



OSA.Nos.166 & 167/2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on 11.09.2024

Delivered on 04.10.2024

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE K.RAJASEKAR

OSA.Nos.166 & 167/2021 & CMP.Nos.7330 & 7350/2021

OSA.No.166/2021:-

Mrs.Nafisa Ismail Dhariwala

... Appellant/Defendant

Vs.

- 1.Taher Bhai Sheikh Abbas Bhai Deesawala
- 2.Saifuddin Bhai Sheikh Abbas Bhai Deesawala
- 3.Iqbal Bhai Abba Sheikh Abbas Bhai Deesawala
- 4.Safu Bai
- 5.Nafisa Bai
- 6.Alifya Bai

... Respondents/Plaintiffs

Prayer : Original Side Appeal filed under Clause 15 of Letters Patent read with Order 36 Rule 1 of High Court Original Side Rules against the judgment and decree passed in CS.No.222/2007 dated 18.11.2019.



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OSA.Nos.166 & 167/2021

For Appellant : Mr.R.Thiyagarajan
For R1 to R6 : Mr.S.R.Raghunathan

OSA.No.167/2021:-

1.Nafisa Ismail Dhariwala
2.M/s.Polyhose India Private Limited
rep.by its Joint Director Mr.Y.J.Shamsudeen ... Appellants

Vs.

1.Taher Bhai Sheikh Abbas Bhai Deesawala
2.Saifuddin Bhai Sheikh Abbas Bhai Deesawala
3.Iqbal Bhai Abba Sheikh Abbas Bhai Deesawala
4.Safu Bai
5.Nafisa Bai
6.Alifya Bai
7.Salma Bai
8.Ali Asger Siraj
9.Maria Bai
10.Munira Bai
11.Rasheeda Bai
12.Nafeesa Bai
13.Zarah Bai
14.Husainy Bhai Mulla Akbarli Deesawala ... Respondents

Prayer : Original Side Appeal filed under Clause 15 of Letters Patent read with Order 36 Rule 1 of High Court Original Side Rules against the judgment and decree passed in CS.No.121/2009 dated 18.11.2019.



For Appellants	: Mr.R.Thiyagarajan
For R1 to R6	: Mr.S.R.Raghunathan
RR7 to 14	: Vacated

COMMON JUDGMENT

S.S.SUNDAR, J.,

- (1)The appeal in OSA.No.166/2021 is against the judgment and decree dated 18.11.2019 in CS.No.222/2007 filed under the Original Side jurisdiction of this Court by the respondents for partition and separate possession among other reliefs as against the appellant.
- (2)The appeal in OSA.No.167/2021 is against the judgment and decree dated 18.11.2019 in CS.No.121/2009 filed by the appellants for specific performance of an Agreement of Sale by directing defendants 1 to 6 to execute the Sale Deed in respect of 1/3rd of undivided share of the suit property and for granting a decree for a sum of Rs.1,08,00,000/- as damages for the loss of opportunity due to the non performance of the Agreement by the defendants 1 to 6.
- (3)The case of the respondents in CS.No.222/2007 is that the suit property measuring an extent of 15 grounds 811 sq.ft., bearing Door No.37/1, West



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Mada Church Road, Royapuram comprised in RS.No.97/4, 4th Tondiarpet Taluk, Chennai District, originally belonged to a Firm M/s.Goolamally & Co., consisting of one Akbarally Esufally Visnagarwala and three others as partners. It is stated in the plaint that by subsequent arrangement each partner was given 1/4th share. It is stated further that in an oral partition among the legal heirs of all the four persons on 01.03.1972, which was subsequently recorded on 16.03.1972, the suit property was allotted to Abbasbahi Mulla Akbarali Deesawala, Siraj Bhai Mulla Akbarali Deesawala and Husasiny Bhai Mulla Akbarali Deesawala.

(4) Respondents 1 to 6 are the legal heirs of Akbarli Deesawala who died on 01.08.1989. In the year 2000, respondents 1 to 6 and other sharers who are entitled to 2/3rd share in the suit property, entered into a Memorandum of Understanding with the appellant for joint development. It is admitted that the Joint Venture Agreement for development and construction of a superstructure of built up area of 30,000 sq.ft. did not go through.



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(5) It is also admitted that without the consent of respondents 1 to 6, the co-sharers of 2/3rd share who are Siraj Bhai Mulla Akbarali Deesawala and Husasiny Bhai Mulla Akbarali Deesawala, sold their 2/3rd share in the scheduled property to the appellant in OSA.No.166/2021 by two Sale Deeds dated 22.07.2005 bearing Doc.Nos.2293 of 2005 and 2294 of 2005 for a total consideration of Rs.92 lakhs. Therefore, in the plaint in CS.No.222/2007, the plaintiffs/respondents 1 to 6 contended that they have a right of pre-emption to purchase the shares of other sharers and the respondents are willing to purchase the 2/3rd share of other two sharers. Therefore, the plaintiffs filed the suit in CS.No.222/2007 for partition and separate possession of their 1/3rd share in the suit property by metes and bounds and for a direction to the appellant/defendant to sell her 2/3rd share purchased by her under the two Sales Deeds. The plaintiffs have also prayed for permanent injunction restraining the defendant from in any manner interfering with the peaceful possession and enjoyment of the suit property by the plaintiffs by transferring 2/3rd share of suit schedule property to anyone. Later, the respondents in OSA.No.166/2021 gave up their prayer based on their alleged right of pre-emption.



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(6)The appellants in OSA.No.167/2021 as plaintiffs, filed the suit in CS.No.121/2009 for specific performance by directing the respondents to execute the Sale Deed in respect of 1/3rd of undivided share of suit property in favour of the appellants and to grant a decree of a recovery of a sum of Rs.1,08,00,000/- as damages for the loss of opportunity due to the non-performance of Agreement by the defendants/respondents 1 to 6.

(7)The case of the appellants in the plaint in CS.No.121/2009 is as follows.

The suit property measuring an extent of 15 grounds 806 sq.ft., comprised in S.No.97/4 fell to the share of Abbas Bhai Akbar Deesawala ; Siraj Bhai Mulla Akbarali Deesawala and Hussainy Bhai Mulla Akbarali Deesawala. Defendants 1 to 6 are the legal heirs of Abbas Bhai Akbarali Deesawala, one of the co-owners of property having 1/3rd share. The 1st respondent represented to the 2nd appellant that he is the Power of Attorney agent for all the defendants in respect of suit 'B' schedule property and entered into an Agreement with second plaintiff for joint development of the suit 'A' schedule property along with the other co-owners of the property. Thereafter, the defendants modified the Joint Development Agreement as one for outright sale and the second plaintiff had agreed for outright sale.



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In furtherance of the agreement, defendants 1 to 6 and other co-owners had delivered possession of the entire suit 'A' schedule property to the 1st plaintiff and therefore, the plaintiffs/appellants are in physical possession of the entire suit 'A' schedule property.

(8) The 1st plaintiff was always ready and willing to purchase the property and had purchased 2/3rd share from the other two co-owners under two Sale Deeds dated 22.07.2005. Though the 1st plaintiff was always ready and willing to purchase the remaining 1/3rd undivided share which was owned by defendants 1 to 6, the defendants did not come forward to execute sale. Even on the date of agreement dated 20.04.2000 [Joint Development Agreement], the entire extent of 15 grounds and odd was handed over to the first plaintiff. The 1st plaintiff was always ready and willing to purchase the suit 'B' schedule property which is 1/3rd of the total property, namely, the suit 'A' Schedule and though the 1st plaintiff, had the financial capacity to purchase the suit 'B' schedule property, she was unable to get the Sale Deed from defendants. Non performance of contract by defendants 1 to 6 is unjustified and illegal and hence, the plaintiffs were entitled to the relief of specific performance.



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(9) Since the 1st plaintiff had planned for a residential development along with the 2nd plaintiff, due to breach of contract by defendants 1 to 6, the plaintiffs/appellants had suffered a loss of Rs.1.08 Crores and hence, 1st plaintiff is entitled to damages for the loss of opportunity due to non performance of agreement by defendants 1 to 6. With the above pleadings, the appellants in OSA.No.167/2021 prayed for specific performance by directing the respondents 1 to 6 to execute suit 'B' schedule property which is described as 1/3rd of undivided share of a total extent of 15 grounds and 811 sq.ft., and for damages as stated supra.

(10) In the written statement filed by appellants in the suit for partition, the appellants admitted the title of plaintiffs' 1/3rd share in the suit 'A' schedule property which is also described as schedule "a" in the plaint in CS.No.121/2009. It is admitted that the 1st plaintiff in CS.No.121/2009 who is the sole defendant in CS.No.222/2007 and all the other co-owners of the suit property entered into a Joint Development Agreement. The defendant in CS.No.222/2007 came with a specific plea that subsequently, the parties to the Joint Development Agreement modified the agreement as one of outright sale. Therefore, identical contentions



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are raised by the defendant in the suit for partition as stated in the plaint in the suit for specific performance. In other words, in both the suits, the plea taken by the appellant was only by relying upon the Joint Development Agreement and by a subsequent oral agreement of sale. During trial, the plaintiffs in CS.No.222/2007 gave up their relief as regards right of pre-emption.

(11)The Trial Court framed the following issues in the respective suits:-

[a]Issues framed in CS.No.222/2007:-

- (1)Whether the plaintiffs are entitled to 1/3rd share in the plaint schedule property?
- (2)Whether the plaintiffs have a right of pre-emption purchase of 2/3rd share in the plaint schedule property as per the personal law applicable to them?
- (3)Whether the sale deed dated 22.07.2005 executed in favour of the defendant shall not be binding upon the plaintiffs?
- (4)Whether the defendant shall be bound by the right of pre-emptive purchase claimed by the plaintiffs?
- (5)Whether the plaintiffs are entitled to be relief of partition and separate possession?
- (6)Whether the plaintiffs are entitled to a decree against the defendant directing the defendant to sell the 2/3 shares purchased



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by the defendant under document Nos.2293/2005 and 2294/2005 for the same price which the defendant paid to her vendors?

(7) Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for?

(8) To what other reliefs the plaintiffs are entitled to?

[b]Issues framed in CS.No.121/2009:-

- (1) Whether there was any concluded agreement for the sale of the 1/3rd share of the defendants 1 to 6 in plaint 'A' schedule property as claimed by the plaintiffs?
- (2) Whether the plaintiff has come to the Court with clean hands by not furnishing the particulars such as date of agreement, nature of agreement, conditions incorporated in the agreement, advance paid and the price agreed to between the parties?
- (3) Whether the plaintiffs had been and continue to be ready and willing to perform their part of the agreement?
- (4) Whether the plaintiffs are entitled to the relief of specific performance directing defendants 1 to 6 to execute a sale deed in favour of the plaintiffs conveying their 1/3rd undivided share in the suit property?
- (5) Whether the plaintiffs are entitled to a decree for recovery of a sum of Rs.1,08,00,000/- as damages for the loss allegedly caused to the plaintiffs due to the non performance of the agreement by defendants 1 to 6?



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(6) Whether the plaintiffs are entitled to any relief against defendants 7 to

(7) Whether the defendants 7 to 14 are entitled to exemplary cost?

(12) After considering the pleadings and evidence both oral and documentary, the learned Single Judge found that the plaintiffs in CS.No.222/2007 are the absolute owners entitled to 1/3rd share in the suit property which is described in the plaint in CS.No.121/2009. Since the plaintiffs/respondents gave up the relief on the basis of right of pre-emption, the suit for partition is decreed by holding that the plaintiffs are entitled to decree for partition and separate possession of their 1/3rd share by metes and bounds.

(13) In the suit for specific performance, the learned Trial Judge held that the plaintiffs are unable to prove any agreement subsequent to the Joint Development Agreement. In the absence of any proof to show that there was any agreement for outright sale, the learned Judge held that the plaintiffs in CS.No.121/2009 are not entitled to any relief. Considering the conduct of the plaintiffs/appellants, the learned Single Judge held that the plaintiffs are not entitled to any discretionary relief. As regards



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the claim for damages, the learned Judge held that in the absence of any development of residential or commercial complex, the plaintiffs in the suit for specific performance is not entitled for any relief towards damages. Therefore, the suit in CS.No.121/2009 in toto was dismissed whereas the suit in CS.No.222/2007 was partly allowed by granting a decree for partition of 1/3rd share of respondents in respect of the suit property vide common judgment dated 18.11.2019.

(14) Aggrieved by the common judgment of the learned Single Judge dated 18.11.2019, the defendant in CS.No.222/2007 have filed OSA.No.166/2021 and the plaintiffs in CS.No.121/2009 have filed OSA.No.167/2021.

(15) Mr.R.Thiyagarajan, learned counsel appearing for the appellants in both the appeals raised the following grounds:-

- (a) The learned Single Judge failed to consider the entire pleadings and evidence in a proper perspective which would show that the Joint Development Agreement was later converted as an outright purchase.



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- (b) The plaintiffs in the suit for specific performance were always ready and willing to perform their part of the agreement to purchase the suit property from the defendants and that the defendants had taken a sum of Rs.15 lakhs as advance which was appropriated towards part of consideration for the sale.
- (c) The plaintiffs who had purchased 2/3rd shares from the other sharers had necessary funds for purchasing the remaining 1/3rd from the defendants.
- (d) The learned Judge failed to consider the admitted facts and the probabilities of the case. When possession of the entire property was handed over to the plaintiffs at the time of Joint Development Agreement, the learned Judge failed to appreciate that the defendants have committed breach of agreement and therefore, the appellants are entitled to specific performance of the agreement and the defendants are liable to compensate the plaintiffs for damages as the plaintiffs had suffered on account of failure to honour the agreement.



(e) The appellants who were put in possession of the property and who have put up a superstructure in the suit property pursuant to the Joint Development Agreement and sale, those aspects of the case were not considered by the learned Judge while refusing to grant specific performance.

(f) The respondents cannot seek partition by metes and bounds as the appellants have a right to purchase the respondents' 1/3rd undivided share in the suit property. When the Joint Development Agreement which was entered into in the year 2000 is not disputed by the respondents, the learned counsel for the appellants submitted that the relief of specific performance cannot be denied as the appellants in furtherance of the sale agreement were in possession of the property for development.

(16) In view of the admitted facts, the only issue that arise for consideration in OSA.No.166/2021 is *whether the respondents are entitled to seek partition and separate possession of their 1/3rd share in the suit schedule property.*



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(17) Since the right of pre-emption is given up by the respondents even before the Trial Court, this Court need not consider the other issues framed by the learned Judge. Since the suit for specific performance is independent and the 1/3rd right of plaintiff in CS.No.222/2007 is admitted, this Court finds that there is no impediment for declaring the right of respondents to seek partition and hence, this issue is answered in favour of the respondents/plaintiffs in CS.No.222/2007. Consequently, the plaintiffs are entitled to separate possession of 1/3rd share in the suit property. Hence, **the judgment and decree in CS.No.222/2007 are confirmed and the appeal in OSA.No.166/2021 stands dismissed.**

(18) Considering the pleadings, documents and the arguments of the learned counsel appearing on either side, this Court frames the following points for consideration in OSA.No.167/2021:-

- a) Whether there is any concluded contract of sale between the plaintiffs and defendants 1 to 6 in the suit in CS.No.121/2009?*
- b) Whether the plaintiffs in CS.No.121/2009 are always ready and willing to perform their part of the Agreement?*
- c) Whether the suit for specific performance is liable to be*



dismissed on the ground that the suit is barred by limitation?

and

d) Whether the plaintiffs are entitled to equitable relief of specific performance?

POINT [a]:-

(19) This Court is unable to countenance any of the submissions of the learned counsel for the appellants. There is no dispute with regard to the title of 1/3rd share of the suit property which is the subject matter of both the suits. Even though the Joint Development Agreement is admitted by the respondents 1 to 6 in CS.No.222/2007, the alleged Sale Agreement is specifically denied by the respondents in the written statement. The Memorandum of Understanding which is marked as Ex.P1 in CS.No.121/2009 does not give any indication about any Sale Agreement. The terms of Joint Development Agreement requires some explanation from the plaintiffs in CS.No.121/2009 who pleaded that Joint Development Agreement was converted as outright purchase. As per the terms of Memorandum of Understanding for Joint Development, only a sum of Rs.5 lakhs was paid by a cheque dated 10.03.2000. The payment



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of further consideration was not even pleaded in the plaint. As per the Joint Development Agreement, the appellants are required to complete the project within a period of 48 months from the date of plan sanction. Even though the idea of Joint Development was dropped, the terms of oral agreement of sale is not set out in the entire plaint. In a suit for specific performance, there must be an enforceable agreement between the parties as to the essential terms of bargaining. It is quite surprising to note that the consideration for the Sale Agreement in respect of the suit property is not even stated in the plaint.

(20) Since the suit for specific performance is valued for a sum of Rs.50 lakhs, learned counsel for the appellants now explains that the total sale consideration is Rs.50 lakhs for 1/3rd share of the respondents. The Joint Development Agreement [Ex.P1 filed in CS.No.121/2009] is dated 20.04.2000. The Power of Attorney Deed was also executed on the same day vide Ex.P2 marked in CS.No.121/2009. The Power of Attorney Deed dated 20.04.2000 is only for development of the land. The appellants purchased the property from the owners of 2/3rd share under two Sale Deeds dated 22.07.2005 nearly five years after the MOU for Joint



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Development. The two Sale Deeds are from the respective owners of 1/3rd undivided share in the property each for a consideration of Rs.46 lakhs. The total consideration of Rs.46 lakhs was paid under the document and there is no whisper about the amount paid under the MOU for joint development. There is no reference to the Joint Development Agreement in the Sale Deeds. The Sale Deeds from the other two sharers do not indicate any Sale Agreement or the sale was in continuation of the Joint Development Agreement. The other sharers are not parties to the MOU and therefore, the Sale Deeds executed by other sharers are independent transactions. Therefore, the plea that the Joint Development Agreement was later converted as outright purchase, is not acceptable. The burden lies on the appellants in OSA.No.167/2021 to prove the oral agreement and the terms thereof by proper pleading and evidence. The oral Agreement in a suit for specific performance can be accepted only when the essential terms of the Agreement are pleaded and proved. Any Sale Agreement should be mutual. In this case, the plaint does not indicate specific pleading as to the terms agreed between the parties. As pointed out, not even the consideration is specified or paid or



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acknowledged as advance is stated in the plaint. Time for performance and other usual clauses are not even pleaded in the plaint. Without specific pleading, we are unable to accept that there was an oral agreement of sale of the suit property in favour of the appellants.

(21) Since it is admitted that the Agreement is oral, the plaintiffs have to establish the date of Agreement, the consideration agreed between the parties and the other terms of the Agreement.

(22) This Court has already seen that there is no specific pleading as to the essential terms of the Agreement. From the evidence of PW1, it is seen that the plaintiff in a suit for specific performance has categorically admitted that the consideration fixed for the sale is not mentioned in the plaint. In the cross-examination of PW1 in CS.No.121/2009, it is stated that whatever consideration that was paid to other co-owners, for the two Sale Deeds obtained from them was payable to respondents 1 to 6. The learned counsel for the appellants states that the consideration was Rs.50 lakhs. PW1 further admits that he does not remember whether he issued any letter or notice to the defendants/respondents before filing the suit for specific performance. In fact, absolutely there was no correspondence or



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exchange of notice between the parties after the MOU for Joint Development dated 20.04.2000 till notice under Ex.P5 was sent on behalf of plaintiffs to respondents. Even in the pre-suit notice under Ex.P5 dated 13.03.2007, there is no reference to the date of Agreement, the total consideration agreed etc. It is quite surprising to note that in the notice under Ex.P5, the respondents were called upon to execute the Sale Deed in favour of plaintiffs in respect of 1/3rd undivided share owned by the respondents within seven days from the date of receipt of the suit notice without any reference to the contractual obligation of the appellant to pay the consideration. The Agreement was specifically denied by the respondents in their reply which is marked as Ex.P6 [dated 29.03.2007]. Therefore, the appellants have not produced any other document or independent witness to prove the oral agreement and the terms thereof. When there is no pleading this Court cannot believe the story in the evidence to surprise the plaintiff in CS.No.222/2007.

(23) From the reading of entire evidence of PW1, this Court is unable to gather any information as to the date, time and consideration for the alleged agreement of sale. The suit itself is filed nearly two years after



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the suit for partition is filed by the respondents. The sequence of events only show that the appellants at one point of time, who entered into a Joint Development Agreement in the year 2000, purchased the property from the owners of 2/3rd sharers. Even though the Joint Development Agreement did not go through and there was no Agreement of Sale, a false defence is taken in the suit of partition and as a consequence, the appellants had filed a suit for specific performance of an imaginary agreement without disclosing the essential terms of the Agreement only to delay and defeat the rights of plaintiffs in CS.No.222/2007. Therefore, this Court has no hesitation to hold that the appellants had miserably failed to prove the existence of the alleged oral agreement. The suit is engineered by the appellants as a counter blast to the suit for partition without any *bona fides* or truth in any of the contentions of the appellants in the plaint in CS.No.121/2009. It is also interesting to note that the appellants have not stated anything about the time agreed for performance. In the absence of any reference to time, the Court could only hold that the Agreement is not real and true.



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(24)The Hon'ble Supreme Court in ***Brij Mohan and Others Vs. Sugra Begum and Others [1990 [4] SCC 147]***, while observing that there is no requirement of law that an Agreement or Contract of Sale of immovable property should be only in writing, held that the plaintiff who come forward to seek specific performance of an agreement of sale in relation to immovable property on the basis of an oral agreement, should prove that there was *consensus-ad-idem* between the parties for a concluded oral agreement of sale of immovable property. It is useful to refer to paragraph No.20 of the judgment which reads thus:-

"20. We have given our careful consideration to the arguments advanced by learned counsel for the parties and have thoroughly perused the record. We agree with the contention of the learned counsel for the appellants to the extent that there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. However, in a case where the plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiffs to prove that there



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was consensus ad idem between the parties for a concluded oral agreement for sale of immovable property. Whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement."

(25) In view of the above, this Court is of considered view that there is no concluded contract of sale between the appellants and respondents 1 to 6 who are defendants 1 to 6 in CS.No.121/2009 and **Point [a]** is answered against the appellants in OSA.No.167/2021.

POINT [b]:-Readiness and Willingness:-

(26) The Agreement itself is prior to amendment and the suit for specific performance in CS.No.121/2009 are prior to amendment. Therefore, Section 16[c] of the Specific Relief Act, 1963 prior to amendment, has to



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be applied. Section 16 prior to 2018 amendment, speaks about the personal bar in granting relief of specific performance. Section 16 mandates specific pleading and proof as to readiness and willingness of the plaintiff. It is also to be noticed that readiness and willingness should be to perform the essential terms of the contract. This Court has already seen that the plaintiffs had not even stated in the pre-suit notice as to the consideration or as to the willingness of the plaintiffs to pay the consideration which was agreed between the parties to the alleged oral agreement. Merely because the appellants/plaintiffs states in the plaint that they are ready and willing to perform their part of agreement, the Court will not accept unless the readiness of the plaintiffs is properly pleaded and proved. The distinction between readiness and willingness has been reiterated by this Court and Hon'ble Supreme Court in several precedents. In the absence of a specific pleading regarding essential terms of the agreement, this Court could never accept the case of plaintiffs / appellants that they are ready and willing to perform their part of the alleged oral agreement.



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(27)The appellants have not pleaded anywhere in the agreement as to the date of oral agreement pursuant to the Joint Development Agreement.

This is only to tide over the situation where the plaintiffs are required to show that the suit is well within the period of limitation. The appellants who state that the original contract for Joint Development was given up and the parties agreed to convert the same as an agreement for outright sale, have not referred to the date of agreement anywhere. This, coupled with the admission of PW1 shows that the appellants have come forward with an imaginary agreement without specific pleading as to their obligations. Therefore, this Court is unable to accept the contention of the appellants that they were always ready and willing to perform their part of contract.

(28)The learned counsel for the appellants relied upon the following judgments in support of his contentions:-

- a) 2020 [15] SCC 731 [Madhukar Nivrutti Jagtap and Others Vs. Pramilabai Chandulala Parandekar [Dead] through LRs and Others]*
- b) 2020 [3] SCC 280 [C.S.Venkatesh Vs. A.S.C.Murthy]*
- c) 2021 [17] SCC 705 [Sughar Singh Vs. Hari Singh [Dead]]*



Through LRs and Others]

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(29)Section 16[c] of the Specific Relief Act bars the relief of specific performance of a contract in favour of a person who fails to aver and prove his / her readiness and willingness to perform his/her part of the contract. It may not be necessary or essential to plaintiff to actually tender money to the defendant or to deposit money in Court unless it is directed by the Court, to prove readiness and willingness, in view of Explanation [i] to Clause [c] of Section 16 of Specific Relief Act. Nevertheless, he must prove his readiness to perform his part of contract [to pay balance] by acceptable evidence. In the case of ***Man Kaur Vs. Arthar Singh Sangha*** reported ***2010 [6] CTC 652 : 2010 [10] SCC 512***, the Hon'ble Supreme Court has held as follows:-

“40.A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff



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fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of the plaintiff is something which need not be proved, if the plaintiff is able to establish that the defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where there is a contract for sale for a consideration of Rs. 10 lakhs and earnest money of Rs. 1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs. 15 lakhs. In such a case there is a clear breach by the defendant. But in that case, if the plaintiff did not have the balance Rs. 9 lakhs (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract had to be performed, the plaintiff will not be entitled to specific performance,



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even if he proves breach by the defendant, as he was not “ready and willing” to perform his obligations.”

(30) From the illustration given by the Hon’ble Supreme Court, it can be held that the proof of continuous readiness and willingness from the date of contract, time of hearing is mandatory before a person seeks the relief of specific performance. In ***Umabai Vs. Nilkanth Dhondiba Chavan*** reported in ***2005 [6] SCC 243***, the Hon’ble Supreme Court has held that there must be finding by the Court regarding the continuous readiness and willingness of plaintiff to perform his part of the contract before granting specific performance. The Hon’ble Supreme Court recently in ***U.N.Krishnamurthy through LRs Vs. A.M.Krishnamurthy*** reported in ***2022 [2] MWN [Civil] 799***, after referring to several binding precedents, has held as follows:-

"45. The Respondent Plaintiff has relied upon the notice dated 13.02.2003 and evidences of PW2 & PW3 to prove that he was always ready and willing to perform his part of the contract. Even though it may be true that the Respondent Plaintiff had deposited the balance sale consideration in court on 06.04.2010, it



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cannot be ignored that such deposit was made by him seven years after 15.3.2003, being the date by which the sale had to be concluded. No evidence has been adduced on behalf of the Respondent Plaintiff as to how the Respondent Plaintiff was in a position to pay or make arrangements for payment of the balance sale consideration within time. The Courts below also erred in not adjudicating upon this vital issue except to make a sweeping observation that, given that the Respondent Plaintiff was a businessman he had sources to arrange the balance funds. Careful study of balance sheet dated 31.03.2003 of the Respondent Plaintiff would demonstrate that he did not have sufficient funds to discharge his part of contract.

46. It is settled law that for relief of specific performance, the Plaintiff has to prove that all along and till the final decision of the suit, he was ready and willing to perform his part of the contract. It is the bounden duty of the Plaintiff to prove his readiness and willingness by adducing evidence. This crucial facet has to be determined by considering all circumstances including availability of funds and mere statement or averment in plaint of readiness and willingness, would



not suffice."

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(31) Having regard to the specific findings of this Court and the precedents above referred to, this Court finds that the judgments relied upon by the learned counsel for the appellants have any relevance or application to the facts of this case. The appellants after entering into an agreement with the respondents for development, took possession of the property on the basis of the Development Agreement and the Power of Attorney Deed. From the sequence of events, the appellants in the suit for specific performance has now set up a false case of oral agreement to seek specific performance by filing a vexatious suit only to delay the suit for partition. The object behind this litigation shows the greedy mind of the appellants. **Hence, Point [b] is also answered against the appellants holding that the appellants were never ready and willing to perform their part of the contract.**

POINT [c]:- Limitation:-

(32) In the suit for specific performance, the plaintiff is expected to mention the date of agreement as well as the date specified for performance. In this case, the appellants as plaintiffs, have neither referred to the date of



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Agreement nor the date agreed or specified for performance. Even though a contract of sale should have all the essentials to be enforceable in a Court of law, this Court is given a peculiar situation where there is no pleading or proof as to the date of oral agreement and other essential terms of the agreement including time, the parties have agreed upon for performance. When there is no plea as to the date specified for performance, the appellants expect this Court to presume that no date was fixed. However, there must be a plea even for saying that the limitation starts only when the plaintiff noticed that the defendant had refused performance of the alleged agreement. In the instance case, the defendants have specifically denied existence of any oral agreement. In the absence of proof of existence of an agreement and the appellants have already obtained Sale Deeds from the other shareholders in the year 2005, this Court can take it that the respondents have not agreed for sale of the property when other sharers executed the Sale Deed in favour of the appellants. In such circumstances, the suit which is filed in the year 2009 is clearly barred by limitation. In this case, the suit is filed nearly nine years after the alleged agreement without a specific plea with regard to



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time, whether it is the essence of the contract or whether the non performance was due to the defendants' attitude. **Therefore, this Court is of the view that the suit filed by the appellants in CS.No.121/2009 is barred by limitation.**

POINT [D]:-Equitable relief:

(33)This Court has already held that the appellants have not proved the alleged oral agreement with details and the terms thereof. This Court has also seen that the suit is filed in the year 2009 without specifying the date of agreement and without specifying whether time was the essence of the agreement or not. Even though when an agreement is in respect of immovable property, the old view was that time is not the essence of the agreement, this Court and Hon'ble Supreme Court, taking note of the steep rise in price and the inflation, have agreed that time can be specified in the Agreement to make it as an essential term of the Agreement. The plaintiffs in CS.No.121/2009 have come forward with a suit without disclosing the terms of the Agreement. Even if we accept a oral agreement, the same is an unconscionable one to grant specific relief. The appellants cannot be allowed to take advantage of their own conduct.



The suit is filed nine years after the Agreement. The appellants had purchased 2/3rd share in the year 2005 and it is stated by PW1 that the respondents were expected to execute the Sale Deed for the same price they had paid to other sharers in respect of 2/3rd share. This Court, in a case of this nature is required to assess the conduct of parties so as to exercise the discretionary and equitable relief.

(34)Section 20 of Specific Relief Act reads as follows:-

"20.Discretion as to decreeing specific performance.—

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or



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the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—*Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).*

Explanation 2.—*The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing*



at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

(35) Now the question that would arise for consideration is whether this Court would exercise its discretion in favour of plaintiff under Section 20 of the Specific Relief Act. Even though Section 20 of the Specific Relief Act is amended in 2018, this Court has to apply the unamended provision in view of few of the recent pronouncement of Hon'ble Supreme Court. A Three Member Bench of Hon'ble Supreme Court in ***Smt.Katta Sujatha Reddy & Another Vs. Siddamsetty Infra Projects Pvt Ltd & Others*** in ***Appeal Nos.5822 to 5824/2022 [Judgment dated 25.08.2022]*** considered the question whether Section 20 of Specific Relief Act as substituted by Act 18 of 2018 is prospective or retrospective and held that it is



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prospective and cannot apply to those transactions that took place prior to its coming into force. Paragraphs 54 to 56 of the judgment is relevant and hence, extracted:-

"54.In the light of the aforesaid discussion, it is clear that ordinarily the effect of amendment by substitution would be that the earlier provisions would be repealed and amended provisions would be enacted in place of the earlier provisions from the date of inception of that enactment. However, if the substituted provisions contain any substantive provisions which create new rights, obligations, or take away any vested rights, then such substitution cannot automatically be assumed to have come into force retrospectively. In such cases, the legislature has to expressly provide as to whether such substitution is to be construed retrospectively or not.

55.In the case at hand, the amendment act contemplates that the said substituted provisions would come into force on such date as the Central Government may appoint, by notification in the Official Gazette, or different dates may be appointed for



different provisions of the Act. It may be noted that 01.10.2018 was the appointed date on which the amended provisions would come into effect.

56.In view of the above discussion, we do not have any hesitation in holding that the 2018 amendment to the Specific Relief Act is prospective and cannot apply to those transactions that took place prior to its coming into force."

(36)In the case of ***V.Dhanasekaran and Others Vs. A.Krishnamurthy [died] and Others*** in ***AS.Nos.355 and 356/2014*** vide common judgment dated 02.02.2023, a Division Bench of this Court in which one of us is a party, has considered the scope of unamended Section 20 of the Specific Relief Act in the following manner:-

*"66.In the case of **Kamal Kumar Vs. Premlata Joshi and Others** reported in **2019 [3] SCC 704**, the Hon'ble Supreme Court has considered the scope of Section 20 of the Specific Relief Act and the material questions which are required to be looked into by Court. It is useful to refer to paragraph No.7 of the*



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said judgment:-

"7. 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:

7.1. First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property.

7.2. 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.

7.3. 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;

7.4. 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



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can be used as an instrument of oppression to have an unfair advantage to the plaintiff or to the defendant..."

(37)Applying all principles that are adopted and followed by the Hon'ble Supreme Court while interpreting Section 20 of the Specific Relief Act in different situations, this Court having regard to the peculiar facts and circumstances discussed above, finds that the appellants are not entitled to the relief of specific performance. Having regard to the specific pleading in this case and evidence, this Court finds no explanation for the inordinate delay of nine years in approaching the Court seeking the relief of specific performance. The delay is also one of the reasons for which the relief of specific performance should be denied to the appellants assuming that the agreement is true, valid and genuine. The suit property is located in Royapuram which is a very near the city. In North Madras, the industrial development and growth of population and demand for lands particularly in Royapuram is known to everyone. The plaintiffs/appellants want to strike a deal by filing a suit nine years after the alleged oral agreement. The conduct of the appellants/plaintiffs is a reason why the equitable relief cannot be granted in favour of the



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appellants/ Learned Single Judge has rightly dismissed the suit for specific performance. Further, in cases of this nature, Section 54 of the Limitation Act comes in aid of people to come to Court on the basis of oral agreement without disclosing the date specified for performance. This is to save the period of limitation. It is to be noted that the appellants in this case, have not produced any letter, correspondence or independent evidence to show that the appellants kept the alleged contract alive for more than six years to file a suit for specific performance after a lapse of nine years. This Court therefore, has no hesitation to hold that the conduct of the appellants is sufficient not to grant the equitable relief of specific performance in favor of appellants.

Hence, Point [D] is answered in negative and as against appellants.

This Court finds that the suit for specific performance is a vexatious litigation with a object to delay the suit for partition. The object behind this litigation is obvious. By virtue of this vexatious litigation, the respondents 1 to 6 are deprived of their property for more than 17 years. The suit is with an ill-motive to pressurize the plaintiffs in CS.No.222/2007 apparently to knock the property taking advantage of an



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MOU in 2000 for Joint Development. Hence, OSA.No.167/2021 is liable to be dismissed with exemplary cost.

(38)In the result,

[a]OSA.No.166/2021 stands dismissed confirming the common judgment and decree of the learned Single Judge dated 18.11.2019 passed in CS.Nos.222/2007 & 121/2009. **No costs.**

[b]OSA.No.167/2021 stands dismissed with cost of Rs.5,00,000/- [Rupees Five Lakhs only] to be paid by the appellants jointly to the respondents 1 to 6 in the appeal within a period of eight weeks from the date of receipt of a copy of this judgment.

(39)When a final decree application is filed by the respondents in OSA.No.166/2021, the same shall be disposed of by the Executive Court as expeditiously as possible preferably within a period of three months from the date of such petition/application being filed by the respondents.

[S.S.S.R., J.] [K.R.S., J.]
04.10.2024



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Internet : Yes

Neutral Citation: Yes

Index: Yes / No