THE HON'BLE SRI JUSTICE A. VENKATESHWARA REDDY

C.C.C.A. No.137 of 2002

JUDGMENT:

The unsuccessful plaintiff in O.S.No.858 of 1992 has filed this appeal suit, assailing the judgment and decree dated 20.02.2002 in O.S.No.858 of 1992 on the file of the learned VII Senior Civil Judge, City Civil Court at Hyderabad.

2. The plaintiff has filed the original suit against the sole defendant for specific performance of the agreement of sale dated 03.04.1992 in respect of the mulgi bearing No.13-5-565/1, Malaimpet, Natrajnagar, Hyderabad, admeasuring 205 square yards approximately with precise boundaries as mentioned in the plaint schedule, hereinafter referred to as "suit schedule property" for the sake of brevity.

3. The trial Court has dismissed the suit of the plaintiff with costs, however, ordered the defendant for return of Rs.2,00,000/- advance amount to the plaintiff within 30 days from the date of judgment.

4. The learned counsel for the appellant/plaintiff has filed a Memo dated 06.03.2002 stating that in compliance with the judgment dated 20.02.2002, a sum of Rs.2 lakhs was deposited by the defendant, vide treasury challan No.335 and bank challan No.23845 in State Bank of Hyderabad at Gunfoundary Branch, Hyderabad, to the credit of above suit in O.S.No.858 of 1992 and the trial Court has received the same and deposited by way of fixed deposit.

5. During pendency of the suit, the sole defendant died and his legal representatives were brought on record as defendants 2 to 5 before the trial Court. Feeling aggrieved by the said judgment and decree, the sole plaintiff has preferred this appeal suit.

6. For the sake of convenience, the parties are hereinafter referred to as plaintiff and defendants as arrayed in the original suit.

Pleadings in the plaint and written statement before the trial Court:

7 (a). The plaintiff and first defendant are known to each other. The plaintiff has offered to sell the suit schedule property at the rate of Rs.1,800/- per square yard inclusive value of mulgi representing that it is admeasuring 250 square yards for total consideration of Rs.4,28,000/-. They entered into agreement of sale dated 03.04.1992. On that day, the plaintiff has paid an amount of Rs.1 lakh towards advance amount and both the parties subscribed their signatures. Though the plaintiff does not know English, believing that the defendant must have incorporated all the terms and conditions, the plaintiff has signed on the agreement of sale dated 03.04.1992. Originally, it was agreed between the parties that i) the area of the plaint schedule property shall be measured by a technical man before execution of registered sale deed; ii) the consideration according to the final measurement @ Rs.1,712/- per square yard, but not tentatively agreed amount of Rs.4.28 lakhs; iii) registration charges shall be borne equally by both the parties; iv) a penal clause of

forfeiture and return of ¼ part of consideration governing both the parties in the event of both of them failing to get the sale deed executed within the agreed period of six months; v) that the plaintiff would be put in possession of plaint schedule property on payment of second instalment of sale consideration; vi) that the time for registration of the sale deed shall be extended with mutual consent; vii) the plaintiff shall be at liberty to run grocery business in the suit mulgi; viii) the time of registration of the sale deed shall not be made as essence of contract; ix) the defendant shall fulfill of his contractual obligations and discharge the formalities undertaken to be completed by him during subsistence of the contract so as to make suit property free from all encumbrances.

7 (b). It is further averred in the plaint that in spite of specific understanding between the parties, all these terms were not incorporated in Ex.A.1-agreement of sale dated 03.04.1992 and fraudulently obtained his signatures, thus the defendant has cheated him. The plaintiff has later paid an amount of Rs.5,000/- on 11.05.1992 for construction of

brick wall with a door adjacent to the mulgi in place of demolished wall of the plaint schedule and it was carried out by the defendant. However, thereafter the defendant avoided to adhere to the agreed terms. That on 03.07.1992 on the alleged target date for getting the sale deed executed, the plaintiff took the elders of the locality to the plaint schedule property, wherein the defendant in the presence of elders admitted that the suit land was not measured and that due to inadvertence, all the terms were not incorporated and it was not a deliberate mistake and also promised that he would request his counsel to incorporate all these terms.

7 (c). Accordingly, the defendant undertook for execution of separate agreement of sale on 03.07.1992 on a stamp paper of Rs.100/- and also delivered possession of the suit schedule property to the plaintiff in the presence of elders for the purpose of carrying on the grocery business. At that time, the plaintiff paid another amount of Rs.1 lakh to the defendant and handed over the keys of the mulgi. On the same day, the plaintiff moved cupboards and some

grocery items into the mulgi and locked the iron shutter with his lock. Since 11.07.2002 was Moharrum and the next day being Sunday, the plaintiff could purchase the grocery in the wholesale market on 13.07.1992 and brought them to the suit mulgi, kept the same in the mulgi along with his widowed mother. But when she went to have lunch, the defendant accompanied by goonda elements came to the suit shop, put his lock on the other side of the shutter and second lock to the compound wall and went away.

7 (d). Thereafter, in spite of best efforts by the plaintiff, the defendant avoided to meet him, then the plaintiff has sent elders viz., Shaik Ismail and mohd. Ismail, who could meet the defendant with difficulty on 17.07.1992 and that the defendant informed them that the contract of sale came to end on 03.07.1992 itself and that he was not bound to execute fresh agreement of sale. Thus, the defendant has committed fraud, obtained an agreement with conditions which were not agreed and received Rs.2,05,000/- in all from the plaintiff. Though the

defendant has promised in the presence of elders to execute a fresh agreement of sale on 03.07.1992 after receiving second instalment of Rs.1 lakh, locked the premises on 03.07.1992, dispossessed the plaintiff from the suit schedule premises, as such the plaintiff is entitled for recovery of possession of suit schedule property under Section 6 of the Specific Relief Act, 1963. He is also entitled for perpetual injunction against the defendant from dispossessing him, apart from specific performance of the agreement of sale after measurement of suit property calculating the consideration @ Rs.1,712/- per square yard and also for mesne profits @ Rs.2,000/- per month with interest at 6% per annum.

8 (a). The sole defendant has filed a detailed written statement denying the plaint averments, however, admitting the execution of Ex.A.1 on 03.04.1992. The main averments of the written statement filed by the defendant are that he has entered into written agreement of sale as in Ex.A.1 on 03.04.1992 agreeing to sell the suit schedule property for a total consideration of Rs.4.28 lakhs

and on that day he received Rs.1 lakh as advance amount, acknowledged the same under a separate receipt. Later, on 11.05.1992 received an amount of Rs.1 lakh, but it was received under protest. The plaintiff is not entitled for enforcement of Ex.A.1-agreement of sale for specific performance or any other relief flowing under that agreement of sale.

8 (b). The defendant has denied that the suit schedule property was not admeasuring 250 square yards, as mentioned in the agreement of sale-Ex.A.1. It is contended that it was measured at the time of agreement of sale itself and it was found to be 250 square yards and there was no agreement to sell the said property on the basis of square yard @ Rs.1,712/- per square yard, but the agreement was to pay a lumpsum amount of Rs.4.28 lakhs. No such negotiations were conducted, through Maqbool Khan and Shaik Chand as pleaded by the plaintiff, but one Kareem and Yusuf were present at the time of execution of Ex.A.1-agreement. The terms of agreement between the plaintiff and defendant were

explained in the presence of witnesses and both the parties having agreed the same signed on Ex.A.1 in the presence of attesting witnesses.

8 (c). Thus, the plea of the plaintiff that the terms were settled prior to execution of Ex.A.1 as alleged in the plaint and the defendant deliberately not included the same in the Ex.A.1, taking advantage of the fact that the plaintiff does not know English etc are all false. There were no such terms as mentioned in the plaint. There was no occasion for the defendant to mention that the extent of the land is tentatively mentioned in Ex.A.1 and that the rate of property is Rs.1,712/- per square yard. All these averments in the plant are only pleaded to overcome Ex.A.1. In fact, time is essence of the contract. Initially on 03.04.1992 an amount of Rs.1 lakh was paid agreeing to pay the second instalment of Rs.1.50 lakhs on 20.04.1992 and the balance sale consideration of Rs.1,78,000/- at the time of registration to be done within three months from the date of Ex.A.1. But, the plaintiff has failed to pay the

second instalment of Rs.1,50,000/- on 20.04.1992, thereby committed breach of contract.

8 (d). However, the defendant has got served notice dated 20.05.1992 to the plaintiff under Certificate of Posting asking the plaintiff to honour the agreement. Since the plaintiff failed to honour the agreement, the amount paid towards advance is forfeited. No such panchayat was held on 03.07.1992 in the presence of any elders as alleged in the plaint and the defendant has not delivered the possession of suit property to the plaintiff either on 11.07.1992 or 13.07.1992 or at any point of time. Hence, the question of dispossession etc., does not arise. The plaintiff has not paid an amount of Rs.5,000/- to the defendant for construction of wall. In fact, the Court Commissioner has visited the suit premises, opened the mulgi with the keys handed over by the defendant. The plaintiff was not ready and willing to perform his part of contract, failed to pay the amount as agreed to and all false allegations are made for the purpose of the suit.

8 (e). The defendant further pleaded that since he was in urgent need of money, it is mentioned in Ex.A.1 that time is essence of the contract, the plaintiff is not entitled for specific performance of the agreement, as he failed to comply his part of contract by paying the balance sale consideration as agreed to, accordingly prayed for dismissal of the suit.

Issues and Additional Issues:

9. Basing on the above pleadings, the trial Court has framed the following issues and additional issues:

1. Whether the defendant got prepared the suit agreement in English without incorporating all terms agreed to by both the parties and fraudulently rad over the contents to the plaintiff who does not know English as if all the agreed conditions are incorporated including about the extent?

2. Whether the extent of the suit property shown in the agreement was tentative and the defendant agreed to adjust the sale consideration as per the extent that may be foud after measurement?

3. Whether a panchayat was held in the presence of the elders as claimed by the plaintiff on 03.07.1992 and that the defendant admitted having omitted to

mention certain conditions agreed upon by both the of them and agreed to rewrite another agreement incorporating all conditions but later failed and on that day delivered possession of the property in the presence of the elders?

4. Whether the plaintiff shifted the articles and grocery to suit premises, but on 03.07.1992 the defendant dispossessed him by putting his locks to the premises, if so, whether the plaintiff is entitled to seek back possession status quo ante?

5. Whether the plaintiff is entitled for mesne profits at the rate of Rs.2,000/- per month with 6% per annum over such damages from the defendant?

6. Whether the payment of only Rs.1,00,000/- out of the agreed Rs.1.50,000/- as second instalment had nullified the contract?

7. Is there novation of contract between the parties?

8. Whether the relief under Section 6 of the Specific Relief Act is maintainable?

9. Whether the plaintiff is entitled for perpetual injunction?

10. Whether the plaintiff is entitled for the specific performance of contract?

11. The result of suit?

Additional Issues:

1. Whether Ex.C.5 is forged by defendant and thereby committed an act of forgery punishable under IPC?

2. Whether the defendant put the plaintiff into possession after payment of second instalment of Rs.1,00,000/- on 11.05.1992 and if it is so, whether the defendant would be liable to pay interest over those Rs.2,00,000/-, at what rate and on what amount and is it liable to be adjusted towards residue sale consideration besides meeting the demand of mesne profits?

Evidence and findings of the trial Court:

10. During trial on behalf of the plaintiff, in all PWs.1 to 8 were examined. Exs.A.1 to A.17 documents are marked. In the evidence of PW.5-Sri Y.V. Ravi Prasad, learned Advocate Commissioner, Exs.C.1 to C.5 documents are marked, whereas in the evidence of PW.7, Exs.X.1 to X.3 documents are marked. Thereafter, on behalf of the defendant, the first defendant himself got examined as DW.1. Exs.B.1 to B.4 documents are marked and three other independent witnesses are examined as DWs.2 to 4. It is only after recording the evidence of defendant as

DW.1, he died and his legal representatives were brought on record as defendants 2 to 5.

11. The trial Court has answered issue Nos.1, 2 and 7 together against the plaintiff and in favour of the defendant. Similarly, issue Nos.3, 4 and additional issue No.2 were answered together against the plaintiff and the second part of additional issue was answered to the effect that the defendant is not liable to pay interest over the said amount of Rs.2 lakh. Issue Nos.5 and 8 were also answered against the plaintiff. Issue No.6 was answered against the defendant, whereas issue No.7 is answered against the plaintiff. The additional issue No.1 is also answered against the plaintiff. Finally, issue No.10 is answered against the plaintiff holding that the plaintiff is not entitled for specific performance of agreement of sale, however, directed the defendant for return of Rs.2 lakhs within 30 days from the date of judgment as stated above.

12. A memo dated 06.03.2002 is filed by the plaintiff stating that pursuant to the judgment and decree dated 20.02.2002, the said amount of Rs.2 lakhs was

deposited by the defendant before the trial Court to the credit of the original suit. Feeling aggrieved by the said findings recorded by the trial Court, the plaintiff has filed the present appeal suit.

13. Heard the learned counsel for the appellant/ plaintiff and the respondents/defendants. The detailed submissions made on either side have received due consideration of this Court.

14. In the light of the rival contentions and material available on record, the following points would arise for consideration:

i) Whether time is essence of the agreement of sale dated 03.04.1992-Ex.A.1;

ii) Whether the plaintiff is entitled for specific performance of the said agreement of sale dated 03.04.1992?

iii) Whether the judgment and decree impugned is sutainable?

Point Nos.(i) to (iii):

15. Since all the point Nos.(i) to (iii) are inter-related, for the sake of convenience and brevity, they are answered together as under:

16. The admitted or undisputed facts of the case are that the plaintiff and first defendant are known to each other. They have entered into suit agreement of sale on 03.04.1992 agreeing to sell the suit schedule property for consideration of Rs.4.28 lakhs. Whereas, it is the specific case of plaintiff that he is an illiterate person, he does not know reading and writing of English language, there were other specific conditions as narrated in the plaint, but all these conditions were not incorporated in the agreement of sale dated 03.04.1992 and in fact, it was agreed to purchase and to sell the suit property @ Rs.1,712/- per square yard subject to measurements and it is only 205 square yards, time was never agreed to be an essence of contract. It was further agreed between the plaintiff and defendant that both of them will share equally the registration expenses and it was also agreed to put the

plaintiff in possession of suit property on receipt of second instalment and it was agreed to extend the time for registration with mutual consent. Pursuant to the said agreement itself, on 03.07.1992, a panchayat was held in the presence of elders and the defendant has agreed for execution of fresh agreement of sale on Rs.100/- stamp paper and that on 03.07.1992 itself received another amount of Rs.1.50 lakhs as second instalment, delivered the possession of suit schedule property in favour of the plaintiff, but he was dispossessed on 13.07.2002.

17. Whereas, it is the specific case of the defendant that on 03.04.1992 itself the agreement as in Ex.A.1 was executed. The terms and conditions were read over and explained to the plaintiff in the presence of attestors. On that day, the plaintiff has paid Rs.1 lakh agreeding to pay the second instalment of Rs.1.50 laks on or before 20.04.2002. The plaintiff failed to pay the second instalment as agreed to on 20.04.2002, however paid only an amount of Rs.1 lakh on 11.05.2002. On this the defendant has received the said amount under protest.

Thereafter, the plaintiff failed to perform his part of contract as agreed to. Accordingly, the defendant got issued a notice dated 20.05.1992 informing that time is essence of the contract and the advance amount paid stands forfeited. However, the receipt of said notice is denied by the plaintiff. It is further case of the defendant that within stipulated three months period i.e., by 03.07.1992 the plaintiff has failed to pay the balance sale consideration and failed to perform his part of contract and it was never agreed between the parties to sell the suit schedule property @ Rs.1,712/- per square yard, there was no occasion to mention the price of Rs.4.28 lakhs as tentatively and that the suit schedule property is approximately 250 square yards and it was not 205 square yards as offered by the plaintiff. With these pleadings both the parties have adduced evidence. Shorn of unnecessary details the relevant evidence adduced on both sides is discussed as under.

18. On behalf of the plaintiff as stated above, he himself got examined as PW.1. In his evidence, Exs.A.1 to

A.13 documents are marked and he was cross-examined at length. PW.2 is an independent witness who claims to be present at the time of Ex.A.1, but he is not an attestor. PW.3 is the Junior Planning Officer, Quli Qutub Shah Urban Development Authority. In his evidence, Exs.A.14 to A.17 documents are marked. PW.4 is a surveyor who assisted the advocate commissioner and surveyed the land, in his evidence, Ex.C.1-plan and Ex.C.2-rough sketch are marked. Whereas, PW.5 is the learned advocate commissioner, in his evidence, Exs.C.3 and C.4 documents are marked. PW.6 is the surveyor of Municipal Corporation of Hyderabad (M.C.H.), but his evidence is eschewed from consideration on 23.07.1999. PW.7 is the crucial witness, he is the Section Officer of M.C.H, in his evidence, Ex.X.3 is marked, which is equivalent to Ex.B.1. PW.8 is another independent witness examined in support of plaintiff's case.

19. PW.1 has reiterated the plaint averments in his evidence in the chief examination. In the cross-examination, it is admitted that he has paid an amount of

Rs.1 lakh on 03.04.1992 and he has accepted to purchase the property for Rs.4.28 lakhs in the presence of attestors and the second instalment of Rs.1.50 lakhs was agreed to be paid on 20.04.1992, but paid only Rs.1,00,000/- on 11.05.1992. However, it is stated that he has paid the second intalment and possession was delivered. The rate was mentioned as Rs.1,712/- per square yard, but it is not incorporated in the agreement. PW.1 further stated that actually property including the mulgi is 220 square yards and the area as shown in Ex.A.1 was not found at the spot. Accordingly, he asked the defendant to get the land surveyed and to execute the registered sale deed in respect of 250 square yards. The defendant was not prepared for sitting and discussions, as such he is compelled to file the suit.

20. In further cross-examination, PW.1 has stated that the terms and conditions as in Ex.A.1 were decided and agreed at the house of defendant and Ex.A.1 was got typed by the defendant. Mr. Babu Miya and Moin Miya were the attesting witnesses to Ex.A.1. Shaik Jan, Shaik

Mahbool and two other persons mentioned in the chief examination were not the attestors and that he will not examine the attesting witnesses. He admitted that Ex.A.2 is also attested by Babu Miya and Moin Miya and Ex.A.3 is attested by one Naseeruddin and another.

21. It is pertinent to note that PW.1 has admitted that as per second clause of Ex.A.1, the second instalment of Rs.1.50 lakhs is payable on or before 20.04.1992 and it is binding on him. Under Ex.A.3 he has only paid Rs.1 lakh on 11.05.1992 against Rs.1,50,000/- of the second instalment on or before 20.04.1992. PW.1 further admitted that a total consideration is agreed at Rs.4.28 lakhs and he has not given any notice from the date of Ex.A.1, till the date of filing of the suit expressing that he is ready and willing to pay the balance sale consideration. He has admitted that he is in possession of Ex.A.1 and after Ex.A.1 till filing of the suit he has not protested about the absence of recitals in Ex.A.1 regarding the oral agreement to share the stamp duty and registration charges and also with regard to valuation of extent and proportionate

deduction or increase of the cost of land. PW.1 has categorically stated that the terms and conditions of Ex.A.1 are binding on him. He has not filed any document to show that he was ready and willing to pay the balance sale consideration of second instalment as agreed to on or before 20.04.1992. PW.1 further stated that in the Ex.B.1-sanctioned plan, the extent of suit property mentioned as 250 square yards and it was given to him when he paid Rs.1 lakh on the date of Ex.A.1. The witness stated that he cannot give the correct date of dispossession from the suit property, but it may be about 20.05.1992 and he never gave any notice till filing of the suit expressing his readiness and willingness to pay the balance sale consideration and to obtain sale deed and he did not agitate by issuing notice stating that the agreed land is less than 250 square yards or that the land was less than 250 square yards at the spot.

22. PW.1 further stated that it was agreed to deliver the possession after second instalment of Rs.1.50 lakhs, but he has only paid Rs.1 lakh as second instalment, that

too after due date. The witness further admitted that as per the terms of Ex.A.1 in case of failure in payment instalments, the defendant is entitled for forfeiture of 1/4th of the sale consideration, as such the defendant is entitled for forfeiture of Rs.1,07,000/- being the 1/4th of sale consideration, but stated that even now he is ready and willing to pay the balance sale consideration to the defendant. He has categorically stated that he does not know the date and dispossession, he did not give any report to the police about his alleged dispossession and also he did not ask the defendant for refund of the amount. He does not have any documents to show that he was in possession of the suit schedule property at any point of time.

23. PW.2 is Sri Mohd. Nazruddin in his evidence in chief examination supported the evidence of PW.1. However, in the cross-examination, the witness stated that though he was present at the time of agreement of sale, he does not remember on what date the Ex.A.1 was executed, but the plaintiff has told him that he has paid Rs.1 lakh

and not Rs.1.50 lakh and discussion with regard to the land being less than 250 square yards took place between the parties, but he cannot give the date, month or the year of said discussion and further stated that he is unable to give the date, month or the year when the local people questioned defendant as to dispossession of the plaintiff from the suit schedule property.

24. PW.3, Mohd. Shaik Imam, he is the Junior Planning Officer in Quli Qutub Sha Urban Development Authority. In his evidence, Exs.A.14 to A.17 documents are marked. This witness stated that road widening has taken place from Asifnagar to Tappachaputra via Malaimpet and Ex.A.14 is the proceedings issued by the Chief Planning Officer. Ex.A.15 and A.16 are the certified copies of the plans showing the effected area. Ex.A.17 is the certified copy of Road Development Plan. In the cross-examination, the witness has stated that he was present in the court hall at the time of examination of PW.2. He has not produced any authorization letter authorizing him to give evidence and fairly admitted that he has not

authorized by his Department for giving evidence in this suit. He has explained that Ex.A.16 bears his signature and he was not authorized by the Department for preparing Ex.A.16 plan and it is not part of official record and his Chief Panning Officer has not instructed him to depose or give evidence in respect of suit schedule property.

25. PW.4-Sri V.Y.B.N. Chary is the surveyor accompanied the Advocate Commissioner. He has stated that on two occasions he has surveyed the suit property. Exs.C.1 and C.2 are the plans. Further stated that excluding the effected area, the suit property comes to 224 square yards + 65 square yards and explained that 65 square yards is the effected area. In the cross-examination, this witness stated that this 65 square yards is intervened by the road and mulgi and he has shown the effected area in Ex.C.1 without any basis for the same and he has not seen the document in the custody of concerned authorities to show that the measurement of road mentioned by him are correct and he has also not asked the authorities to

produce relevant documents as to extent covered by road widening.

26. PW.5 is the learned Advocate Commissioner. In his evidence, Exs.C.3-report and C.4-surveyor report are filed. In the cross-examination, this witness has stated that he has filed Exs.C.1 and C.2. They are prepared by surveyor and he was permitted to take the technical assistance, accordingly, surveyor has measured the land. He does not remember whether he gave any document to the surveyor. He admitted that his observations in Ex.C.1 with regard to effected area is based only on the sketch and the report of the surveyor and it is not substantiated by any other document and that actually there is no warrant authorizing him by the court to measure the land, but it was only as per the work memos he got the land measured.

27. PW.7 is the crucial witness, he is the concerned Section Officer in the M.C.H. He is in-charge of Circle No.4, Malaimpet, Asifnagar Road, Hyderabad. He spoken through about the permission accorded along with the plan in favour of the defendant on 23.03.1989. The witness stated

that while according permission, the MCH has deleted some portion as effected in road widening, it is 37.3 square yards as in Ex.X.3. In the cross-examination, the witness has stated that the land covered by plan is 254.7 square yards and this is the area in exclusion of the effected area of 37.3 square yards used for road widening and that the total area comes to 292 square yards.

28. PW.8 is one of the attestors of Exs.A.1 and A.2. In the cross-examination, the witness has stated that Exs.A.1 and A.2 bears his signatures as attestor. He has stated that when Rs.1 lakh was paid in the first instance, he was present and signed on Ex.A.1. He has stated that on one day he found the plaintiff in possession of suit mulgi distributing the sweets and thereafter, he never saw the plaintiff in the suit mulgi and again seeing the plaintiff only in the court hall and he has no personal acquaintance with the defendant.

29. On behalf of defendants, the first defendant during his life time himself got examined as DW.1 and reiterated the averments of the written statement filed by

him. In his evidence in the chief examination Exs.B.3 and B.4 documents are marked. Ex.B.3 is the copy of notice sent by him on 20.05.1992, whereas Ex.B.4 is the receipt of Certificate of Posting. This witness stated that as per the agreement the plaintiff has to pay Rs.1.50 lakhs second instalment, but with a delay of 21 days i.e., on 11.05.1992 he has only paid Rs.1 lakh and that he did not pay the remaining balance amount and that the defendant was ready and willing to perform his part of contract and only because of the attitude and conduct of the plaintiff, the defendant could not perform his part of contract.

30. In the cross-examination, the witness-DW.1 has stated that the extent of the land is 250 square yards and it was never agreed as 205 square yards or to sell the same @ Rs.1,712/- or @ Rs.1,800/- per square yard or Rs.1,800/-. He denied all the suggestions given to him with reference to the pleadings in the plaint. He has explained that when the Advocate Commissioner has visited he gave the keys of mulgi and he was present at the time of opening the mulgi and at no point of time

possession of the mulgi was given to the plaintiff. DW.1 has categorically stated that the present extent of land is 250 square yards after deleting the land acquired by the M.C.H. for road widening. The witness has explained that since he was in urgent need of money, it is specifically mentioned as time is the essence of contract and it was agreed to complete the transaction within three months and since the plaintiff failed to perform his obligation within the stipulated time, now he is not willing to execute the sale deed. He denied the suggestion that on 03.07.1992 he has received an amount of Rs.1 lakh with a condition to extend further time. He has categorically admitted that in all he received only Rs.2 lakhs in 1992. The witness has admitted that the documents Exs.A.14 to A.17 and the effected area as 37.3 square yards. Ex.X.1 the proceedings of the administrator for acquiring the land, payment of structural value and Ex.X.2 is the acknowledgement of the receipt. He denied the suggestion that he has received Rs.5,000/- for construction of the compound wall and explained that the Government has only acquired 37 square yards of land and including that land, there is a

total land of 292 square yards. This aspect of evidence of DW.1 is supported by evidence of PW.7, who is the officer in-charge of that area and in whose evidence Ex.X.3 equivalent to Ex.B.1 were marked. DW.1 admitted that he agreed to sell an extent of 250 square yards approximately and he does not know whether the Court Commissioner in his second report has mentioned that the land available is only 224.41 square yards. He has further stated that Ex.A.14 refers to the extent of land acquired by the Government as 37.3 square yards.

31. DW.2 is Mohd. Abbas Ali. He is another attesting witness to Exs.A.1 and A.2, supported the case of defendant on all material aspects. Though he was cross-examined at length, nothing is elicited in support of the plaintiff's case.

32. DW.3-S. Amruth Kumar has stated that he has been running a saloon shop in that area. He knows the defendant. He has supported the evidence of DW.1 on all material aspects. He is not a witness to Ex.A.1. His evidence is only to the effect that the extent of suit

schedule property is about 250 square yards. This witness has stated that he knows that the plaintiff has purchased the suit property, but he is not aware of the agreement of sale etc.

33. DW.4-G. Satyanarayana has stated that the suit premises is consisting of mulgi and open space. The shutter was found to be closed always and that he does not know the plaintiff.

34. On careful appreciation of the oral and documentary evidence discussed above, though the plaintiff has denied the terms mentioned in Ex.A.1, in his evidence in the cross-examination he has categorically admitted each and every term including the time stipulated under Ex.A.1. Nowhere in the entire recitals of Ex.A.1, it is mentioned that the suit property was agreed to be purchased @ Rs.1,712/- or Rs.1,800/- per square yard. In para-1 of Ex.A.1, it is simply mentioned that the total sale consideration agreed to be payable is Rs.4.28 lakhs and that on the date of Ex.A.1, Rs.1 lakh was paid and acknowledged through a separate receipt, which is Ex.A.2.

It is further agreed that the purchaser has to pay additional amount of Rs.1.50 lakhs on 20.04.1992. The plaintiff as PW.1 has categorically admitted that he has to pay the second instalment as agreed to and that only on 11.05.1992 an amount of Rs.1 lakh was paid. The receipt is Ex.A.3.

35. Be it stated that in Ex.A.1 time is mentioned as essence of the contract. In para-3 of Ex.A.1, it is clearly mentioned that the time is stipulated three months from that day for payment of balance sale consideration and obtaining the sale deed and in para-9, it is mentioned that the purchaser shall get the schedule property registered within the stipulated period of three months by paying the balance sale consideration as agreed to and in the event the purchaser fails to pay the balance sale consideration and to get the property registered the amount equivalent to 1/4th of the total consideration paid shall be forfeited by the vendor, as such time is mentioned as essence of the contract.

36. A plain reading of the recitals in Ex.A.1 and the oral evidence of DW.1 clinches the issue to the effect that the defendant was in dire necessity of money and accordingly he offered to sell the suit schedule property for a consideration of Rs.4.28 lakhs and that time was agreed as essence the of the contract. The plaintiff as PW.1 has fairly admitted that he has failed to pay the balance sale consideration including the second instalment as agreed to and that he did not pursue the matter with the defendant, failed to issue any notice from the date of Ex.A.1 till the date of filing of the suit. The plaintiff has disputed the extent of land stating that, it is not more than 205 square yards and in fact, the suit is filed only claiming the suit land to be only 205 square yards. But as per the evidence of surveyor-PW.4, who assisted the leaned Advocate Commissioner, the extent of suit land after deleting 65 square yards of effected area is 224 square yards. However, the learned Advocate Commissioner-PW.5 and the Surveyor-PW.4 have categorically stated that they have no basis to confirm that the effected area is about 65 square yards.

37. In this context, the oral evidence of PW.7, who is the in-charge officer of that area locality gains importance. This witness has spoken through about Ex.B.1 plan which is equivalent to Ex.X.3 and he has clearly stated that the approved plan and the permission was given to the extent of 254.7 square yards and only an extent of 37.3 square yards is covered by road widening. Thus, the oral evidence of PW.7 coupled with the contents of Exs.B.1 and B.2 and Ex.X.3 would establish that the land covered under Ex.A.1 is about 250 square yards only. Nowhere in the recitals in Ex.A.1, it is mentioned that the land covered by it is less than 250 square yards or it has to be measured before execution of registered sale deed. Though the plaintiff has taken a plea that on 03.07.1992 a panchayat was held and that in the said panchayat, the defendant has agreed for execution of another agreement of sale with different terms and conditions and also to get the land measured, no such document is filed and none of the witnesses examined on behalf of the plaintiff have supported this plea.

38. Curiously, no such receipt dated 03.07.1992 as to payment of additional amount of Rs.1 lakh is filed by the plaintiff. Only an amount of Rs.1 lakh was paid on 03.04.1992 and another amount of Rs.1 lakh was paid under Ex.A.3 on 11.05.1992. Though as per the terms of Ex.A.1 the second instalment of Rs.1.50 lakhs has to be paid on 20.04.1992, only an amount of Rs.1 lakh was paid on 11.05.1992. Therefore, the case set up by the plaintiff that he has paid an amount of Rs.1 lakh on 03.07.1992 and that he has also paid an amount of Rs.5,000/- for construction of brick wall etc., is not established.

39. Equally, the case of the plaintiff that he was given possession of the suit land in July, 1992 subsequent to 03.07.1992 and dispossession on 13.07.1992 is also not established with cogent and convincing evidence. The oral evidence of the defendant as DW.1 and the recitals of Ex.A.1 are sufficient to explain the urgency in the matter and accordingly parties with mutual consent have stipulated one of the terms of Ex.A1 as “time is essence of

the contract" and as such incorporated forfeiture clause in Ex.A.1.

40. The learned counsel for the appellant/plaintiff contends that it was mutually agreed between the parties to survey and measure the suit land, thereafter only to go for execution of the sale deed and that there was no delay or latches on the part of the plaintiff at any time in discharging his part of obligation, he was ever willing to perform his part of contract and only in view of the escalation in the price, the defendant has taken a different stand stating that time is essence of the contract and the trial Court failed to appreciate the oral and documentary evidence and that the plaintiff is entitled for specific performance of contract. The learned counsel for the plaintiff has relied on the principles laid in the following decisions:

i) ***A.R. Madana Gopal etc. etc. Vs. Ramnath Publications Pvt. Ltd. And another***[1];

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[1] 2021 (3) ALD 40 (SC)

ii) ***M/s. Hyderabad Potteries Pvt. Ltd. Vs. Debbad Visweswara Rao and others***[2];

iii) ***Ferrodous Estates (Pvt.) Ltd. Vs. P. Gopirathnam (Dead) and others***[3].

41. *Per contra*, the learned counsel for the defendants strenuously contends that it was mutually agreed between the plaintiff and defendant No.1 under Ex.A.1 as time is the essence of the contract and in view of the urgency, the defendant No.1 has agreed to sell the suit property to the plaintiff, as such forfeiture clause was also incurred in Ex.A.1. The plaintiff has failed to perform his part of contract and there is no evidence to show that the plaintiff was ready and willing to perform his part of contract and that he is not entitled for specific performance of the same. The trial Court on careful appreciation of oral and documentary evidence available has directed for return/refund of the advance amount of Rs.2 lakhs and in compliance of such direction, the defendant has also deposited the said amount of Rs.2 lakhs before the trial

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[2] 2021 (5) ALT 209 (DB)
[3] 2021 (1) ALD 4 (SC)

Court. The plaintiff is not entitled for specific performance of the contract as there are latches on his part and relied on the principles laid in the following decisions:

i) ***K.S. Vidyanadam and others Vs. Vairavan***[4];

ii) ***Kamal Kumar Vs. Premlata Joshi & Others***[5];

iii) ***Baddam Pratapa Reddy Vs. Chennadi Jalapthi Reddy and another***[6];

iv) ***Jugraj Singh and another Vs. Labh Singh and others***[7];

v) ***U.N. Krishnamurthy (since deceased) through LRs Vs. A.M. Krishnamurthy***[8].

42. In ***A.R. Madana Gopal***'s case (1st supra), the Hon'ble Apex Court was dealing with Sections 16 and 20 of the Specific Relief Act held that delay or latches by itself is not a ground to dismiss the suit for specific performance and the escalation of price of the land cannot be made a sole ground to deny the relief of specific performance. The relevant para-14 is adverted to as under:

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[4] (1997) 3 SCC 1
[5] in Civil Appeal No.4453 of 2009 of the Hon'ble Supreme Court
[6] AIR 2008 (NOC) 2644 (A.P.)
[7] AIR 1995 SC 945
[8] 2022 (4) ALT 77 (SC)

> "14. A suit for specific performance cannot be dismissed on the sole ground of delay or laches. However, an exception to this rule is where an immovable property is to be sold within a certain period, time being of the essence, and it is not found that owing to some default on the part of the plaintiff, the sale could not take place within the stipulated time. Once a suit for specific performance has been filed, any delay as a result of the Court process cannot be put against the plaintiff as a matter of law in decreeing specific performance. However, it is within the discretion of the Court, regard being had to the facts of each case, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in its favour even at the appellate stage 6. We are in agreement with the Appellants that they did not file the civil suits immediately after the disposal of the Writ Petition in 1998 due to the pendency of Writ Appeals. Escalation of prices cannot be the sole ground to deny specific performance 7. We are of the considered view that the Respondents are not entitled for any additional amount as 90 per cent of the sale consideration was paid by the Appellants before 1994. It is not necessary for us to deal with the submission of the Appellants regarding the applicability of the amendment to the Specific Relief Act, 1963, in view of the conclusion that we have reached in favour of the Appellants."

43. In ***Hyderabad Potteries Pvt. Ltd.***'s case (2nd supra), a Division Bench of this Court while dealing with the question as to whether in a suit for specific

performance, the plaintiff is entitled for specific performance held in paras-59 and 60 as under:

> "59. **Point No.5: Whether the trial court is right in not exercising its discretion for granting relief of specific performance?**
>
> Since the findings on the aspects of possession of plaintiff over the suit schedule property, payments made by the plaintiff within the period of three months as per suit agreements under Exs.A4 and A5 and legal notice dated 08.02.2000 being anti date, are rendered in favour of the plaintiff, the finding of the trial court that the plaintiff is not entitled for decree for specific performance on the ground that plaintiff has taken false plea is erroneous, as such, discretion for grant of specific performance should have been exercised in favour of the plaintiff.
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> 60. The conduct of the defendants 6 & 8 in a suit for specific performance is also to be considered. In the present case, the defendants stated that they have obtained documents as per clause 3 of the suit agreements. Though it is averred in the written statements and also in the chief examination that they have obtained all the requisite permissions/certificates as per Clause 3 of the suit agreements, but in the cross examination, defendant No.6 as D.W.1 and D.W.2, who is husband of defendant No.6-D.W.1 admitted that no such certificates have been obtained. The finding of the trial court is also to the same affect, which finding is not attacked by the respondents 6 & 8 herein in the present appeal. The said aspect was not considered by the trial

Court in proper perspective. The Hon'ble Apex Court in ***Silvey & others v. Arun Verghese*** [(2008) 11 SCC 45] held that the conduct of the defendants in taking false pleas is also to be taken into account while decreeing or denying the specific performance. Mere delay by itself, without more, cannot be the sole factor to deny specific performance filed within limitation and cannot be dismissed on the sole ground of delay and laches. Any delay as a result of the Court process cannot be put against the plaintiff as a matter of law in decreeing the Specific Performance. Defendants 6 & 8 were held to have taken up dishonest pleas and also held to have been in breach of a solemn Agreement. He who asks for equity must do equity. Given the conduct of the plaintiff in this case who is ready and willing to perform its part of the contract, the discretion must be exercised in his favour. Though learned counsel for the defendants relied on the judgments reported in ***Lourdu Mari David v. Louis Chinnaya Arogiaswamy*** [1996) 5 Supreme Court Cases 589] and ***Malamma v. Permanand*** [2003 SCC Online AP 919: (2004) 1 ALT 537], but the same are not applicable to the facts and circumstances of the case on hand. It is the defendants, who took false please in the written statements as well as in the chief examinations that they have not received sale consideration and also that they have obtained necessary permissions/ certificates from the concerned departments. The point is answered accordingly in favour of plaintiff."

44. In ***Ferrodous Estates (Pvt.) Ltd.***'s case (3rd supra), the Hon'ble Apex Court was dealing with Section 20

of Specific Relief Act, where the defendant has failed to perform a condition incorporated in the agreement. But, in the instant case, as per Ex.A.1 and the oral evidence available on record, there is no such condition on the part of the defendant to measure or to get the suit land surveyed before execution of registered sale deed. But the time was only mentioned as essence of the contract in view of the urgency. Para-31 of the judgment is extracted as under:

> "31. The resultant position in law is that a suit for specific performance filed within limitation cannot be dismissed on the sole ground of delay or laches. However, an exception to this rule is where immovable property is to be sold within a certain period, time being of the essence, and it is found that owing to some default on the part of the plaintiff, the sale could not take place within the stipulated time. Once a suit for specific performance has been filed, any delay as a result of the court process cannot be put against the plaintiff as a matter of law in decreeing specific performance.
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> However, it is within the discretion of the Court, regard being had to the facts of each case, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in its favour, even at the appellate stage."

45. Be it stated that mere escalation of prices itself is not a ground in the case on hand for denying the relief of specific performance in favour of the plaintiff. There are latches on the part of the plaintiff and he has failed to pay the amount as agreed to. Except payment of Rs.1 lakh on 03.04.1992, no other amount was paid as per the agreed terms. As per Ex.A.1, Rs.1,50,000/- has to be paid on or before 20.04.1992, but the plaintiff has only paid Rs.1,00,000/- on 11.05.1992. It is pertinent to note that the plaintiff having pleaded the payment of Rs.1 lakh on 03.07.1992 failed to establish the same. Admittedly, the plaintiff has not demanded or agitated by issuing a notice for specific performance of Ex.A.1 right from the date of Ex.A.1 till the date of filing the suit. The plaintiff has also pleaded that there was an agreement orally for measurement of the land and that possession was also delivered to him, but there is no such cogent and convincing evidence to that effect.

46. Though it has been consistently held by the Courts in India that in case of agreement of sale relating to

the immovable property, time is not the essence of contract, unless specifically provided to that effect, it is well-known in case of urban properties, their prices have been going sharply. Considering the said fact, the Hon'ble Supreme Court in ***K.S. Vidyanadam***'s case (4th supra) cited by the learned counsel for the defendant has categorically held that where in the agreement time is specifically mentioned as essence of the contract, considering the urgent need of the parties, the Courts were advised to bear in mind that when the parties prescribed time period for taking certain steps or for completion of the transaction that must have been significance and the time period prescribed cannot be ignored.

47. In ***Kamal Kumar***'s case (5th supra), the Hon'ble Supreme Court has allowed the essentials for grant of discretionary and equitable relief of specific performance. Para-10 of the judgment is adverted to as under:

> "10. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance,

> are First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property; Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds."

48. In ***Baddam Pratapa Reddy***'s case (6th supra), a learned single Judge of this Court held that if a suit is filed for specific performance of the agreement of sale without making prior demand by way of a notice on the defendant vendor. Such a suit is not in compliance with Form Nos.47 and 48 and therefore liable to be dismissed. In the present case also, as admitted by the plaintiff as PW.1 he has not agitated or requested the defendant for execution of

registered sale deed in terms of Ex.A.1. Admittedly, he has not issued any notice from the date of Ex.A.1 till the date of filing of the suit.

49. In ***Jugraj Singh***'s case (7th supra), the Hon'ble Supreme Court in para-3 dealt with Section 16 (c) of the Specific Relief Act and held that the continuous of readiness and willingness at all stages from the date of the agreement till the date of hearing of the suit need to be proved by the plaintiff for specific performance of his part of contract, for which the substance of the matter and surrounding circumstances including the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract.

50. Here in the instant case, as admitted by the plaintiff, he has only paid Rs.1 lakh on 03.04.1992 as per the terms of agreement. Thereafter, he has failed to perform his part of obligation. Though the time was mentioned as essence of contract, he did not pay the second instalment of Rs.1,50,000/- as agreed to on

20.04.1992, but only an amount of Rs.1 lakh was paid on 11.05.1992. Though it is alleged by him that on 03.07.1992 he has paid another amount of Rs.1 lakh, there is no such oral and documentary evidence to that effect. Thus, viewed from any angle, the plaintiff was not able to prove readiness and willingness either by his oral evidence or with the surrounding circumstances including his conduct.

51. In ***U.N. Krishnamurthy***'s case (8th supra), the Hon'ble Supreme Court while dealing with the Section 16 (c) of the Specific Relief Act - readiness and willingness, held that the plaintiff has to prove that all along and till the date of final decision in the suit, he was ready and willing to perform his part of contract and it is the bounden duty of the plaintiff to prove his readiness and willingness by adducing relevant evidence.

52. In the case on hand, as stated in the preceding paragraphs, under Ex.A.1 time was mentioned as essence of the contract. The plaintiff has failed to perform his part of obligation within the time specified, except payment of

advance amount of Rs.1 lakh on 03.04.1992. Though he is expected to pay the second instalment of Rs.1.50 lakhs on 20.04.1992, he has paid only an amount of Rs.1 lakh on 11.05.1992. Further having pleaded that he has paid an amount of Rs.1 lakh on 03.07.1992, failed to establish the same with cogent or convincing evidence. Further as per the recitals in Ex.A.1, 03.07.1992 is the date on which the plaintiff has to obtain the registered sale deed by paying the entire sale consideration. Be it stated that no condition is stipulated in Ex.A.1 either as to measurement of the land by the defendant before execution of sale deed or that the price is mentioned as per square yard, but mentioned as lumpsum amount.

53. That apart, there is no evidence on record to show that the plaintiff was ever ready and willing to perform his part of contract till date. The continuous readiness and willingness of the plaintiff right from the date of Ex.A.1 till the date of judgment in the original suit is not established. No proof of plaintiff having the balance sale consideration with him is filed. None of the witnesses

examined on behalf of the plaintiff have spoken through about his readiness and willingness to perform his part of obligation.

54. On a careful scanning of the oral and documentary evidence adduced on behalf of plaintiff, the entire thrust of the plaintiff appears to be that the extent of the land is not 250 square yards and it is less than 250 square yards, the plaintiff has agreed to get it measured before execution of sale deed and that it was agreed to be sold @ Rs.1,712/- per square yard or Rs.1,800/- per square yard and not at lumpsum amount of Rs.4.28 lakhs for the entire property. But, the plaintiff has failed to establish the case set up by him. There is no acceptable cogent and convincing evidence to the effect that time was not treated as essence of contract by both the parties or that the other terms and conditions as pleaded by the plaintiff in his plaint were orally agreed between the parties or that time was extended with the mutual consent of both the parties or that the extent of land covered by Ex.A.1 is less than 250 square yards.

55. On the other hand, the oral evidence of concerned officer-PW.7 clinches the issue. He has categorically stated that the land covered by road widening is only 37 square yards as per Ex.B.1 and Ex.X.3 and that the remaining land is 254.7 square yards and that the total extent of land is 292 square yards. This evidence of PW.7 who is the concerned officer clinches the entire issue. When this evidence is read with the recitals of Ex.A.1 and the oral evidence of PW.1 and DW.1, there is no ambiguity in the terms of contract and the parties having agreed in unequivocal terms that time is essence of the contract and that the sale deed has to be executed within three months from the date of Ex.A.1 dated 03.04.1992 and it has to be executed by 03.07.1992, but by that date the plaintiff has not paid even the second instalment amount as agreed to and only paid Rs.1 lakh on 11.05.1992, though pleaded as to the payment of another amount of Rs.1 lakh on 03.07.1992, no such oral and documentary evidence is adduced to that effect.

56. Therefore, viewed from any angle, the plaintiff with the oral and documentary evidence available on record is not able to establish that he is ready and willing to perform his part of contract, as such he is not entitled for discretionary and equitable relief of the specific performance of Ex.A.1. There is ample evidence on record to show that time stipulated in Ex.A.1 is essence of the contract. Therefore, while considering the law laid down in the decisions relied upon by the learned counsel for the defendant, I hold that since the property is situated in Hyderabad city, the defendant was in urgent need of money, time was treated as essence of the contract. Further, the plaintiff has failed to pay the instalments as per the terms agreed to and also failed to obtain the sale deed within the stipulated time. He has failed to issue notice before filing the suit even after 03.07.1992 and having pleaded that he has paid some more amount, apart from the amount as mentioned in Exs.A.2 and A.3, failed to prove the same with cogent and convincing evidence. Therefore, the point Nos.(i) to (iii) are answered against the plaintiff and in favour of the defendants.

57. In the result, the appeal suit filed by the plaintiff is dismissed, confirming the judgment and decree dated 20.02.2002 in O.S.No.858 of 1992 on the file of the learned VII Senior Civil Judge, City Civil Court at Hyderabad, in its entirety. However, in the circumstances of the case, there shall be no order as to costs.

As a sequel, miscellaneous applications, if any pending in this appeal, shall stand closed.

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A. VENKATESHWARA REDDY, J.

Date: 10.01.2023
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