced to a sum of Rs.1,24,60,000/- as against the earlier sale consideration of Rs.1,05,00,000/. The plaintiff agreed to pay the balance of Rs. 75,00,000/- at the time of registration of the Sale Deed. . Though time was not the essence of the contract the plaintiff was always ready and willing to pay the balance sale consideration but however the defendants were not coming forward to execute the deed.

4.5. The plaintiff was not willing to precipitate matters as the defendants 1 to 4 were his school mates and therefore he knew defendants 1 to 5 very well. He was also aware of their difficulties in vacating the suit premises and shifting to the new place which the defendants had identified at Anna Nagar. However, the plaintiff was constrained to issue a legal notice dated 29.08.2005 calling upon the defendants to come and execute the sale deed within 5 days as he was ready to pay the balance sale consideration of Rs.75,00,000/-.

4.6. To this the defendants 1 to 5 had issued a reply stating that the plaintiff cannot demand specific performance but could only receive Rs.35,00,000/- as compensation and they refused to execute the Sale Deed as agreed. The plaintiff would submit that refund of the advance amount of Rs.49,60,000/- with interest was not adequate compensation as the plaintiff had wanted to purchase the property for his residence as well as business purpose. The plaintiff would further state that as per the terms of the supplementary agreement, the plaintiff's right to pay the balance sale consideration and have the sale deed executed is available till such time as the defendants refund the sum of Rs.35,00,000/-. Since the defendants have not refunded the said sum the plaintiff has come forward with the suit.

5.***Written statement of the 3rd defendant adopted by defendants 1,2, 4 and 5.:***

5.1. The two primary defenses put forth by these defendants is that the suit is barred by limitation and the plaintiff was never ready nor willing to perform his part of the contract.

5.2. The defendants would contend that under the agreement dated 28.10.1995 the balance sale consideration was payable on 30.04.1996. Without taking any steps to have the Sale Deed executed the defendants with the sole intention of saving limitation had simply filed a suit for Specific Performance without numbering the same. The defendants would further submit that under the Deed there was no obligation cast upon the defendant except for the plaintiff to pay the balance Sale Consideration and have the sale executed. The defendants would submit that the plaintiff did not have the requisite funds and therefore had not come forward to pay the balance sale consideration and have the Sale Deed executed.

5.3. Thereafter at the behest of the plaintiff a supplementary agreement was entered into which came into effect on 30.04.2001, which was the day on which the last of the parties had affixed their signature. For ease of reference, this shall be referred to as the Supplementary Agreement dated 30.04.2001. Under this agreement, the sale consideration was enhanced and a sum of Rs.75,00,000/- was payable towards balance sale consideration on or before 07.06.2001 by the plaintiff. The suit instituted in the year 2005 is clearly barred by limitation. In fact, in response to the plaintiff notice dated 29.08.2005 the defendants had sent a reply dated 09.09.2005 clearly stating that the agreement had come to an end and nothing survives for consideration. They had also offered the sum of Rs.35 lakhs as contemplated under the Agreement. They sough for the dismissal of the suit.

<u>6. Written statement of defendants 6 to 8.</u>

6.1. These defendants would submit that they are neither proper nor necessary parties to the suit and therefore the suit be dismissed against them. They would however state that the plaintiff is neither ready nor willing to conclude the transaction and that the suit has been filed nearly 20 years after the original agreement. They sought to have the suit dismissed.

*7. **<u>Issues:</u>***

Issues framed on 08.01.2010;

> *"i.Whether the suit for Specific Performance is maintainable?*
>
> *ii.Whether the plaintiff was ready and willing to perform its obligation under the Agreement of Sale dated 28.10.1995?*

iii.Whether on the plaintiff's admission that the balance consideration was not paid by 07.06.2001, the plaintiff is dis entitled to the relief of Specific Performance?

iv.Whether the plaintiff was ready and willing to perform the obligation under the Supplementary Agreement?

v.Whether the plaintiff committed breach of its obligation and the Agreement became unforgeable?

vi.Whether the suit is barred by limitation?

vii.Whether the plaintiff is disentitled to the equitable remedy of Specific Performance under Section 20 (c) of the Specific Relief Act?

viii.Whether the Agreements dated

28.10.1995 and 30.04.2001 have lapsed or its unenforceable?

ix.Whether the Agreement dated 28.10.1995 read with Supplementary Agreement is binding on the parties herein?

x.To what reliefs are the parties entitled to?"

Additional Issues framed on 29.01.2021;

" a.Whether the plaintiff is entitled to the relief of compensation of Rs.3,75,00,000/- ?

b.Whether the claim for compensation is barred by limitation ?"

8. Submissions:

Both sides have apart from making oral submissions also filed written submission.

8.1. Mr. George Cheriyan, learned counsel appearing on behalf of the plaintiff would submit that the defendants 1 to 5 were well known to the share holder of the plaintiff Company. When they came to know that the defendants were proposing to sell the suit schedule property they had offered to purchase the same. He would submit that on 12.10.1995 they had paid a sum of Rs.19,60,000/- to the defendants and thereafter on 28.10.1995 5 separate agreements were entered into and a sum of Rs.20,00,000/- was paid. Thereafter on 04.06.1996 a further sum of Rs.10,00,000/- was paid to the defendants 1 to 5 (Ex.P1 Series). The balance sale consideration was to be paid at the time of execution of the sale deed and handing over possession of the property.

8.2. He would submit that since the defendants were not coming forward to execute the Sale Deed despite the plaintiff being ready to proceed with the sale the plaintiff had filed a suit for specific performance on 13.04.1999 in D.No.11315 of 1999. Thereafter, the defendants had come forward to execute a Supplementary Agreement dated 30.04.2001(EX.P2) under which the sale consideration was increased to Rs.1,24,60,000/- from the original agreed price of Rs.1,05,00,000/- and the plaintiff was required to pay the balance of Rs.75,00,000/- on or before 07.06.2001.

8.3. It is the contention of the counsel for the plaintiff that time was never the essence of the contract and as per Clause 5 of the supplementary agreement dated 30.04.2001 till such time as the defendants do not pay the sum of Rs.75,00,000/- it is open to the plaintiff to pay the sum of Rs.35,00,000/- and have the sale executed in their favour. The counsel would submit that a conjoint reading of clauses 3,5 and 6 of Ex.P2 would clearly prove this contention and the court has to only consider the terms of the contract as it is. He would further submit that Ex.P5 Legal Notice dated 29.08.2005 would clearly demonstrate the readiness and willingness of the plaintiff. It is only under Ex.P6 reply notice that the defendants have refused to perform their obligation under Ex.P2 by repudiating the terms and conditions contained thereon. Therefore the counsel would contend that not only is the suit in time as the suit is filed immediately on the repudiation by the defendants but the plaintiff has also proved their readiness and willingness.

8.4. He would submit that the defendants were the ones who prevented the completion of the sale by not vacating the premises. They have not let in any evidence to show that they were ready to vacate and hand over vacant possession to the plaintiff.

8.5. No pleading were made in to support the alternative relief of compensation and even evidence had not been let in to substantiate the same. In fact, the plaintiff had filed an additional proof affidavit on 09.02.2021 along with two new documents which was objected to by the defendants. Thereafter, on 19.02.2021, the plaintiff withdrew the additional proof affidavit and endorsed that they had no further evidence to let in. However, in the written arguments the plaintiff has stated new facts which has not been tested in evidence. Therefore, this Court cannot look into these arguments not supported by pleadings and evidence.

8.6. As regards readiness and willingness the counsel would submit that the plaintiff was all along willing to complete the contract and it was the defendants who were causing the obstruction.

8.7. The learned counsel would further submit that under section 20(3) of the Specific Relief Act, the plaintiff is entitled to the decree for specific relief as they have paid a substantial part of the sale consideration in advance. The counsel would rely on Section 10 of the Specific Relief Act to say that the plaintiff had sought to purchase the property to develop and sell the constituted area after returning a portion for his residence and office. Therefore there is no method to calculate the damage for non performance and further, it will not be an adequate relief. He has relied on the following judgments:

a) "2018 (11) SCC 508: Nabha Power Limited (NPL) vs Punjab State Power Corporation (PSPCL)":

This judgment has been relied by the counsel in support of his contention that the explicit terms of the contract are always the final word with regard to the intention of parties. That apart where a contract contains multiple clauses these clauses had to be interpreted in such a manner that no clause of the contract should do violence to another part of the contract.

b) AIR 1962 SC 77- International Contractors Ltd vs Prasanta Kumar Sur :

Here the Hon'ble Supreme Court had observed that in order to be entitled to a decree from specific performance there was no necessity to formally consider the money or prove that money was within the power of the purchaser. The Courts should see whether the other party has definitely and unequivocally refused to carry out his part of the contract and had intimated that the money would be refused if tendered.

c) AIR 2017 SC 1236 -A.Kanthamani vs Nasreen Ahmed :

Sufficient that the respondents establish that they have the capacity to pay the sale consideration and was ready and willing to perform her part of the agreement.

d) AIR 1965 SC 1405 - Madamsetty Satyanarayana vs G. Yellogi Rao and Others :

Delay cannot be a ground to refuse specific performance

e) 2004 (4) CTC 150 -P. D'Souza vs Shondrilo Naidu :

Seller cannot take advantage of their wrong and plead that grant of decree for specific performance would be in equitable. Escalation of price cannot be a ground to deny the decree for specific performance. The decree for specific performance being a discretionary relief the courts should exercise this discretion judicially.

f) 2011 (4) CTC 139 - M.Kamalakannan and others vs M.Manikandan :

The defendants who are at fault cannot raise a defense that the suit is barred by limitation.

g) 2007(11) SCC 447 - Kusheshwar Prasad Singh vs State Of Bihar & Ors :

A wrong doer cannot seek to make a profit out of his wrong doing and gain a favorable interpretation of law.

8.8. Per contra, Mr. M.K. Kabir, learned Senior Counsel appearing on behalf of Mr. A. Dhiraviyarathan, learned counsel for the defendants would at the outset submit that defendants 6 to 8 who have no right, title or interest in the suit property are neither necessary nor proper parties to the proceedings and the suit should be dismissed against them. He would rely on the judgments mentioned hereinbelow in support of this proposition.

(i) 1995 (3) SCC 147: Anil Kumar Singh vs Shivnath Mishra

And Gadasa Guru;

(ii) AIR 2005 SC 2813: Kasturi vs. Iyyamperumal and others

8.9. The learned Senior Counsel would submit that the plaintiff who has come forward with a suit for specific performance has miserably failed to prove their readiness and willingness to perform their part of the contract. As per Ex.P1 agreement dated 28.10.1995 the date for paying the balance sale consideration and have the sale deed executed was 30.04.1996. The plaintiff has at no point of time, prior to 30.04.1996, stated that he is ready with the balance and neither was the draft sale deed handed over to enable the defendants to obtain necessary income tax clearance. However the plaintiff has rushed to file a suit on 30.04.1999 which was an attempt to save limitation.

8.10. The plaintiff has also not adhered to the terms of the supplementary agreement dated 30.04.2001 under which the balance enhanced sale consideration of Rs.75,00,000/- had to be paid by 07.06.2001. Once again neither was the amount paid nor a demand made to complete the sale. The suit instituted on 30.09.2005 is clearly barred by limitation and manifests the intention of the plaintiff that they were not ready and willing to proceed with the sale. The learned Senior Counsel would also invite the courts attention to the cross examination of P.W.1 in which the witness has denied everything including a simple question as to how many departments were there in the plaintiff's Company and in which floor the Company had its Office. The plaintiff has not proved that they had the required wherewithal to pay the balance sale consideration even a portion of this amount has not been paid prior to 07.06.2001. The plaintiff who has failed to prove his readiness and willingness is not entitled to any relief. In support of this argument he would rely on the following judgments:

"(i) 1997 (3) SCC page 1- K.S. Vidyanadam And Ors vs Vairavan

(ii) 2003 (10) SCC page 390 Manjunath Anandappa urf. Shivappa Hanasi vs Tammanasa & Ors.

(iii) 2004 (4)LW page 807 - Ranganatha Gounder v. Sahadeva Gounde and others

(iv) AIR 2007 Guj 56- Husenabibi and another vs Abdulmiya Kasammiya Kureshi and others

(v) 2008 (12) SCC 145- Bal Krishna and another vs. Bhagwan Das (dead) by lrs and others

vi) 1996 (4) SCC 526 - His Holiness Acharya Swami Ganesh Dassihi vs Sita Ram

Thaapar

vii) 2000 (4) CTC 278 - Indravathi vs kamala"

8.11. The plaintiff has not proved his readiness and willingness in respect of both the agreement dated 28.10.1995 (Ex.P.1) and the Supplementary Agreement dated 30.04.2001 (Ex.P.2).

8.12. He would further submit that the suit is barred by limitation. Under Article 54 of the Limitation Act the suit should be filed within 3 years from the date fixed for performance and in the absence of such date when plaintiff noticed that performance was refused Under the earlier agreement dated 28.10.1995 the plaintiff ought to have paid the balance sale consideration on or before 30.04.1996. The unnumbered suit was filed after the limitation. Under the Supplementary Agreement dated 30.04.2001, the time fixed for performance was 07.06.2001 so the suit should have been filed on or before 06.06.2004. However even the legal notice is issued only on 29.08.2005 and the suit instituted on 30.09.2005. He would further argue that a conjoint reading of Clause 2,3,5 and 6 of the supplementary agreement would clearly prove that time is the essence of the contract. One of the cause of action pleaded for the suit is that the defendants were attempting to sell to 3rd parties. The defendants were only exercising their right under the supplementary agreement dated 30.04.2001. To buttress the argument regarding limitation he would rely on the following judgments:

1. 1997 (2) SCC 611- T.L Muddukrishana and another vs Lalitha Ramchandra Rao

2. AIR 2004 Ori 160- Babaji Charan Sahu and others vs Rajendra Narayan Dash

and others.

3. AIR 1988 Kant 83 - Mehbood Pasha vs Syed Zaheeruddin"

8.13. Another contention put forward is that the property value has sky rocketed which is also admitted by the plaintiff as P.W.1. Therefore time becomes the essence of the contract.

i) 2011 (12) SCC 18- Saradamani Kandappan vs S. Rajalakshmi and Others

ii) 2011 (9) SCC 147 - Citadel Fine Pharmaceuticals vs Ramaniyam Real Estates Private Limted and Other.

The above judgments have been relied for the proposition time is the essence of the contract.

8.14. With reference to the alternative relief claimed and which is covered under the additional issues, the contention of the Learned Senior Counsel is that the same is neither substantiated in the plaint nor proved by letting in evidence. Further the said relief is claimed after a period of over 24 years. Further this runs contrary to the plaintiff's own pleading that compensation is not an adequate remedy. Therefore he would pray to have the suit dismissed with costs.

9. Discussion:

9.1. The pleadings, evidence and the arguments have been considered in great detail. I shall therefore proceed to give my findings with reference to the Issues framed.

9.2. Issues Nos.2, 3, 4 and 5 covers the issue of readiness and willingness in respect of both the agreement dated 28.10.1995 and supplementary agreement dated 30.04.2001.

9.3. The Agreements dated 28.10.1995 which is marked as the Ex.P.1 series was entered into between the plaintiff and the defendants. Under these agreements the plaintiff was to pay the balance sale consideration by 30.04.1996 and have the sale registered in their favour. From the pleadings as well as the cross examination of the plaintiff as P.W.1 it is clearly evident that at no point of time after the execution of the Agreement on 30.04.1996, the plaintiff had either intimated the plaintiff that he is willing to pay the balance sale consideration of Rs.49,60,000/- or called upon the defendants to execute the sale deeds. Without doing any of the above the plaintiff has rushed to file an unnumbered suit on 30.04.1999. The suit appears to have been filed only to arrest limitation. There is no deposit of the balance sale consideration.

9.4. Thereafter the parties have entered into the supplementary agreement dated 30.04.2001 marked as Ex.P.2 which is the agreement with which we are more particularly concerned in this suit. A perusal of the clauses in the agreement will throw light of the arrangement between the plaintiff and the defendants. To answer the above issues, we are particularly concerned with clauses 2, 3, 5 and 6 of Ex.P.2 which is herein below extracted:

> *"2. The purchaser agrees to pay the balance renegotiated sale consideration of Rs.75 lakhs to the owners on or before 07.06.2001 (7th June 2001) and on receipt of the same, the owners agree to execute and register the sale deed conveying the "Said Property' subject to approval of Appropriate Authority, in a manner as required by the purchaser and hand over vacant possession of*

the property. The sale will be performed by the owner in the name of the purchaser or in the name of any nominee appointed by the purchaser. The parties agree to comply with all the required formalities to register the Sale Deed conveying the "Said Property" to the purchaser or their nominee.

3. In the event of the purchaser failing to adhere to the terms referred to in clause 2 above, the owners are at liberty to deal with the property after 7.06.2001 (7th June 2001) and shall refund a sum of Rs.35 lakhs to the purchaser as full and final settlement as per clause 6, as and when they identify a buyer for the property or as and when they are able to arrange funds from alternate sources. On *payment of Rs.35,00,000/- the purchaser shall return the agreements duly cancelled and shall relinquish all their rights under the said agreement dated 28.10.95.*

5. In the event of the purchaser not having paid a sum of Rs. 75 lakhs on or before 07.06.2001 as per clause 2, while the owners enjoy the option to pay Rs.35 lakhs to the purchaser as full and final settlement, the purchaser also has the option to pay the owners the said sum of Rs.75 lakhs and have the sale completed, whichever comes earlier.

6. Both parties agree that in case the owner proposes to enter into an agreement for sale, as per clause 3, the sum of Rs.35 lakhs will *become payable forthwith when such agreement for sale is being entered into by the owner. If the owner enters into an agreement for sale without the purchaser being paid the sum of Rs.35 lakh, such agreement is voidable at the option of the purchaser. "*

9.5. If the above clauses are broken down in a more simpler form we can understand the agreement between the parties.

i) That the balance sale consideration of Rs.75 lacs will be paid by the plaintiff to the defendants on or before 07.06.2001 and on the receipt of payment the defendants would execute and register the sale deed. The vacant possession was also to be given on the payment of the balance sale consideration.

ii) If the plaintiff was not in a position to pay the balance sale consideration on or before 07.06.2001, the defendants were free to deal with the property thereafter and the defendants were required to refund a sum of Rs.35 lacs towards full and final settlement as and when they identify the buyer or they arrange the funds. When this amount is paid the plaintiff was required to return the original agreements of sale duly cancelled and relinquish all their rights under the agreement dated 28.10.1995.

iii) That till such time as the defendants exercise their right to refund the sum of Rs.35 lacs, the plaintiff can pay the balance sum of Rs.75 lacs and have the sale registered.

iv) When the defendants enter into an agreement of sale with a 3rd party the sum of Rs.35 lacs becomes payable forthwith. Any agreement of sale entered into with a 3rd party without payment of the above amount is voidable at the option of the plaintiff.

9.6. Therefore these clauses make it very clear that the balance sale consideration shall be paid on or before 07.06.2001. If the amount is not paid by 07.06.2001 the defendants are free to enter into an agreement with 3rd parties to sell the suit property. The defendants have to refund Rs.35 lacs to the plaintiff towards full and final settlement. This amount was to be paid when the defendants entered into an agreement of sale or when they were able to source money from an alternative source. In case the defendants do not immediately enter into an agreement of sale with 3rd parties the plaintiff could still pay the sum of Rs.75 lacs and get the sale execute. However if the defendants exercise their right to sell to 3rd parties, then the plaintiff cannot exercise the option to purchase. This latter clause is only a concession given to the plaintiff and not a matter of right.

9.7. In this backdrop let us examine the pleadings of the plaintiff. In the plaint the plaintiff has clearly admitted as follows:

> *" It appears now that there is an attempt to sell the premises to 3rd parties overlooking*

the plaintiff herein."

9.8. Further in their reply dated 08.09.2005, the defendants have clearly stated that the plaintiff is entitled only to the refund of Rs.35 lacs. Therefore, the defendants have communicated their intention to sell to 3rd parties. Therefore, the defendants have exercised their option under Clause 3 of the Supplementary agreement. Once this option is exercised then they concession given to the plaintiff to pay the sum of Rs.75 lakhs after 07.06.2001 is no longer available to the plaintiff. It has to be remembered that the refund of Rs. 35 lacs arises when the agreement of sale is entered into between the plaintiff and such 3rd party.

9.9. The evidence would show that till 07.06.2001 the plaintiff has not taken any steps to pay the balance sale consideration or intimate the defendants that they are ready with the amount and calling upon the defendants to execute the sale deed.

9.10. Further the defense is that the plaintiff was unable to proceed with the sale as they did not possess the wherewithal. The plaintiff has filed Ex.P.9 Bank Statement which only covers the period October 1995 to June 1996. The plaintiff has not produced any document after the execution of the supplementary deed dated 30.04.2001 till 07.06.2001. A perusal of Ex.P9 would show no entries for the period 10.11.1995 to 24.05.1996. However on 10.11.1995 the plaintiff has a balance of Rs.2,600.54 and on 24.05.1996 they had a balance of 2,043.02. This clearly shows that on 30.04.1996 when the balance of Rs.49,60,000/- was payable the plaintiff did not possess sufficient funds. Since the bank statement for the period 30.04.2001 to 07.06.2001 has no been produced we can only draw adverse inference against the plaintiff for keeping back vital documents from the court.

9.11. A plaintiff in a suit for specific performance has to not only plead readiness and willingness but must also prove the same. In the judgment reported in" ***2003(10) SCC page 396-Manjunath Anandappa vs Tammanasa",*** the Hon'b;e Supreme Court after considering the various pronouncements regarding Section 16(c) of the Specific Relief Act ultimately held as follows in paragraph No.27

> *"27. The decisions of this Court, therefore, leave no manner of doubt that a Plaintiff in a suit for specific performance of contract not only must raise a plea that he had all along been and even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same. Only in certain exceptional situation where although in letter and spirit, the exact words had not been used but readiness and willingness can*

be culled out from reading all the averments made in the Plaintiff as a whole coupled with the materials brought on record at the trial of the suit, to the said effect, the statutory requirement of Section 16(c) of the Specific Relief Act may be held to have been complied with."

In the case of hand readiness and willingness has not been proved either expressly or by implication.

9.12. From a conspectus of the above it is clear that the plaintiff was neither ready nor willing to proceed with the sale. Issue Nos. 2, 3, 4 and 5 are answered against the plaintiff.

9.13. Next let us consider the issue of limitation which is covered in Issue Nos. 6 and 8. Though we are only primarily concerned with the Supplementary Agreement dated 30.04.2001, however in order to analyze the conduct of the plaintiff it is necessary to also discuss the steps taken by the plaintiff to enforce the earlier agreement dated 28.10.1995.

9.14. Under the Agreement dated 28.10.1995, the plaintiff was to pay the balance sum of Rs.49,60,000/- on or before 30.04.1996. The reading of the agreement would show that the obligation of the defendants would start only after the plaintiff paid the balance sale consideration. On such payment the defendants was to handover vacant possession of the property to the plaintiff and the plaintiff was permitted to demolish the existing building. There is not an iota of proof to show that the plaintiff was ready with the balance consideration at any time prior to or on 30.04.1996. The only statement made by the plaintiff in the Plaint is that they have filed an unnumbered suit for Specific Performance on 30.04.1999 (No proof of this is filed). This suit is not proceeded with. Thereafter two years later the Supplementary Agreement is entered into between the parties on 30.04.2001 and the only condition imposed in this agreement is for the plaintiff to pay the balance sale consideration by 07.06.2001 and on failure to pay the same, a right would enure to the defendants to sell the property to third parties. Therefore considering the fact that the agreement specifies a date of performance i.e., 07.06.2001, the first portion of Article 54 of the Limitation Act would apply and the suit ought to have been filed on or before 06.06.2001. The legal notice Ex.P5 is itself issued only on 29.08.2005 nearly 4 years and 2 months after the date of performance. The suit is thereafter filed only on 30.09.2005.

9.15. The plaintiff would argue that as per Clause 6 of the Supplementary agreement Ex.P2 the plaintiff's right to pay the balance sale consideration and half the sale deed executed continues till such time as the defendants do not exercise the option to refund the sum of Rs.35 lacs as provided under Clause 3 of Ex.P2. This argument is fallacious in the light of Article 54 of the Limitation Act. Further Clause 6 is only a concession given which has to be exercised by the plaintiff within the period of limitation. Under clause 2 of Ex. P2 the right of the plaintiff ceases the minute they fail to pay the balance sale consideration on or before 07.06.2001 and the defendants get the right to sell the property to 3rd parties. The period of limitation starts running from 07.06.2001. The plaintiff cannot postpone this payment indefinitely. The refund of the sum of Rs.35 lacs would accrue only when the defendants enter into an agreement with a 3rd party to sell the suit property. Further the plaintiff who had originally entered into an agreement of sale on 28.10.1995 has not been in a position to pay the balance sale consideration till 07.06.2001. Article 54 of the Limitation Act would govern the transaction. The Article reads as follows:

*"**54.**For specific performance of a*

contract, three years from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. "

9.16. In the judgment reported in ***2006 (3) SCC page 634 Gunwantbhai Mulchand Shah & Others vs Anton Elis Farel & Others.*** The issue for the consideration of the Court was whether a suit for specific performance filed in respect of an agreement dated 18.12.1964 and a subsequent agreement dated 05.10.1968 filed on 04.04.1994 was barred by limitation. The suit was tried on a preliminary issue of limitation and jurisdiction. The trial court dismissed the suit on the preliminary issue of limitation. This judgment was confirmed upto the High Court in Second Appeal and the aggrieved plaintiff was before the Hon'ble Supreme Court. The main plea of the plaintiff was that the agreement did not provide for any period for performance and therefore the first limb of Article 54 would not apply and as regards the second limb of Article 54 the notice of refusal was only on 19.11.1993 and therefore the suit was within limitation. The learned Judges though had upheld the plea of the appellant had observed as follows:

> *"It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963, then the enquiry should have been, first, whether any time was fixed for performance in the agreement of sale and if it was so fixed, to hold that a suit filed beyond 3 years of the date was barred by limitation unless any case of extension was pleaded and established."*

9.17. In the case of hand the date for payment of the balance sale consideration was fixed as 07.06.2001. In fact, Clause 3 of the Ex.P.2 would clearly stipulate that if the plaintiff fails to pay the balance sale consideration by 07.06.2001 then the defendants are at liberty to sell the property to third parties. Therefore the case would fall within the first limb of Article 54. Therefore issue Nos. 6 and 8 are answered against the plaintiff.

9.18. As regards issue Nos.1,7 and 9 in the light of the discussion hereinabove with regard to the readiness and willingness of the plaintiff it follows that the plaintiff is not entitled to the equitable remedy of specific performance and the suit as filed is not maintainable. The agreement dated 28.10.1995 Ex.P.1 read with the Supplementary Agreement (Ex.P2) has become time barred and is no longer binding on the parties. No doubt, the Decree for Specific Performance is a discretionary power however the Court has to exercise this discretion keeping in view the settled principles of Law. The plaintiff who originally entered into an agreement as early as in the year 1995 has not displayed his readiness and willingness to proceed further with the Contract that apart he has filed the suit beyond the period of limitation. These issues are also answered against the plaintiff.

9.19. As regards additional issues a and b, except for seeking the alternative relief by way of amendment the plaintiff has not amended the pleadings and no evidence has been adduced in proof of this claim. The alternative relief is also sought for only after a period of 22 years after the filing of the suit and 25 years after the cause of action had admittedly accrued. Further in the Plaint, they have contended that the refund of the advance is not an adequate remedy. In the light of the above the plaintiff is not entitled to the alternative relief of compensation.

9.20. The answer to issue No.10 is that the plaintiff is not entitled to the relief claimed by them in the suit.

9.21. In fine, the Civil Suit is dismissed with costs.

02.06.2021

Internet : Yes/No
Index :Yes/No
Speaking / Non-Speaking
mrn/mps

List of Witnesses examined on the plaintiffs' side:-

PW1- N.G. George

List of Exhibits marked on the Plaintiffs' side:-

Ex.P-1 - Series- Agreement of sale dated 28.10.1995

Ex.P-2 - Supplementary Agreement dated 30.04.2001

Ex.P-3 - Form No.37-1

Ex.P-4 - Encumbrance Certificate dated 28.03.2005

Ex.P-5 - Legal notice from plaintiff to defendants dated 29.08.2005

Ex.P-6 - Reply notice from D1 to D5 dated 08.09.2005

Ex.P-7 - Reply notice from D6 to D8 dated 09.09.2005

Ex.P-8 - Guideline value of the property 1995-2011

Ex.P-9 - Bank Statement of funds available dated 29.11.1995

Ex.P.10 - Letter dated 20.03.2012.

List of Witnesses examined on the Defendants' side:-

DW1- Mohammed Fouzi

List of Exhibits marked on the defendants' side:-

Ex.D-1 - Xerox copy of the annual returns of the plaintiff company for the year 1995

Ex.D-2 - Xerox copy of the Extract of the Registrar of Companies regarding the status of the company

Ex.D.3 - Original notice issued by the plaintiff which was received by the third defendant dated 29.08.2005

Ex.D.4 - Office copy of the reply notice sent by defendant's counsel on behalf of the defendant 1 to 5 dated 08.09.2005.

Ex. D5 - Office copy of the reply sent by the counsel for the defendants 6 to 8 dated 09.09.2005

P.T. ASHA. J,

mrn/mps

Pre-Delivery Judgment in
C.S.No.878 of 2005

02.06.2021