

(2008) 02 KAR CK 0063

In the Karnataka High Court

Case No : Regular First Appeal No. 1162 of 2004

Dr. N. Kasinath

APPELLANT

Vs

Sri Arun R. Rawell and Others

RESPONDENT

Date of Decision : 05-02-2008

Acts Referred:

Limitation Act, 1963 — Section 54

Specific Relief Act, 1963 — Section 19 (b), 21, 21 (1), 21 (2), 21 (4)

Citation : (2008) ILR (Kar) 857 : (2008) 2 KCCR 907

Hon'ble Judges : S. Abdul Nazeer, J

Bench : Single Bench

Advocate : Ashok Haranahalli, for the Appellant; S.V. Giridhar, for R3(a) to (f), R2 and R2, for the Respondent

Judgement

S. Abdul Nazeer, J.—This appeal arises out of a judgment and decree in O.S. No. 1198/1991 dated 28.7.2004 passed by the 11th Additional City Civil Judge, Bangalore City. The appellant was the plaintiff in the suit and the respondents were the defendants. Since the third respondent died during the pendency of this appeal, his legal. representatives have been brought on record.

2. The plaintiff has contended that first defendant is the owner of site bearing No. 26/4 (old site Nos.31 and 32 laid out in Sy. No. 5/1 of Gangehalli village), K.H. Muniswamappa Block, Gangenahalli, Bangalore, which is more-fully described in the schedule to the plaint thereafter referred to as "schedule site") having purchased the same from J.P. Shastri, under a sale deed dated 23.4.1974. The second defendant is the uncle and power of attorney holder of the first defendant. In July/August, 1985, the second defendant represented on behalf of the first defendant that the first defendant is the sole and absolute owner, in possession and enjoyment of the schedule site. The plaintiff was looking for a suitable site to be given to his daughter. On inspection, the plaintiff found that the schedule site is suitable for the said purpose. Therefore, he negotiated with the second defendant for the purchase of the said site. The

terms of sale were concluded between himself and the first defendant represented by the second defendant where-under the plaintiff agreed to purchase and the first defendant agreed to sell the schedule site to him or to his nominee for a total sale consideration of Rs. 1,30,000/-. All the terms and conditions of the sale were set out in the agreement dated 6.9.1985 entered into between the parties. The plaintiff had paid and the first defendant had received an advance of Rs. 30,000/-. It is further contended that the second defendant had informed him that a writ petition in No. 2311/1982 filed by the first defendant challenging the notification for acquisition of the schedule site is pending, and subject to the said writ petition, the first defendant had good marketable title to the schedule site. After the agreement, the plaintiff used to meet the second defendant from time to time and enquire about the progress made in the writ petition. On 8.4.1987, the second defendant wrote a letter to the plaintiff informing him that second defendant had improved the property at a cost of Rs. 60,000/- and to revise the price payable at Rs. 1,90,000/-. Plaintiff has sent a reply refusing to pay an additional sum of Rs. 60,000/-.

3. It is further contended that a mechanic of the second defendant met the plaintiffs son Prem Kumar in August, 1987 and informed him that the second defendant is negotiating with the third defendant for the sale of the schedule site. When Prem Kumar informed him the same, he sent Prem Kumar to the third defendant to inform him the execution of agreement by defendant Nos. 1 and 2 in favour of the plaintiff in respect of the schedule site. Accordingly, Prem Kumar informed the third defendant about the transaction entered into between the plaintiff and defendant Nos. 1 and 2. It is contended that the third defendant after going through the agreement, thanked Prem Kumar for having informed him about the agreement and assured him that he will not enter into any transaction with defendant Nos. 1 and 2 in respect of the schedule site. On 26.12.1989, the plaintiff sent a notice through his Advocate to the first defendant with a copy to the second defendant calling upon them to inform him if the writ petition has been disposed of and to perform their part of the contract by receiving the balance of the sale consideration and execute the sale deed. On 7.11.1990, the plaintiff met the second defendant in the head office of the State Bank of Mysore, Bangalore and enquired with him the latest position of the writ petition. The second defendant evaded the question. This made the plaintiff suspicious and he made enquiry about the writ petition and learnt that the Hon"ble High Court had quashed the notification impugned in the said writ petition by its order dated 18.10.1990 in so far as the same related to the schedule site. Thereafter, the plaintiff met the second defendant and offered to pay the balance of the sale consideration and requested the second defendant to execute the sale deed in terms of the agreement. However, the second defendant refused to execute the sale deed after receiving the balance of the sale consideration. Therefore, the plaintiff issued a notice through his Advocate on 17.12.1990 to defendant Nos. 1 and 2 calling upon them to execute and register the sale deed. Defendant Nos. 1 and 2 sent an untenable reply on 12.2.1991. In

the meantime, Sri Prem Kumar applied for and obtained an encumbrance certificate in respect of the schedule site and came to know that defendant Nos. 1 and 2 have sold the schedule site to the third defendant on 8.11.1989 itself for a consideration of Rs. 1,90,000/-. The plaintiff contends that the said sale is not binding on him. It is further contended that the third defendant is not a bonafide purchaser of the schedule site for value without notice of the prior contract. Therefore, he has filed the suit seeking a direction to defendant Nos. 1 and 2 to accept the balance of the sale consideration of Rs. 1,00,000/- and execute a sale deed in respect of the schedule site in his favour. Alternatively, the plaintiff has sought for a direction to the defendant Nos. 1 and 2 to pay Rs. 1,00,000/- towards damages and refund advance amount of Rs. 30,000/- with interest at 18% per annum from the date of the suit till the date of realisation.

4. Defendant Nos. 1 and 2 have filed their written statement denying the plaint averments. It is contended that the second defendant informed the plaintiff that he cannot keep the site vacant in view of first defendant securing the sanctioned plan. The plaintiff visited the schedule site along with the second defendant and agreed that defendant Nos. 1 and 2 may develop the site and undertook to make good the expenses. Accordingly, the second defendant improved the schedule site by spending a sum of Rs. 60,000/- to prevent the schedule site being confiscated by the authorities concerned. In spite of several requests, the plaintiff failed to pay to defendant Nos. 1 and 2 the said sum of Rs. 60,000/-. Therefore, the second defendant wrote a letter to the plaintiff calling upon him to pay a sum of Rs. 60,000/- spent for the aforesaid purpose. Plaintiff having agreed to pay the said amount earlier, refused to pay the same. Therefore, the second defendant has terminated the agreement. Defendant Nos. 1 and 2 have prayed for dismissal of the suit.

5. The third defendant has filed his written statement on 12.7.1994 denying the plaint averments. It is contended that even according to the plaintiff, the schedule site was notified for acquisition by the Bangalore Development Authority vide preliminary notification dated 16.3.1976. The final notification was issued on 30.11.1977. The first defendant had filed a writ petition in No. 23117/1982 before the Hon"ble High Court of Karnataka challenging the aforesaid notifications in so far as the schedule site is concerned. On the date of agreement, namely, on 6.9.1985, the first defendant had no interest in the schedule site. Therefore, question of first defendant agreeing to sell the schedule site through his power of attorney holder-the second defendant herein in favour of the plaintiff is illegal. It is contended that the plaintiff was aware of the acquisition proceedings and pendency of the writ petition and therefore, he could not have entered into any such agreement. It is further contended that the suit is barred by time. In the event of plaintiff making a demand on 8.4.1987 and defendant Nos. 1 and 2 refusing to execute the sale deed as per the original agreed price, it amounted to refusal on the part of the plaintiff to execute the sale deed. In which event, the time begins to run for the suit for specific performance of contract from the said date. If defendant Nos. 1 and 2 refused to

perform the alleged agreement of sale as per the letter of the plaintiff dated 8.4.1987, the suit for specific performance should have been filed on or before 8.4.1990. It is denied that a mechanic of the second defendant met the plaintiff's son Sri Prem Kumar on 1 "August, 1987, and informed that the second defendant is negotiating with the third defendant. It is contended that prior to 1987, the third defendant never knew either defendant No. 1 or defendant No. 2. Therefore, question of the third defendant negotiating with defendant Nos. 1 and 2 for sale of the schedule site before 1987 is a patent falsehood. It is contended that the third defendant has not met the plaintiffs son at any point of time. It is contended that the third respondent is a retired Deputy Commissioner of Commercial Taxes. He was a member of Mahalakshmi House Building Cooperative Society, Bangalore South Taluk, Bangalore. When he was in service, a site bearing No. 155 in the layout formed by the aforesaid society was allotted to him. His near relatives were residing near the schedule site. Therefore, he desired to have a site in R.T. Nagar and wanted to construct a house therein for his occupation so that he can spend his retired life amongst his relatives. With this intention, he sold the site allotted to him by the aforesaid society on 2.11.1980 for a consideration of Rs. 1,90,000/-. After selling the said site, he purchased the schedule site for a consideration of Rs. 1,90,000/- under a registered sale deed dated 8.11.1989. It is contended that he was not aware of the notification of the Bangalore Development Authority for acquisition of the schedule site and defendant Nos. 1 and 2 challenging the said acquisition proceedings by filing a writ petition before the High Court of Karnataka. It is further contended that even after the sale of the schedule site, nobody put forth any claim to the schedule site for about two years. Immediately on taking possession of the schedule site, he has got the said site fenced. It is further contended that the fourth defendant was an allottee of the said site from the Bangalore Development Authority. The fourth defendant started interfering with the third defendant's possession of the schedule site. Therefore, the third defendant filed a suit in O.S. No. 5275/1992 against the fourth defendant and obtained an interim order.

6. The fourth defendant has also filed his written statement. It is contended by him that he was allotted a site bearing No. 395 measuring 60 ft. x 40 ft. by the Bangalore Development Authority in R.T. Nagar. He was put in possession of the said site on 4.5.1989 as per the possession certificate dated 15.5.1989. The Bangalore Development Authority has executed a lease-cum-sale agreement in his favour. He has also paid taxes to the Bangalore Development Authority in respect of the said property. He has paid the entire consideration to the Bangalore Development Authority on 26.11.1988. Since the date of taking possession of the said site, he has been in possession and enjoyment of the same. He has denied the identity of the schedule site. He has prayed for dismissal of the suit.

7. On the basis of the pleadings, the court below has framed the following issues:

- (1) Whether the plaintiff proves the agreement dated 6.9.1985?
- (2) Whether the plaintiff proves that 1st defendant received Rs. 30,000/- on 6.9.85 under the agreement?
- (3) Whether the plaintiff proves that he is not bound by the sale of property to 3rd defendant dated 8.11.1989?
- (4) Whether the plaintiff proves that he is all along and is ready and willing to perform his part of the contract?
- (5) Whether the 3rd defendant proves that he is a purchaser for valuable consideration without notice?
- (6) Whether the plaintiff is entitled for specific performance of contract?
- (7) Whether plaintiff is entitled for the recovery of advance amount and damage?
- (8) If so, whether the plaintiff is entitled for interest?
- (9) What order or decree?

8. The plaintiff was examined as P.W1 and documents Ex.PI to Ex.P19 were marked in his evidence. First, second and fourth defendants have not let in any evidence. Third defendant was examined as D.W 1 and documents Ex. D1 to Ex.D14 were marked in his evidence. The court below on appreciation of the pleadings and evidence of the parties, has answered issue Nos. 1 to 4, 7 and 8 in the affirmative and in favour of the plaintiff. Issue Nos. 5 and 6 have been answered in favour of third defendant. Further, the court below has directed the first defendant to refund a sum of Rs. 30,000/- with interest at 9% per annum from the date of the suit till the date of realisation to the plaintiff. The relief of specific performance of the agreement as prayed for by the plaintiff has been rejected. The court below has held in paragraph 39 of the judgment that the suit filed by the plaintiff is barred by time. The court below has also rejected the alternative prayer of the plaintiff seeking damages of Rs. 1,00,000/-.

9. I have heard Sri Ashok Haranahalli, learned Counsel for the appellant/plaintiff and Sri S.V. Giridhar, learned Counsel for respondent No. 3(a) to (f).

10. Learned Counsel for the appellant/plaintiff would contend that the court below was not justified in holding that the suit is barred by time. It is contended that as per Clause 3 of the agreement, the sale has to be completed within a period of one month from the date of successful disposal of the writ petition No. 23117/1982 in favour of the first defendant. The writ petition was allowed on 18.10.1990. Thereafter, the appellant has issued a notice Ex.P12 calling upon defendant Nos. 1 and 2 to execute and register the sale deed in respect of the schedule site since they have failed to execute the sale deed within a period of one month from the disposal of the aforesaid writ petition. Since defendant Nos. 1 and 2 have sent an untenable reply as per Ex.P15 dated 12.2.1991, the appellant has filed the suit on 21.2.1991. Thus, the suit is well within time. It is

further submitted that the court below was not justified in answering issue No. 5 in favour of the third defendant. The third defendant was not a bonafide purchaser of the schedule site for value without notice of the previous agreement Ex.P1. He further submits that the third defendant was aware of the agreement Ex.P1 entered into between the plaintiff and defendant Nos. 1 and 2. The son of the plaintiff Sri Prem Kumar has informed the third defendant about the execution of Ex.P1 by defendant No. 2 in favour of the plaintiff. Alternatively, it is contended that Bangalore Development Authority had issued notice of acquisition of the schedule site along with the other lands for the formation of a layout. Defendant No. 3 has failed to enquire as to what has happened to the acquisition proceedings. When defendant No. 3 has failed to enquire into the acquisition proceedings, inference has to be drawn that he has not enquired into the title of the first defendant in respect of the schedule site. Therefore, the third defendant is not entitled to the protection u/s 19(b) of the Specific Relief Act, 1963 (for short "the Act"). Alternatively, it is contended that since the court below refused to grant a decree for specific performance of agreement Ex.P1, it ought to have granted compensation/damages as claimed in the suit.

11. On the other hand, learned Counsel appearing for the third respondent/third defendant has sought to justify the findings of the court below. It is his submission that the second defendant, who is none other than the power of attorney holder of the first defendant, has issued a notice as per Ex.P3 treating the agreement as cancelled for not paying a sum of Rs. 60,000/- said to have been demanded by the second defendant from the plaintiff. The plaintiff has not taken any steps to enforce the agreement Ex.P1 within a period of three years from the date of Ex.P3. It is further contended that defendant No. 3 is a bonafide purchaser of the schedule site for value, without notice of the previous agreement Ex.P1 entered into between defendant Nos. 1 and 2 and the plaintiff. It is submitted that Prem Kumar, son of the plaintiff has never met the third defendant at any point of time and Prem Kumar was not examined by the plaintiff. It is argued that the third defendant is a retired Deputy Commissioner of Commercial Taxes. He has retired from service in the year 1982. He was a member of the Mahalakshmi House Building Cooperative Society and he was allotted a site from the said society. Since his near relatives were all residing in R.T. Nagar, he wanted to settle down in R.T. Nagar area. Therefore, he sold the site allotted by the aforesaid society on 2.11.1980 for a sale consideration of Rs. 1,90,000/-. Out of the said sale consideration, he has purchased the schedule site, which is close to the houses of his relatives. Before purchasing the schedule site, he secured copies of the documents relating to the schedule site and obtained legal opinion from his Advocate. As instructed by his Advocate, he has obtained encumbrance certificate in respect of the schedule site. Prior to the purchase of the schedule site, third defendant had met defendant No. 1 and made an enquiry regarding the subsistence and continuance of general power of attorney in favour of the second defendant. At that time, defendant No. 1 gave a letter to him confirming the subsistence of the general power of attorney in

favour of the second defendant, Ex.P8. He has also obtained the certified copy of the sale deed dated 5.8.1971 executed in favour of the vendor of defendant No. 3 and the sale deed executed in favour of first defendant by his previous owner J.P. Shastry. He has also obtained katha endorsement dated 10.12.1992 and tax paid receipts dated 23.7.1999 and 11.10.2000. Therefore, the court below was right in holding that the third defendant is a bonafide purchaser of the site in question for value, without notice of the previous contract between defendant Nos. 1 and 2 and the plaintiff. He submits that the court below was justified in not granting any damages. He prays for dismissal of the appeal.

12. I have carefully considered the arguments of the learned Counsel made at the bar and perused the records of the trial Court. Having regard to the submission of the learned Counsel made at the bar, the points for consideration in the appeal are as under:

(i) Whether the court below was justified in holding that the suit filed by the plaintiff/appellant is barred by time?

(ii) Whether the court below was right in holding that respondent No. 3, defendant No. 3 is a bonafide purchaser of the schedule site for value, without notice of the agreement-Ex.PI?

(iii) Whether the plaintiff is entitled for award of damages?

13. Re. Point No. (i): Article 54 of the Schedule to the Limitation Act, 1963 provides for the period of limitation for filing of a suit for specific performance of a contract. It is as under:

___	Description	Period of Time from which	of Suit limitation Period begins to run
-----	-------------	---------------------------	---

___	54.	For specific	Three	The date fixed for the performance	Years.
		performance, or, if no	of a contract.	such date if fixed, when the plaintiff has	
		notice that performance is	refused.		

It is clear from the aforesaid Article that whenever the time is fixed for specific performance, the first part of it would apply and in other cases, the second part will apply. The limitation of three years for a suit for specific performance under the first part starts from the date fixed for performance, and in the absence of a date fixed for performance of the contract, the time does not start until there has been a demand and refusal, and the date commences when the plaintiff got the notice of refusal. The words "date fixed for the performance" in Article 54 of the Limitation Act does not require that a particular date from the calendar must be mentioned in the document. It is sufficient if the basis of calculating the date fixed for performance is found in the document. The Apex Court in Ramzan Vs. Hussaini, was considering a similar matter. In that case, a contract for sale was entered into between the parties in respect of a house, which was under mortgage. The defendant/seller under the contract had agreed to execute a deed of sale on the date the purchaser

redeemed the mortgage. The suit for specific performance of the contract was filed by the purchaser about 14 years after the redemption of the mortgage. In the circumstances, the Apex Court held that under the agreement, the date for the defendant/seller to execute the sale deed was fixed, although not by mentioning a certain date but by a reference to the happening of a certain event, namely, the redemption of mortgage and immediately after the redemption by the plaintiff/purchaser, the defendant/seller became liable to execute the sale deed, which the plaintiff/purchaser was entitled to enforce. The period of limitation thus started running on that date. The case was therefore covered by the first part of Article 54 and not the second part.

In *K. Venkoji Rao v. M. Abdul Khuddur Kureshi* AIR 1991 KAR 119, this Court has held that, where the time for execution of a sale deed was extended up to certain fixed date but in view of the fact that a suit was filed by the first purchaser, the sale deed could not be executed. The time was again extended till disposal of suit filed by the first purchaser i.e. up to happening of certain subsequent event. The suit for specific performance of an agreement to sell, filed within three years from the decision in first suit dismissing it, would not be time barred, but would be within limitation. It has been further held that though the word "date" is used in Article 54 of the Limitation Act, it should not be taken that a particular date should be specifically stated in the agreement. Even if the time of performance cannot be ascertained at the time of agreement itself, it could be ascertained at the time of performance, it may be said to be a case where the date is fixed for performance of the contract.

In *Suresh Bhatt and Another etc. Vs. S. Brahmanand and Others*, the Court has held that the expression "date fixed for performance" appearing in the third column of Article 54 does not mean a precise date by calendar alone but the same is comprehensive enough to include a date which can be ascertained with reference to an event certain to happen, the applicable principle being the doctrine of *id certum est quod certum reddi potest*.

13.1 Clause 3 of the agreement at Ex. P1 makes it clear that the sale shall be completed within a period of one month from the date of disposal of W.P. No. 23117/1982. The said Clause is as under:

(3) The sale shall be completed within a period of one month from the date of final successful disposal of the Writ Petition No. 23117/1982 in favour of the Vendor which is now pending on the file of the Hon'ble High Court of Karnataka at Bangalore and which has been filed by the Vendor herein.

Even though the aforesaid Clause does not fix a date by calendar, it is possible to ascertain the date for performance from the agreement itself with reference to an event i.e. disposal of the writ petition in favour of the defendant No. 1. In other words, the date for performance of the agreement did become ascertainable by a calendar date upon happening of an event of the dismissal of the writ petition in favour of defendant No. 1. Thus, the limitation of filing the

suit would be governed by first part of Article 54 and not the second part.

13.2 The agreement Ex.P1 gives the basis of calculating the date for performance of the contract. The first defendant should have executed the sale deed within one month from the date of disposal of writ petition No. 23117/1982 in his favour. The writ petition was disposed of on 18.10.1990. Thereafter, the plaintiff has called upon defendant Nos. 1 and 2 to execute and register a sale deed in terms of agreement as per Ex.P12 dated 17.12.1990. Defendant Nos. 1 and 2 have sent their reply as per Ex.P1 5 dated 12.2.1991 denying their liability to execute and register the sale deed. The suit was filed on 21.2.1991. Therefore, the suit is in time. The court below has held that plaintiff has not taken steps to enforce the agreement Ex.P 1 in spite of the notice Ex.P3 dated 8.4.1987. A careful perusal of the notice Ex.P3 makes it clear that the second defendant has not cancelled the agreement Ex.P1. Having regard to Clause (3) in the agreement Ex.P1, the plaintiff could not have maintained the suit before disposal of the writ petition No. 23117/1982. The finding of the court below that the suit is barred by time is contrary to law and the said finding is hereby set aside.

14. Re. Point No. (ii): A contract may be enforced not only against any party to it but also against any person claiming under him by a title arising subsequently to the contract, except a transferee for value, who has paid consideration in good faith and without notice of the original contract as provided in Section 19(b) of the Act. The said provision is as under:

Section 19: Relief against parties and persons claiming under them by subsequent title: Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-

(a) xxxxxxxxx

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

(c) xxxxxxxxx

(d) xxxxxxxxx

(e) xxxxxxxxx

Where a person has acquired the property under a purchase subsequent to the agreement of which the plaintiff seeks specific performance, such person is protected where he has acquired it acting bonafide for value and without notice of the plaintiff's agreement, in which case, the plaintiff will not be entitled to claim specific performance of the contract against him. In other words, a purchaser under an agreement of sale of property can enforce his contract against the subsequent purchaser, who has notice of that agreement. Notice under this Clause may be express or imputed upon the subsequent transferee. If the circumstances connected with the transferor's dealings of his property

known to the defendants were such as to put them on enquiry, the subsequent transferees cannot be regarded as without notice of the original contract.

15. Section 3 of the Transfer of Property Act, 1882 (for short "T.P Act"), defines the term "a person is said to have notice". It states that a person is said to have notice of a fact when he actually knows that fact or when but for willful abstention from enquiry or search, which he ought to have made, or gross-negligence, he would have known it. Explanation 2 to Section 3 of the T.P. Act states that any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

16. Here, the contention of the learned Counsel for the appellant is two fold:

(i) That the third defendant had actual notice of the agreement Ex.P1 before he purchased the schedule site, and

(ii) That the third defendant has willfully abstained from making an enquiry or search he ought to have made with regard to the prior contract between the plaintiff and defendant Nos. 1 and 2.

17. Actual notice: Actual notice is a notice whereby a person acquires actual knowledge of the fact. It must be definite information given in the course of the negotiations by a person interested in the property, for a person is not bound to attend to vague rumours.

18. The plaintiff has entered into an agreement for sale of the schedule site with defendant Nos. 1 and 2 as per Ex.P1 on 6.1.1985. The third defendant has purchased the schedule site from the first defendant as per Ex.PI 7 on 8.11.1989. It is the case of the plaintiff that the third defendant was aware of the agreement Ex.PI In paragraph 8 of the plaint, the plaintiff contends that in August, 1987 a mechanic of the second defendant, who had come to the plaintiff's shop and who knew about the execution of the agreement Ex.PI between the plaintiff and defendant Nos. 1 and 2, met the plaintiff's son Sri Prem Kumar and informed him that the second defendant is negotiating with the third defendant for sale of the schedule site. Prem Kumar informed the same to the plaintiff. The plaintiff immediately sent his son to the third defendant with instructions to appraise the third defendant about the agreement Ex.PI. Plaintiffs son accordingly met the third defendant and showed him a copy of the aforesaid agreement. The third defendant in his written statement has categorically denied of any notice much less the actual notice of Ex.P1. He has denied the mechanic of the second defendant having come to the plaintiff's shop, who had known about the agreement Ex.P1 and meeting the plaintiffs son Prem Kumar in August, 1987, and informing him about the negotiation for sale of the schedule site to him. He has further denied the son of the plaintiff having met him at any point of time.

19. The evidence of the plaintiff is contrary to his pleadings. In his examination-in-chief, he has deposed that driver of the second defendant met him and not his

son. He has further deposed that he does not know the name of the driver. He has further deposed that his son got the address of defendant No. 3 through the driver. In his cross-examination, P.W1 has stated that the third defendant has purchased the schedule site in the year 1987 itself for Rs. 1,90,000/-. This version of the plaintiff cannot be believed. None of the correspondence made by the plaintiff with defendant Nos. 1 and 2 after 1987 till the date of suit contains a reference to the negotiation/purchase of schedule site by defendant No. 3.

20. P.W1 has further deposed that the mechanic gave the information regarding the negotiation of sale by defendant No. 2 in favour of defendant No. 3 to his son. He was not present when his son alleged to have met defendant No. 3. Thus, the entire evidence of the plaintiff is hearsay. The son of the plaintiff has not been examined so as to corroborate the case put forth by the plaintiff in his pleadings as also in his evidence. It is also in the evidence of the plaintiff that since last 25 years, the terms between him and his son Prem Kumar are not cordial. It is clear from the evidence of P.W1 that there is a dispute in respect of the schedule site between himself and his son. Admittedly, his son is residing separately. In the cross-examination, P.W1 admits that when he entered into a sale agreement in respect of the schedule site, his daughter Sujatha was aged about 18 years and the age of his son was about 36 or 38 years. At that time, his son was already married. Immediately after his marriage, his son started living separately. Since the last 25 years, the relationship between himself and his son was not cordial. He had informed his son that schedule site was to be purchased for the benefit of his daughter. The dispute between himself and his son is in connection with the schedule site. Under these circumstances, it is very difficult to accept the say of the plaintiff that he had sent his son to meet defendant No. 3 along with the copy of the agreement after he came to know that defendant No. 1 was negotiating with defendant No. 3 for sale of the schedule site so as to inform defendant No. 3 regarding the existence of agreement at Ex.PI in his favour. If the relationship between the plaintiff and his son were not cordial from the year 1978, there is no question of sending his son Prem Kumar to meet defendant No. 3. It is the duty of the plaintiff to produce necessary documents to substantiate the facts. The Court cannot assume the existence of things when no evidence to demonstrate the same is produced. The Court cannot assume that the second defendant had a driver much less a mechanic and the son of the plaintiff has received the information from the said mechanic regarding the negotiation done by defendant No. 1 with defendant No. 3 for sale of the schedule site, particularly, in the absence of the evidence of the mechanic as well as the evidence of plaintiff's son. The documents produced by D.W. 1 makes it clear that he was not aware of the execution of the agreement of sale Ex.PI in favour of the plaintiff. Therefore, it cannot be said that defendant No. 3 had actual notice of the agreement Ex.P1 entered into between plaintiff and defendant Nos. 1 and 2.

21. Willful abstention from enquiry or search: The words "willful abstention from an inquiry or search" means such abstention as would show want of bonafides.

The word "willful" employed in Section 3 of the TP Acct makes it clear that the abstention from inquiry should be designed and due to a desire to avoid an inquiry which would lead to ultimate knowledge, and that due omission to make inquiries was not to be regarded as sufficient to constitute constructive notice within the meaning of the *Kausalai Ammal Vs. Sankaramuthiah Pillai*, .

22. Learned Counsel for the appellant/plaintiff submits that the third defendant had willfully abstained from making an enquiry or search which ought to have been made with regard to the prior contract between the plaintiff and defendant Nos. 1 and 2. Therefore, it should be presumed that the third defendant had notice of the prior contract and he is not entitled for the protection u/s 19(b) of the Act. It is submitted that the State Government had issued notifications under the provisions of the Bangalore Development Authority Act for acquisition of the schedule site in question to the formation of a layout. The first defendant had challenged the said notification in W.P. No. 23117/1982 and the matter was pending before this Court. The schedule site was allotted by the Bangalore Development Authority to the 4th defendant on 26.11.1988. If the third defendant had enquired about the acquisition proceedings, he would have come to know the prior contract. It is contended that the onus is on the transferee to prove that he had no notice of prior agreement to sell. In this connection, he has relied on the following decisions:

(i) *Ram Niwas (Dead) Through Lrs. Vs. Smt. Bano and Others*, and

(ii) *R.K. Mohammed Ubaldullah and Ors. v. Hajee C. Abdul Wahab (D) by Lrs and Ors.* AIR 2000 SC 1658

23. On the other hand, learned Counsel for the third defendant submits that the third defendant had purchased the schedule site after taking necessary precaution for valuable consideration and that he is a bonafide purchaser for value without notice of the prior contract. It is further contended that the third defendant is a retired Government servant and after selling the site allotted to him by Mahalakshmi Housing Cooperative Society, he has purchased the schedule site. It is further contended that initial burden to establish that he had no knowledge of the earlier agreement was on the third defendant, and he has discharged the burden by leading positive evidence.-However, the plaintiff has failed to establish that the third defendant had notice of the earlier agreement.

24. Plaintiff has not pleaded that defendant No. 3 has willfully abstained from an inquiry or search which he ought to have made in respect of the schedule site so that he could have come to know of the existence of prior contract nor has he let in any evidence in this regard. His case is that defendant No. 3 had actual notice, which has been negated in (he earlier paragraphs. It is evident from Ex. PI dated 6.9.1985 that the schedule site is a vacant site measuring 60 ft. x 45 ft. The third defendant in his written statement has stated that he has visited the site for the first time in the year 1989 and when he visited the site, it was fenced. It is not the case of the plaintiff that somebody was residing in the

schedule site after putting up construction. Therefore, Explanation II to Section 3 of the Transfer of Property Act, has no application to the facts of this case. The decision in Ramniwas's case (supra) relied on by the appellant was a case where tenant was in occupation of the suit shop. The question was whether the subsequent purchaser had made an enquiry into the real nature of possession of the tenant. Therefore, the said decision has no application to the facts of this case. Similarly, R.K. Mohammed Ubaidullaits case (supra) relied on by the learned Counsel for the appellant is also in respect of a matter covered under Explanation II to Section 3 of the Transfer of Property Act. The said decision also is not applicable to the facts of the case.

25. It is clear from the evidence of D.W1 that before purchase of the property, he has taken a legal opinion from his Advocate with regard to the title of the schedule site. As insisted by his Advocate, he has secured the title deeds of the said property. Since the negotiation was made by the second defendant, who was the power of attorney holder of the first defendant, he has approached the first defendant and made enquiry regarding the subsistence and continuance of general power of attorney in favour of the second defendant, and the first defendant gave a letter Ex.P8 to him confirming the subsistence of the general power of attorney in favour of the second defendant. It is his case that his relatives are all residing very close to the schedule site and the schedule site meets all his requirements. He has also visited the schedule site along with his family members and inspected the site and they have also approved for the purchase of the said site. He has held negotiations with the second defendant for purchase of the property. He has secured the copies of the documents relating to the property. He came to know the pendency of the acquisition proceedings only after he received the suit summons. Thereafter, he became aware of the agreement Ex. PI. Immediately thereafter, he has fenced the suit schedule site. The earlier encumbrance certificate given by defendant Nos. 1 and 2 is marked as Ex.D9 and the encumbrance certificate obtained by him has been marked as Ex. P16. Therefore, he cannot be held to have willfully abstained from making inquiry or search. On appreciation of material on record, the trial Court has held that the third defendant is a bonafide purchaser of the schedule site for value, without notice of the prior agreement, which does not call for interference.

26. It is settled that the initial burden to show that the subsequent purchaser of schedule site covered by earlier suit agreement was a bonafide purchaser for value without notice of the suit agreement squarely rests on the shoulders of such subsequent transferee. This onus can only be discharged by the evidence led in the case. However, it has to be kept in view that once evidence is led by both the sides, the question of initial onus of proof pales into insignificance and the Court will have to decide the question in controversy in the light of evidence on record Jagan Nath Vs. Jagdish Rai and Others, The third defendant has discharged the onus by leading evidence that he had no notice of the prior agreement to sell in favour of the plaintiff. Plaintiff has failed to establish that third defendant had prior notice of the agreement Ex.P1.

27. Re. Point No. (iii): Plaintiff in the alternative has sought for award of damages in a sum of Rs. 1 lakh in addition to refund amount of Rs. 30,000/- with interest at 18% per annum on the said amount from the date of the suit till the date of realisation. Defendant Nos. 1 and 2 except filing of the written statement denying the plaint averments, have not stepped into the witness box. The court below while answering issue Nos. 1 to 4 has held that the plaintiff has proved the agreement Ex.P1 and that the plaintiff was all along ready and willing to perform his part of the contract and defendant Nos. 1 and 2 have intentionally avoided to perform their part of the obligation. However, the court below has rejected the claim of the plaintiff for specific performance of the contract on the ground that the third defendant has purchased the schedule site for value in good faith and without notice of the contract at Ex.P1. The finding of the court below on issue Nos. 1 to 4 is not under challenge. While answering point No. (i), I have held that the suit filed by the plaintiff is not barred by limitation. However, I have held that the third defendant has purchased the schedule site for value without notice of the prior contract. The court below has directed defendant No. 1 to refund Rs. 30,000/- to the plaintiff along with interest at the rate of 9% per annum from the date of the suit till the date of realization in accordance with Sub-section (b) of Section 22 of the Act. However, the court below has not awarded any damages/compensation to the plaintiff. Learned Counsel for the plaintiff/appellant submits that when the court below has rejected the claim of the appellant/plaintiff for specific performance of the contract, it could have at least awarded compensation/damages as provided u/s 21 of the Act.

28. Section 21 of the Act provides for awarding compensation in certain cases. Sub-section (1) of Section 21 of the Act enables the plaintiff to seek the relief of compensation in addition to or in substitution of specific performance. Sub-section (2) of Section 21 of the Act provides that the Court may grant compensation in substitution of specific performance when it finds that there is a contract between the parties which has been broken and decides that specific performance ought not to be granted. Sub-section (3) of Section 21 of the Act has no application to the facts of this case. Sub-section (4) of Section 21 of the Act provides that the compensation shall be governed by the principles of Section 73 of the Contract Act and Sub-section (5) of Section 21 of the Act requires the plaintiff to claim compensation in his plaint and enables the Court to allow amendment to the plaint at any stage of the proceedings to make such a claim. Sub-section (3) of Section 22 of the Act states that the power of the Court to refund any earnest money or deposit is without prejudice to its powers to award compensation u/s 21 of the Act. Therefore, even if the Court directs refund of earnest money or deposit, it will not preclude the Court to award compensation u/s 21 of the Act. The claim for compensation and the claim for specific performance under the provisions of the Act are independent of each other. An alternative relief u/s 21 of the Act does not debar a plaintiff from asking for specific relief on the ground that plaintiff has, on his own, quantified the actual amount to which he is entitled to in the event of the grant of alternative relief to

him.

29. Though the plaintiff has alternatively pleaded for award of damages of Rs. 1 lakhs, in essence, it is compensation for breach of contract, Section 21 of the Act, contains both substantive as well as procedural rights. "Compensation" is said to be referred to the pecuniary recompense which a person is entitled to receive in respect of damage or loss which he has suffered, other than as a result of an actionable wrong, litigated in the civil court, committed by the person bound to make the recompense. It suggests the image of balancing one thing against another; it primarily signifies equivalence, and secondarily something given or obtained as an equivalent. Compensation/damages is not punitive in nature. It is settled that a party committing breach is liable to compensate.

30. The agreement Ex.PI does not provide for payment of damages in case of breach of contract. Therefore, a reasonable compensation has to be assessed having regard to the facts and circumstances of the case. In this case, it is concluded by the court below that the first defendant has committed breach of contract. The third defendant has purchased the property without notice of the previous contract entered into between plaintiff and defendant Nos. 1 and 2. Therefore, he cannot be made liable to pay the compensation. In the case of *Kanshi Ram Vs. Om Prakash Jawal and others*, , the Apex Court has held that granting decree for specific performance of a contract of immovable property is not automatic. It is one of the discretion to be exercised on sound principles. When the Court gets into equity jurisdiction, it would be guided by justice, equity, good conscience and fairness to both the parties. In the said case, the court below has found that the plaintiff has claimed damages as an alternative relief. Therefore, the Apex Court has held that the court below would have been well justified in granting alternative decree for damages and accordingly, damages were awarded. In *K. Narendra Vs. Riviera Apartments (P) Ltd.*, , while refusing to grant specific performance of the agreement, the Apex Court was considering the grant of compensation and awarded a sum of Rs. 3,25,000/- which is equivalent to the amount which was paid by the respondent to the appellant on the facts and circumstances of the case.

31. The sale consideration fixed in Ex.P1 was Rs. 1,30,000/-. Defendant No. 1 has sold the property as per Ex.P17 to the third defendant for a sum of Rs. 1,90,000/-. Thus, the first defendant has made a profit of Rs. 60,000/-. Having regard to the facts and circumstances of the case, it is just and proper to award a compensation of Rs. 60,000/- to the plaintiff/appellant and the first defendant, who has breached the contract is liable to pay the same.

32. Conclusion: As noticed above, the court below has held that plaintiff was ready and willing to perform his part of the contract while answering issue Nos. 1 to 4. Though I have held that the suit filed by the plaintiff is in time, having regard to the finding on point No. (ii), the claim of the plaintiff for specific performance of the agreement Ex.PI is rejected. However, I direct defendant No. 1/respondent No. 1 to pay a sum of Rs. 60,000/- by way of compensation to the

plaintiff/appellant which amount shall carry interest at the rate of 9% per annum from today till realisation, in addition to the refund of Rs. 30,000/- with interest at 9% per annum from the date of the suit till the date of realisation as ordered by the court below. Having regard to the facts and circumstances of the case, I direct the parties to bear their own costs. The appeal is disposed of in the aforesaid terms. Draw the decree accordingly.