
(2007) 04 AP CK 0081
In the Andhra Pradesh High Court
Case No : AS No. 130 of 1991

Godavarthi Ramakrishna Rao and Another	APPELLANT
Vs	
B. Sitaramachandra Raju (died) by LRs.	RESPONDENT

Date of Decision : 13-04-2007

Acts Referred:

Specific Relief Act, 1963 — Section 16, 19, 19(1), 20
Transfer of Property Act, 1882 — Section 3

Citation : (2007) 4 ALD 760 : (2007) 4 ALT 784

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : M. Dhananjay Reddy, for L. Ravi Chander, for the Appellant; C. Subba Rao, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Introductory Facts: This appeal is preferred by defendants 2 and 3 as against the decree and judgment made in OS No. 46 of 1985 on the file of the Principal Subordinate Judge, Visakhapatnam.

2. The plaintiff is the 1st respondent in the appeal and inasmuch as the plaintiff died, his legal representatives-respondents 3 to 5 were brought on record. The 2nd respondent in the appeal is the 1st defendant in the suit.

3. The deceased-plaintiff instituted the said suit OS No. 46 of 1985, referred to supra, praying for the relief of specific performance of the agreement of sale in relation to the plaint schedule property dated 20-5-1984 executed by the 1st defendant in his favour and in alternative further prayed for the refund of the advance amount of Rs. 90,000/- and also for damages and also for certain other ancillary reliefs.

4. On the strength of the respective pleadings of the parties and having settled the issues, the learned Principal Subordinate Judge, Viskhapatnam, recorded the evidence of PW. 1, the plaintiff, DW. 1, the husband of 1st defendant, DW.2, the

2nd defendant, and yet another witness DW.3, marked Exs. A1 to A17 and Exs. B1 to B17 and came to the conclusion that the plaintiff is entitled to the relief of specific performance of agreement of sale in question and also the plaintiff is entitled for recovery of possession of the plaint schedule property and defendants 1, 2 and 3 to execute a sale deed in favour of the plaintiff at the expenses of the plaintiff after receipt of balance sale consideration and if there is failure to execute the sale deed by the defendants, the plaintiff is at liberty to obtain the sale deed through Court and the plaintiff to deposit the balance of sale consideration within a week from the date of the decree. It is stated by the Counsel representing the legal representatives of the plaintiff that the remaining sale consideration had been deposited, but during the pendency of the appeal the same had been withdrawn and again a re-deposit was made and it is stated that the amount which had been made by way of re-deposit was lying in the Court deposit to the credit of the suit. Aggrieved by the above judgment and decree, the present appeal was preferred by defendants 2 and 3. The 1st defendant had not preferred any independent appeal challenging the findings which had been recorded by the learned Principal Subordinate Judge, Visakhapatnam.

5. This Court on 23-1-2003 made a limited order of remand directing the learned Principal Senior Civil Judge at Visakhapatnam to frame an additional issue to the effect that whether defendants 2 and 3 were bona fide purchasers for value without notice of prior contract of sale or otherwise and remit back the suit to this Court within a period of two months. The learned Judge recorded findings in relation thereto by order dated 11-11-2003 and subsequent thereto, as can be seen from the docket, the matter had undergone several adjournments and ultimately the matter is coming up for final hearing before this Court.

Contentions of Sri L. Ravichander

6. Sri L. Ravichander, learned Counsel representing Sri Dhananjaya Reddy, learned Counsel representing the appellants, in all thoroughness had taken this Court through the respective pleadings of the parties, the evidence available on record and further pointed out to the clauses in the agreement and would maintain that in the facts and circumstances of the case decreeing the suit for specific performance cannot be sustained. The learned Counsel also would maintain that though normally time may not be the essence of the contract in cases of immovable of property, in the light of the specific clauses in the agreement of sale in question and also the conduct of the parties it is clear that time is the essence of the contract. The learned Counsel also would point out that the question whether defendants 2 and 3 are the bona fide purchasers or not may assume some importance if there was a subsisting contract and in the light of the events it is clear that the contract itself was put to an end to and subsequent thereto the purchase was made and hence the question whether these parties are bona fide purchasers for value or not within the meaning of Section 19(b) of the Specific Relief Act, 1963 would not assume much

importance. While further elaborating his submissions, the learned Counsel would maintain that this should be the next question, but the principal question to be decided is whether in the facts and circumstances can it be said that the plaintiff had been ready and willing to perform his part of the contract. The learned Counsel pointed out to the specified dates mentioned in the agreement of sale and non-compliance of such conditions by not making such payments within the stipulated time. The learned Counsel would point out that this is a typical case where the plaintiff having entered into the agreement of sale, subsequent thereto began conducting some enquiry into title and began delaying the matter and by virtue of this conduct, the 1st defendant had put an end to the contract in accordance with law and in view of the same and inasmuch as by the date defendants 2 and 3 purchased the property, there was no valid subsisting contract as such, the question whether these defendants are subsequent bona fide purchasers for value or not would lose its significance. The learned Counsel also would submit that it is true that the 1st defendant having derived the advantage by receiving amounts from both parties, the plaintiff as well as defendants 2 and 3, became a silent spectator. However, the Counsel would submit that even in such case where the bona fide purchasers challenged the decree and judgment made in a suit for specific performance, they are entitled to raise all such pleas and defences which would be otherwise available to the original owner, i.e., the 1st defendant in the present suit. Hence, the learned Counsel would submit that on overall appreciation of the facts and circumstances since the relief of specific performance being the discretionary relief and relief based more on equity, it would be just and proper to allow the appeal protecting the sale transaction in question. The Counsel placed reliance on several decisions to substantiate his submissions.

Contentions of Sri C. Subba Rao

7. Sri C. Subba Rao, learned Counsel representing the legal representatives of the plaintiff at present would maintain that the contention of the other side that the rights in favour of PW. 1 had got extinguished cannot be a sustainable contention and if this contention to be accepted, automatically in every suit for specific performance the original owner would try to defeat the agreement of sale in question by executing a sale deed by putting forth such contention and hence, the same cannot be accepted. The learned Counsel also would submit that merely because the other side contends that there was no subsisting contract as on the day when the alleged bona fide purchasers said to have purchased the property, that by itself may not be sufficient. The Counsel also would submit that it is true that for sufficiently long time the view was that a bona fide purchaser cannot put forth all other pleas which may be otherwise available in the case of the original owner in a suit for specific performance, but subsequent thereto the other pleas like readiness and willingness to perform the contract also may be put forth by the bona fide purchasers. The Counsel also would submit that this would not seriously alter the situation if the facts are carefully analysed. The learned Counsel would point out that by virtue of the limited order of remand

calling for a finding on additional issue, the learned Principal Senior Civil Judge at Visakhapatnam submitted findings in relation thereto by order dated 11-11-2003 wherein it was recorded that defendants 2 and 3 are not bona fide purchasers for value without notice of Ex. A1. the Counsel also would submit that in the light of those findings, the only question that may have to be decided is whether the plaintiff had been ready and willing to perform his part of contract and whether time would be the essence of the contract in the light of the recitals in the agreement of sale in question and whether the other findings recorded by the learned Principal Subordinate Judge to be confirmed or to be disturbed in the facts and circumstances of the case. The learned Counsel had taken this Court through the contents of Exs.A5 and A6 and would submit that the conduct of PW. 1, if carefully appreciated as reflected from his evidence, it is clear that he had been always ready and willing to perform his part of contract and even otherwise the clauses introduced in Ex. A1 are not such clauses resulting in penal consequences or otherwise or these are at best can be said to be in terrorom and not beyond thereto and hence it cannot be said that the time is the essence of the contract in the present case. The learned Counsel placed strong reliance on certain decisions to substantiate his contentions.

8. Heard the learned Counsel representing the respective parties, perused the oral and documentary evidence available on record and also the findings recorded by the Court of first instance and the further findings recorded by the learned Principal Senior Civil Judge at Visakhapatnam by order dated 11-11-2003 on an additional issue.

9. Before further proceeding with the further discussion, it would be appropriate to have a look at the respective pleadings of the parties.

Averments made in the Plaintiff

(a) The first defendant is the owner of a building and site, which are fully described in the schedule attached herewith. The first defendant executed an agreement of sale on 20-4-1984 in favour of the plaintiff agreeing to sell the building and the site appurtenant thereto for a sum of Rs. 3,00,000/- and she has received an advance of Rs. 90,000/-. The said agreement was executed with the following conditions for the purpose of executing a sale deed in favour of the plaintiff. It was agreed that the part of balance of the consideration is payable on 30-6-1984 Rs. 1,10,000/- and the remaining balance is agreed to be paid at the time of registration. The stamp and registration charges will have to be borne by the plaintiff. The sale deed is to be executed on or before 20-7-1984. The other formalities necessary for due execution of the sale deed have to be pursued by the first defendant.

(b) When the plaintiff is ready and willing to take a registered sale deed with the balance money, the first defendant gave a registered lawyer's notice through Advocate at Kakinada on 21-8-1984 claiming that she is cancelling the agreement to sell in favour of the plaintiff because as per the stipulations in the

agreement, the plaintiff did not properly pay the amount. The said allegations in the notice are not true because unless income tax and wealth tax clearance are received, no document will be registered. The plaintiff informed the husband of the first defendant that he will take a registered sale deed and he is ready with money by phone and requested him to give the copy of original sale deed of first defendant to enable the plaintiff to prepare a draft sale deed for the purpose of registration. The first defendant was postponing the same, as necessary certificates are not received. The plaintiff sent a detailed reply bringing out the above facts on 31-8-1984.

(c) Subsequently the plaintiff suspected that the defendant No. 1 on contemplating to execute an agreement to sell in favour of the defendants 2 and 3 and to alienate the property in favour of the defendants 2 and 3. Thereupon the plaintiff sent a registered lawyer's notice to the first defendant on 15-11-1984 and a copy of the original reply sent to the Advocate Sri P. Bangara Raju of Kakinada is also enclosed, informing the defendants about the existence of the agreement to sell dated 26-4-1984 and if any agreement of sale is executed it is not valid and binding on the plaintiff, for which the first defendant sent a reply stating that she did not execute any agreement of sale in favour of the defendants 2 and 3 and that she is ready and willing to execute a sale deed and requested for payment with 12.1/2% interest on the outstanding balance amount, for which a reply has been sent by the plaintiff bringing out the provisions of the Income Tax Act and also expressing their readiness and willingness to perform their part of the contract and the willingness to perform their part of the contract and first defendant herself has committed breach of contract of the agreement. The plaintiff subsequently learnt that they have inducted the defendants 2 and 3 into the house (till then it was vacant) and subsequently executed an agreement of sale on 21-11-1984 in favour of defendants 2 and 3 and a registered sale deed was also executed in their favour on 5-12-1984 for Rs. 1,50,000/- in favour of the third defendant and another bit of property in favour of the second defendant for Rs. 75,000/-.

(d) The defendants 2 and 3 are quite aware of the agreement of sale in favour of the plaintiff and payment of sale consideration as advance and the said agreement is still subsisting and having knowledge of the agreement of sale, the defendants 2 and 3 have purchased the property from the first defendant. The said sale deeds are invalid and inoperative.

(e) The plaintiff submits that he is ready and willing to pay the entire sale consideration of Rs. 2,10,000/- and obtain a registered sale deed in his favour. The plaintiff submits that on account of the plan which was given at the time of the agreement of sale and as per the measurements given in the schedule, the plan does not tally with the measurements and the original sale deed which was obtained in 1970 has not been given to the plaintiff. The plaintiff also brought to the notice of the first defendant that one B.V.J.J. Raju who is the father of the plaintiff in claiming title by adverse possession and the first defendant was never

in possession and enjoyment thereof since their purchase. The plaintiff submits that he is not a member of the joint family with his father. Both the father and the son have separated themselves and are living separately having separate mess and partitioned their house among themselves as well as the lands which they are having. Therefore, the plaintiff submits that he is not a member of the joint family with his father. Both the father and the son have separated themselves and are living separately having separate mess and partitioned their house among themselves as well as the lands which they are having. Therefore, the plaintiff submits that he is prepared to take a sale deed even to the rest of the house and the vacant site. The first defendant did not show any municipal tax receipts having paid on the land and on the house of mutation of her in the municipal records. Hence, the plaintiff is filing the suit for specific performance of the agreement of sale dated 20-5-1984 and for recovery of the possession of the plaintiff schedule building and for damages in addition to the specific performance of the agreement.

Averments made in the Written Statement of Defendant No. 1

The material allegations in Para 111(a) of the plaint are all false and incorrect. It is true that the first defendant executed an agreement of sale on 20-5-1984, whereunder the plaintiff agreed to purchase the plaintiff schedule property for Rs. 3,00,000/- (Rupees three lakhs only) and that he paid Rs. 90,000/- (Rupees ninety thousand only) towards advance on the date of sale agreement. The remaining averments in Para 111(a) of the plaint relating to the conditions for executing a sale deed are false and incorrect. It was specifically agreed that the plaintiff should pay the balance of Rs. 2,10,000/- (Rupees two lakhs ten thousand only) in two instalments on or before two specified dates in specific sums mentioned in the agreement of sale. It was agreed that the plaintiff shall pay Rs. 1,10,000/- (Rupees one lakh ten thousand only) in the defendant's village before 30-6-1984 and the balance of Rs. 1,00,000/- (Rupees one lakh only) before 20-7-1984 in the 1st defendant's village and that after the full and final payments, the 1st defendant shall execute a registered sale deed on the proper stamps brought by the plaintiff in favour of the plaintiff's nominee and register the sale deed at the cost of the plaintiff. It was further agreed that in case of failure of the plaintiff to pay in full, the balance of sale consideration before the time fixed and get the deed registered, the advance amount paid shall be forfeited and the sale agreement shall stand cancelled. It was further agreed that in case of any disputes arising in relation to the sale transaction, such disputes shall be subject to the jurisdiction of the Courts having territorial jurisdiction over the defendant's village, Lakshminarasapuram in Rayavaram Taluk of East Godavari District. It is therefore false to state in Para 111(a) of the plaint that Rs. 1,10,000/- a part of the consideration is payable on 30-6-1984. It is equally false to aver that the remaining balance is agreed to be paid at the time of registration. It is payable before 20-7-1984. It is after such full and final payment of the entire amount making a total of Rs. 3,00,000/- (Rupees three lakhs only), the plaintiff should purchase stamps at his expenses and get the

deed registered also at his expense. The last sentence in Para III(A) of the plaint to the effect that the other formalities necessary for due execution of the sale deed have to be pursued by the 1st defendant is a total invention of the plaintiff and there is no such whisper either in the agreement or elsewhere. The plaintiff has conveniently omitted to mention and suppressed the fact relating to the jurisdiction, the clause relating to forfeiture of advance and cancellation of the agreement in case of default by the plaintiff in fulfilling and performing his part of the contract and that time is the essence of the contract.

The material allegations in Para III(b) are false and incorrect and untenable. The plaintiff was never ready and willing to take a registered sale deed with the balance money. The plaintiff never informed either by phone or otherwise the husband of the 1st defendant that he will take a registered sale deed and that he is ready with money. The plaintiff never requested the 1st defendant's husband to give the copy of the original sale deed of the 1st defendant for any purpose much less to enable the plaintiff to prepare a draft sale deed for the purpose of registration. The alleged request does not at all arise as the plaintiff was already given long time back a Photostat copy of the original sale deed that stood in favour of the 1st defendant. The plaintiff was fully aware that the 1st defendant required the funds for running business and that he was obliged to honour the payment schedule stipulated in the agreement of sale. The 1st defendant's husband and her sons and clerks have been persistently demanding the plaintiff to make payment of the balance amount of sale consideration to her. In spite of several demands, the plaintiff did not pay any amount further, in pursuance of the conditions of the agreement. The 1st defendant was, therefore, constrained to issue a registered lawyer's notice dated 21-4-1984 cancelling the sale agreement and forfeiting the advance amount and informing that she would recover the loss that may arise on the resale of the property. The receipt of income tax and wealth tax clearances for registration of any documents has no bearing or relevance in the context of the averments in Para 111(b) of the plaint. It is true that the plaintiff sent a registered lawyer's notice dated 31-8-1984. The allegations therein are false, untenable and contumacious. In the said reply the plaintiff took several inconsistent, untenable and frivolous pleas in collusion with the other members of his family. Sri B. V.J.J. Raju, the 1st defendant's vendor and the plaintiff are all members of the same family. The plaintiff and his father Sri B.V.J.J. Raju along with other members have conspired in obvious from the contumacious pleas taken for the first time in the said reply notice dated 31-8-1984. Almost all the pleas the plaintiff took in the said notice are baseless, false, irrelevant and invented for the purpose of the said notice. The plaintiff was never ready and willing to perform his part of the contract. In a vain attempt to cover up his default, the plaintiff has got sent that so-called detailed reply with all false, untenable and frivolous pleas.

The material allegations in Para III(c) of the plaint are false, incorrect and untenable. It is true that the plaintiff sent a registered lawyer's notice dated 15-11-1984 to the 1st defendant along with a copy of the reply sent to the

Advocate Sri B. Bangara Raju in respect of an earlier notice. It is also correct that the 1st defendant got issued a registered reply lawyer's notice dated 15-11-1984. But the said reply is sought to be misrepresented by the plaintiff to suit his convenience. Apart from controverting all the false, baseless and frivolous allegations in the notice of the plaintiff, a last chance, as a matter of grace, was given to the plaintiff to show his bona fides and readiness with money and that the plaintiff may pay the balance of sale consideration with interest at 12.1/2% by way of demand draft within 7 days from the date of receipt of the said reply. The plaintiff did not avail the said chance and opportunity thereby exposing his mala fides once again. Instead of performing his part of the contract, even though a chance was given to him, the plaintiff resorted to sending a reply with further vexatious and untenable allegations through his Advocate by way of a reply lawyer's notice dated 25-11-1984. The plaintiff was never ready with the balance of sale consideration and had been acting dishonestly all through.

The Rejoinder notice dated 25-11-1984 got issued by the plaintiff contained several untenable contentions, though he was aware that time is the essence of contract, that the provisions of Income Tax Act and Rules would not stand in his way to perform his part of the contract. The plaintiff has thus deliberately and wilfully committed breach of the contract. The 1st defendant is therefore justified in cancelling the sale agreement in favour of the plaintiff and in forfeiting the advance paid by him and in laying a claim for damages sustained by her due to the breach of contract by the plaintiff. It is false and untenable for the plaintiff to contend that the 1st defendant herself has committed breach of contract of the agreement. On the other hand the 1st defendant has acted liberally and nobly towards the plaintiff who along with his father acted dishonestly in the transaction. The averments in Para III(c) of the plaintiff that the 1st defendant has inducted defendants 2 and 3 into the house and executed an agreement of sale and later a registered sale deed in their favour are correct.

The material allegations in Para III(D) about the knowledge of defendants 2 and 3 about the agreement of sale etc., are false and incorrect. The sale in favour of defendants 2 and 3 is valid, operating and binding.

The material allegations in Para III(a) of the plaint are false and untenable. The plaintiff has never been ready and willing at any material point of time, nor is he ready even by the time of filing of the suit. The contentions relating to the plan, measurements etc., mentioned in Para III(e) are false. The plaintiff is in possession of the original sale deed in favour of the 1st defendant. Sri B. V.J.J. Raju, the father of the plaintiff, has no claim to title by adverse possession in respect of any portion of the suit property. The plaintiffs preparedness to take a sale deed even to the rest of the house and vacant site does not at all arise. So also the division in status or otherwise between the plaintiff and his father, their having partitioned their house between themselves, etc., also do not at all arise. Similarly the 1st defendant is not bound to show any municipal tax receipts or

mutation of her name in the municipal records. The suit for specific performance of agreement of sale is not maintainable.

Averments made in the Written Statement of Defendant No. 3

The allegation in Para 3(c) that subsequently the plaintiff suspected that the defendant No. 1 was contemplating to execute an agreement to sell in favour of the defendants 2 and 3 and to alienate the property in favour of defendants 2 and 3. Thereupon the plaintiff sent a registered lawyer's notice to the 1st defendant 15-11-1984 and a copy of the original reply sent to the Advocate Sri P. Bangara Raju of Kakinada is also enclosed, informing the defendants about the existence of the agreement to sell dated 20-5-1984 and if any agreement of sale is executed it is not valid and binding on the plaintiff, for which the first defendant sent a reply stating that she did not execute any agreement of sale in favour of defendants 2 and 3 and that she is ready and willing to execute a sale deed and requested for payment with 12.1/2% interest on the outstanding balance amount, for which a reply has been sent by the plaintiff bringing out the provisions of the Income Tax Act and also expressing their readiness and willingness to perform their part of the contract and the first defendant herself has committed breach of contract of the agreement. The plaintiff subsequently learnt that they have inducted the defendants 2 and 3 into the house (till then it was vacant) and subsequently executed an agreement of sale on 21-11-1984 in favour of the defendants 2 and 3 and as a registered sale deed was also executed in their favour on 5-12-1984 for Rs. 1,50,000/- in favour of the 3rd defendant and another bit of property in favour of the 2nd defendant for Rs. 75,000/-are absolutely false and incorrect.

The allegation in Para 3(d) that the defendants 2 and 3 are quite aware of the agreement of sale in favour of the plaintiff and payment of sale consideration as advance and the said agreement is still subsisting and having knowledge of the agreement of sale, the defendants 2 and 3 have purchased the property from the 1st defendant. The said sale deed are invalid and inoperative are absolutely false and incorrect.

This defendant, as already submitted, has no knowledge about the alleged sale agreement between the plaintiff and the 1st defendant and she has bona fide purchased under registered sale deed dated 19-12-1984 after defendant has occupied the portion and residing in the building. Even at that time, plaintiff never objected for occupying the said building or she has brought to the notice of this defendant that the plaintiff is going to purchase the said building. Therefore, the suit against the defendant is not maintainable.

10. Issue settled by the Court of first instance

1. Whether the plaintiff is entitled to the relief of specific performance?
2. Whether the plaintiff is entitled to refund of Rs. 90,000/- in the alternative?
3. Whether the plaintiff is entitled for possession?

4. Whether the plaintiff is entitled to damages of Rs. 10,000/-?

5. Whether this Court has no jurisdiction to entertain the suit?

6. To what relief?

11. On the limited order of remand made by this Court, the following additional issue also had been settled:

Whether D2 and D3 are bona fide purchasers for value without notice of prior contract of sale or otherwise?

WITNESSES EXAMINED FOR THE PLAINTIFF

PW.1/7.9.90. Seetha Rama Chandra Raju.

WITNESSES EXAMINED FOR THE DEFENDANTS

DW. 1/31.10.90. D. Venkatapathi Raju.

DW.2/15.11.90. Godavarthi Rama Krishna Rao.

DW.3/5.12.90. Sri Raja Vatsawayi Varaha Narasimha Raju.

DOCUMENTS MARKED OR THE PLAINTIFF

Ex.A 1/20.5.84.-Agreement for a sum of Rs. 3,00,000/- executed by Datla Padvathi in favour of Bhupathi Raju Seetharama Chandra Raju.

Ex.A2/21.8.84.-Registered lawyer's notice issued by an Advocate on behalf of the defendant to the plaintiff.

Ex.A3/31.8.84.-Office copy of reply lawyer's notice issued by plaintiff to Sri P. Bangara Raju, who issued notice under Ex.A2.

Ex.A4/15.11.84.-Office copy of registered lawyer's notice sent by the plaintiff to the defendants 1 and 2.

Ex.A5/18.11.84.-Reply sent by DI to the said notice.

Ex.A6/25.11.84.-Rejoinder sent by the plaintiff.

Ex.A7/19.12.84.-Registration extract of sale deed executed by defendant No. 1 in favour of the 2nd defendant.

Ex.A8/19.12.84.-Registration extract of sale deed executed by defendant No. 1 in favour of the 3rd defendant.

Ex.A9/-Phone Call No. 6111 of plaintiff showing that the plaintiff talked with the 1st defendant in September.

Ex. A10/-Phone Call No. 6111 of plaintiff showing that the plaintiff talked with the 1st defendant in the month of August.

Exs.A11 to A15.-Photos with negatives showing the construction of the wall in

front of the schedule property.

ExA16.-Opened cover.

Ex.A17/17.11.84.-Postal acknowledgment.

DOCUMENTS MARKED ON BEHALF OF THE DEFENDANTS

Ex. B1.-Certified copies of Xerox copy of plaint.

Ex.B2.-Written statement in OS No. 1319/84 of ADM Court, Visakhapatnam.

Ex.B3.-Certified copy of Xerox copy of plaint and written statement in OS No. 1471/88 of ADM Court, Visakhapatnam.

Exs.B5 and B6.-Certified copy of Xerox copy of plaint and written statement in OS No. 1369/85 of ADM Court, Visakhapatnam.

Ex.B7.-Proceedings of Visakhapatnam Municipal Corporation, Visakhapatnam issued under B.A. No. 35/71 to Smt. D. Padmavathi.

Ex.B8/13.7.71.-Proceedings of Visakhapatnam Municipal Corporation, Visakhapatnam issued under B.A. No. 11/71 to Smt. D. Padmavathi.

Exs.B9 to B12/13.7.71.-Approved plans issued by Visakhapatnam Municipal Corporation to Smt. D. Padmavathi.

Exs.B13 to B17.-Photos with negatives.

12. Further, after remand, 2nd defendant was examined as DW.2 and the plaintiff reported no rebuttal evidence on his behalf.

Findings recorded by the learned Judge initially and also by answering additional issue

13. The learned Judge, on appreciation of evidence, came to the conclusion that the Court has jurisdiction to entertain the suit and further recorded findings in detail on issues 1 to 3 and came to the conclusion that the plaintiff had been ready and willing to perform his part of contract and hence plaintiff is entitled for the relief of specific performance of agreement of sale in question and also entitled for the recovery of possession. The learned Judge also recorded the finding that in view of the principal relief being granted, the alternative relief of refund need not be considered and the learned Judge also recorded in the light of the principal relief being granted, the plaintiff is not entitled to the damages of Rs. 10,000/-and accordingly the suit was decreed.

14. On the limited remand referred to supra calling for a finding on framing an additional issue, the learned Judge examined further DW.2 and answered additional issue in Paragraphs 7 to 19 and ultimately came to the conclusion that defendants 2 and 3 are not bona fide purchasers for value without notice of Ex.A3.

15. Points which arise for consideration in this appeal

1. Whether the findings recorded by the learned Judge while granting the relief of specific performance in favour of the plaintiff and the other ancillary reliefs, to be confirmed or to be disturbed in the facts and circumstances of the case?

2. Whether the findings recorded by the learned Judge relating to whether defendants 2 and 3 are bona fide purchasers for value without notice to the prior agreement of sale to be confirmed or to be disturbed in the facts and circumstances of the case?

3. If so, to what relief the parties would be entitled to?

Points 1 and 2:

16. For the purpose of convenience, points 1 and 2 are being discussed together.

17. Sri Ravi Chander, learned Counsel representing the appellants in all fairness had submitted that he is not seriously contesting the question of jurisdiction. It is needless to say that the suit in relation to immovable property praying for the relief of specific performance to be instituted before the Court within whose limits such property is located. Be that as it may, since no serious controversy had been raised in this regard, no further discussion need be made on this question.

18. The respective pleadings of the parties, the evidence available on record and the findings recorded by the Court of first instance initially and also on the limited remand calling for the finding made by this Court already had been referred to supra.

19. At the outset, it is pertinent to note that the original owner of the property, the 1st defendant, had not preferred any appeal as against the decree and judgment. The subsequent purchasers claiming to be the bona fide purchasers for value have been contesting the litigation seriously and defendants 2 and 3 alone had preferred the present appeal.

20. PW. 1, the plaintiff, had deposed in relation to the transaction in question, Ex. A1, the agreement of sale executed by defendant No. 1 dated 20-5-1984. PW. 1 deposed that he accepted to purchase the plaint schedule property for Rs. 3,00,000/- and paid Rs. 90,000/- to the 1st defendant and executed an agreement of sale on 20-5-1984-Ex. A1. This witness also deposed that the balance of sale consideration to be paid is Rs. 1,10,000/- on 30-6-1984 and the remaining amount of Rs. 1,00,000/- on 20-7-1984 at the time of registration. The specific stand taken by PW. 1 is that in spite of repeated requests made by him to show the earlier title deed in the name of the 1st defendant in respect of the plaint schedule property, the same was not shown to him and the 1st defendant gave a plan to him at the time of execution of Ex. A1, and the said plan was not tallying with the property on the field. PW. 1 also deposed that the 1st defendant got issued a notice to him as he did not pay the balance of sale consideration as agreed and further stated in the notice that the agreement of

sale was cancelled. Ex.A2 is the notice issued to him by the 1st defendant on 21-8-1984 and he gave a reply-Ex.A3, the office copy of which is dated 31-8-1984. It was mentioned in Ex.A3 that PW. 1 was ready and willing to perform his part of contract and he also requested in Ex.A3 to produce the Income Tax Certificate, Urban Land Ceiling Certificate and also Wealth Tax Certificate. PW. 1 further deposed that subsequently the 1st defendant got published in Eenadu Newspaper on 18-3-1984 that the plaint schedule property would be sold by his father got published in Eenadu Newspaper on 3-4-1984 that in the main hall adjoining room and varandah belonging to his father acquired title by adverse possession. PW. 1 also further deposed that PW. 1 and his father had separated even in the year 1980. PW. 1 also deposed that he asked the 1st defendant about the extent of the site mentioned in Eenadu Paper and the extent of the site mentioned in Ex. A1 and the 1st defendant told him that he would come and show the schedule property, but the 1st defendant did not give a copy of her sale deed. PW. 1 also deposed that he requested the 1st defendant to give the correct extent of site as there is inconsistency in respect of the schedule property to that of the plan and he got issued a notice to the 1st defendant as the 2nd defendant was in occupation of the property sold to him. Ex.A4 is the office copy of the notice dated 15-11-1984. The 1st defendant sent a reply, which is Ex.A5 dated 18-11-1984 and in Ex.A5 it is mentioned that the 1st defendant did not sell the property to the 2nd defendant and 3rd defendant and that they are ready and willing to sell the property as agreed provided PW. 1 paid interest at 12% per annum. PW. 1 further deposed that there is no interest clause in Ex. A1. PW. 1 also deposed that he sent a Rejoinder dated 25-11-1984 stating that there is no stipulation to pay interest under Ex. A1. PW. 1 also deposed that he requested under Ex.A6 to send a copy of the sale deed in the name of the 1st defendant for purpose of drafting the petition for issue of Income Tax Certificate. The 1st defendant executed a sale deed in favour of defendants 2 and 3. Ex.A7 is the registration extract of the sale deed dated 19-12-1984 in favour of the 2nd respondent in respect of a portion of the plaint schedule property and Ex.A8 is the registration extract of the sale deed dated 19-12-1984 in favour of 3rd defendant in respect of another portion of the plaint schedule property. Exs.A7 and A8 originals containing the recitals that the 1st defendant executed agreements in favour of defendants 2 and 3 in respect of the plaint schedule property on the same day. PW. 1 also deposed that the defendants 2 and 3 are aware about the execution of Ex. A1 in his name. PW. 1 also deposed that he is ready and willing to deposit the balance of sale consideration and take a sale deed as ordered by the Court. PW. 1 further deposed that the 1st defendant is a resident of Lakshminarasapuram in Anaparthi in East Godavari District and the phone Number is 41 and he had a talk with the 1st defendant 4 or 5 occasions from Kakinada and he had also a talk with the 1st defendant on 11-8-1984 by phone through their telephone No. 41. Ex.A9 is the phone bill to show that he had a talk with the 1st defendant on 11-8-1984. Ex.A10 is the phone bill showing that he had a talk with the 1st defendant in the month of August and defendants 2 and 3 made alterations and

constructed a wall and the same can be seen from Exs. A1 1 to A15, photos and negatives, showing the construction of the wall in front of the schedule property. This witness also deposed that his father filed a suit against the 1st defendant for declaration that he is the absolute owner of the center hall, its adjoining room and the varandah, on the file of DMC, Visakhapatnam and the same was transferred and renumbered as OS No. 79 of 1988. PW. 1 also deposed that he had been ready and willing to pay the balance of sale consideration and obtain the sale deed even in respect of the property excluding the property claimed by his father. This witness was cross-examined at length. In the cross-examination of 1st defendant, PW. 1 deposed that it is mentioned in Ex. A1 that failure to pay the balance of sale consideration as mentioned in Ex. A1, the money paid as advance should be forfeited and the agreement stands cancelled, and this witness also deposed that he raised an objection to the jurisdiction clause on 20-5-1984 itself, but he did not protest in writing about the jurisdiction of East Godavari District Court. This witness also deposed that the plaint schedule property originally belonged to his paternal grandfather B. V.P. Raju and the plaint schedule property and its adjacent property fell to the share of his paternal grandfather Bh. Sitarama Raju and he knows the physical features of the property as this property had fallen to his share. The 1st defendant's husband carried on business in the suit premises and defendant No. 1 purchased the property in the year 1970. This witness also deposed about the boundaries and other details in Ex. A1. This witness was cross-examined in relation to his father filing OS No. 79 of 1988 and no doubt this witness admitted that it was in relation to a part of the subject-matter of the suit claiming a part of the suit property by way of adverse possession. This witness also deposed that it is not true to say that he was not having funds of a sum of Rs. 1,10,000/- by 30-4-1984 and that a sum of Rs. 1,00,000/-by 20-7-1984. This witness specifically deposed that he was ready with the balance of sale consideration by the above dates and he was keeping money in the Banks and he is having S.B. Account; his properties would be worth more than Rs. 10,00,000/-and he was working as Manager in A.P. Fisheries Corporation and he had resigned to his job. Certain suggestions put to him in other aspects had been denied. This witness also deposed that he did not give any notice to the 1st defendant to the lawyer's notice and he has no disputes with his father in respect of the properties and certain further details relating to OS No. 79 of 1988 had been elicited from this witness. Several suggestions put to this witness had been specifically denied. In the cross-examination of defendants 2 and 3, this witness deposed that his younger sister by name Usha Rani filed OS No. 192 of 1987 for partition against him, his father and mother and they are contesting the said suit. This witness also deposed that this witness and his mother filed OS No. 1471 of 1988 on the file of DMC, Visakhapatnam, against one G. Bangari for permanent injunction. This witness also deposed that it is not true to say that defendants 2 and 3 were inducted into possession of the suit schedule property as tenants and it is not true to say that he was cordial with defendants 2 and 3 and he did not file any suit against defendants 2 and 3 for any injunction. This witness also deposed in

the cross-examination of defendants 2 and 3 that he did not give any notice to the 1st defendant immediately after Ex. A1 and by the date of Ex. A1, he was residing near the suit property in his house. This witness also deposed that the 1st defendant issued Ex.A2 as he did not obtain the sale deed within the time stipulated in Ex. A1 and this witness also deposed that she stated that she was forfeiting the advance and cancelling the agreement for obtaining. This witness also deposed that for obtaining the Income Tax Clearance Certificate, the draft sale deed should be submitted. This witness also deposed that it is not true to say that Wealth Tax Clearance Certificate is not necessary for obtaining the sale deed. This witness also deposed that he did not mention in Ex.A4 that he deposited money payable to the 1st defendant in any bank; he did not mention in his reply-Ex.A6 that he deposited the balance of sale consideration in any bank giving the account number. This witness also deposed that he was an income tax assessee by the date of Ex. A1 and his accounts do not show that he got Rs. 2,10,000/- to pay the balance of sale consideration under Ex. A1. The suggestions put to him in relation to his capacity to pay the amount had been specifically denied.

21. The husband of the 1st defendant was examined as DW. 1, who was deposed about the purchase of the property in the year 1970. This witness also deposed about the boundaries and about their carrying on business in the suit property. This witness also further deposed that the property was sold for a sum of Rs. 3,00,000/- and the plaintiff agreed to purchase the same for Rs. 3,00,000/- and paid a sum of Rs. 90,000/- at his house in Lakshmi Narasapuram and executed the agreement of sale Ex. A1 in Lakshmi Narasapuram. This witness also deposed about the contents of Ex. A1. This witness specifically deposed that failure to pay the balance of sale consideration as agreed on or before the dates specified thereunder, the advance of Rs. 90,000/- should be forfeited. This witness further deposed that the 1st attester on Ex. A1 is his son and the 2nd attester came along with the plaintiff and the scribe of Ex. A1 is Putta Venkata Rayudu. DW. 1 also deposed that in spite of demands made, the plaintiff did not pay the balance of sale consideration as agreed on or before the two dates. DW. 1 also deposed that he offered to sell the plaint schedule property and defendants 2 and 3 agreed to purchase the property for Rs. 2,25,000/- and he sold the suit property at Rs. 2,50,000/- as the property is under litigation and he had enlightened the defendants 2 and 3 that the plaintiff is not allowing anybody to purchase the property. DW. 1 also deposed that there is a recital in the sale deed executed by the 1st defendant in favour of defendants 2 and 3 about the execution of Ex. A1 and they got issued a notice to the plaintiff and the plaintiff received the same. Ex.A2 is the notice issued by them dated 21-8-1984. DW. 1 deposed that under Ex.A2, plaintiff was informed that his agreement-Ex.A1 stood cancelled. DW. 1 deposed that he had received the original of Ex.A3 and in Ex.A3 it is mentioned that DW. 1 committed default in obtaining the Income Tax Clearance Certificate and a certificate from the Urban Land Ceiling Authority. However, this witness deposed that they are not necessary for registration of a

sale deed. DW. 1 also deposed that the property mentioned in Ex. A1 belong to them and the plaintiffs father has no right in the central hall, front verandah and a room. Certain suggestions put to this witness in relation thereto had been denied. This witness had asserted and had given several details relating to the knowledge of the agreement of sale-Ex.A1 to defendants 2 and 3, the purchasers. This witness was cross-examined at length. This witness deposed that he did not give any notice to the plaintiff prior to 30-6-1984 and he did not write any letter to the plaintiff in respect of the suit property, but he issued a notice to the plaintiff on 21-8-1984. Relating to the contents of exchange of notices, several facts had been elicited from this witness in detail. This witness deposed that they executed agreement in favour of defendants 2 and 3 on 21-11-1984 and they informed defendants 2 and 3 about the exchange of notices between them in respect of the suit schedule property. This witness also deposed that defendants 2 and 3 agreed that they would bear all the consequences of any disputes between DW. 1 and the plaintiff in respect of the suit property. This witness also deposed that his wife executed sale deeds in favour of defendants 2 and 3 at Visakhapatnam. This witness, however, deposed that the sale deed executed by his wife in favour of defendants 2 and 3 does not contain that defendants 2 and 3 should bear the costs and consequences that may arise. This witness also deposed about the repairs and improvements made to the property.

22. DW.2, the 2nd defendant, deposed in detail about his relationship with 3rd defendant and several of the particulars relating to the sale transaction. This witness deposed that he received a copy of Ex.A4 and he did not give any reply to the said notice and he approached PW. 1, who told that there were disputes between himself and the defendant No. 1 and giving a notice is only a formal one. This witness also deposed that Ex. B1 is the certified copy of Photostat copy of plaint in OS No. 1319 of 1984 on the file of DMC, Visakhapatnam and Ex.B2 is the certified copy of Xerox copy of written statement filed by the 2nd defendant in the above suit; PW. 1 and others filed OS No. 1471 of 1988 on the file of DMC, Visakhapatnam against one Gummadi Bangari, who purchased the property from the sister of PW. 1; Ex.B3 is the certified copy of Xerox copy of plaint in OS No. 1471 of 1988 and Ex.B4 is the certified copy of Xerox copy of the written statement filed by the defendant in OS No. 1471 of 1988. This witness also deposed that this witness and his wife filed a suit against PW. 1 and Visakhapatnam Municipality claiming that PW. 1 herein encroaching the joint passage belonging to them; Ex.B4 is the certified copy of Xerox copy of plaint in OS No. 1368 of 1986 and Ex.B6 is the certified copy of Xerox copy of written statement filed by the 1st defendant in that suit. This witness also deposed about the construction of the compound wall. This witness further deposed that Ex.B7 is the proceedings of Visakhapatnam Municipality; Ex.B8 is yet another proceeding of Visakhapatnam Municipality dated 13-7-1971; Exs.B9 to B12 are the approved plans and Exs.B13 to B17 are the photos and negatives in respect of the construction of the Lodge by PW. 1. However, this witness also deposed

that before he purchased the property, PW. 1 told him that he can purchase the suit property and PW. 1 also told him that he advanced a sum of Rs. 90,000/- to the 1st defendant for purchase of the suit property. This witness also deposed that he came to know that there was litigation between 1st defendant and PW. 1 in respect of the suit property only after he received Ex.A4. In the cross-examination of this witness, certain facts had been elicited. This witness was cross-examined at length in relation to the litigations pending before the Courts and also the respective contentions and the stands taken by the parties in relation to the property in question.

23. DW.3 deposed that the plaintiff is the brother of his wife and he knows the parties to the suit and the plaintiff himself introduced the 2nd defendant to him in 1984 stating that the 2nd defendant had taken the plaint schedule property as well and the 2nd defendant has been using half in the central hall. This witness deposed that he knows defendants 2 and 3, who purchased the plaint schedule property and defendants 2 and 3 were cordial with him and also cordial towards the plaintiff. This witness also deposed about his father-in-law having sold the property and the other details. This witness also deposed in cross-examination that the 1st defendant is distantly related to him. This witness denied several suggestions put to him in cross-examination. It is needless to say that the evidence of DW.3 is only formal in nature.

24. It is true that in Ex.A1, the payment of advance of Rs. 90,000/- had been recited and two specific dates had been specified for the purpose of performance of the contract. Submissions at length were made by the Counsel on record. The Counsel for appellants contending that inasmuch as these conditions had not been complied with, the default being on the part of the plaintiff, the contract automatically stood cancelled and the same was put to an end and on the contrary the Counsel representing the legal representatives of the plaintiff at present would contend otherwise that time cannot be treated as essence of the contract in the facts and circumstances especially the same being the property in relation to immovable property, and the evidence of PW. 1 is clear and categorical that he had always been ready and willing to perform his part of the contract and hence, the stand taken by the appellant-defendants 2 and 3 cannot be sustained.

25. In Ram Awadh (Dead) by Lrs. and Others Vs. Achhaibar Dubey and Another, , the Apex Court while dealing with Section 16(c) of the Specific Relief Act, 1963 observed that in a suit for specific performance of agreement to sell property, the plea that plaintiff was never ready and willing to perform his part of the agreement can be raised by subsequent purchaser of the property or also his legal representatives, who were defendants in the suit.

26. Strong reliance was placed on the decision of this Court in Vatsavayi Venkata Suryanarayana Raju (died) by LRs. Vs. Metta Veerabhadra Rao and others, , wherein the learned Judge at Paragraphs 12 and 13 observed as hereunder:

Though the time is not the essence of the contract in relation to immovable properties, the law is well settled that by putting stipulation in the contract as to the performance of the contract in a fixed time and also by subsequent notices, etc., the parties could be treated as intended to have made the time as the essence of the contract. The decision of the Division Bench in Tadepalli Kutumba Rama Sastry Vs. Seetepalli Dakshina Murthy and Others, , is an authority to the proposition that even in immovable properties the time could be made essence of the contract by issuing notice to pay the balance of the amount. It is, therefore, open to one of the parties to make time the essence of the contract by calling upon the other party who has been guilty of unreasonable delay to perform the contract within a stated time by giving him reasonable notice. A learned Single Judge of this Court in Koyana Suryanarayana Reddy Vs. C. Chellayamma, , held that mere extension of time even though time is made as essence of the contract, would not operate as waiver of essential condition as to time. In K.S. Vidyanadam and Others Vs. Vairavan, , considering the escalation in prices in urban immovable properties, B.P. Jeevan Reddy, J., as he then was, observed that -

...we are inclined to think that the rigor of the rule evolved by Courts that time is not of the essence of the contract in the case of immovable properties - involved in times when prices and values were stable and inflation was unknown - requires to be relaxed if not modified, particularly in the case of urban immovable properties. It is high time, we do so.... The same time limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its discretion, the Court should also bear in mind that when the parties prescribe certain time limit (s) for taking steps by one or the other party, it must have some significance and that the said time limit (s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).

Thus, a different view is struck, slightly modifying the rigor of the rule of time being not the essence of the contract in immovable properties. The Supreme Court clearly held that stipulation as to time cannot be altogether ignored. Now, seen in the light of the law laid down in the above pronouncements, I have no doubt in mind that the parties intended to make time as essence of the contract. It is clearly stated in Ex. A1 that by 25-9-1980 an amount of Rs. 50,000/- was to be paid and thereafter the land has to be measured. The balance of sale consideration should be paid by 25-11-1980. It was also made clear that the sale deed should be obtained without violating the above dates. It was clearly mentioned. This stipulation is very significant which goes to show that the parties were impressed upon the stipulation as to time. Admittedly, by 25-11-1980 the remaining sale consideration was not paid. Immediately the respondent No. 1

contacted the appellant and even after that when the appellant did not come forward with the balance of sale consideration, he issued the notice Ex.A6. In Ex.A6 ten days time was stipulated, failing which, it was stated that the agreement would be cancelled. The appellant started his game by raising one objection or the other. In Ex. B1 it was stated that 5th defendant being minor, the 1st defendant could not have agreed to sell his share without the permission of the Court. As already stated supra, notices in close proximity are exchanged. The respondents were careful enough in not giving much time in any of the notices for compliance and for payment of the balance sale consideration. Finally, in Ex.B5 he cancelled the contract Ex. A1 and thus legally put an end for it. What happened thereafter is not relevant to consider the question of the time being the essence of the contract. The stipulations in the agreement when read in combination with the subsequent conduct of the parties, make it abundantly clear that the parties intended that time should be made essence of the contract.

27. In Syed Dastagir Vs. T.R. Gopalakrishnasetty, , it was held at Paragraphs 9 and 10 as hereunder:

So whole gamut of issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise sometimes vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by Counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test, whether he has performed his obligations one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. Same plea may be stated by different persons through different words then how could it be constricted to be only in any particular nomenclature or word. Unless statute specifically require for a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for mechanical production of the exact words of a statute is to be insisted for the form rather than essence. So absence of form cannot dissolve an essence if already pleaded.

Returning to the facts of the present case we find the aforesaid pleading recites that all balance amount of the consideration under the contract has been paid by the plaintiff of which there is an endorsement by the defendant except the balance amount of Rs. 120/- about which also there is a specific plea that he has tendered the same in the Court. It is true in the pleading the specific word "ready and willing to perform" in this nomenclature is not there but can aforesaid plea, could be read that plaintiff was not ready and willing to perform his part of the obligation? In other words, can it be said he has not pleaded that he is "ready and willing" to perform his part? Courts cannot draw any inference in abstract or to give such hyper-technical interpretation to defeat a claim of specific performance which defeats the very objective for which the said Act was enacted. The section makes it obligatory to a plaintiff seeking enforcement of specific performance, that he must not only come with clean hands but there should be a plea that he has performed or has been and is ready and willing to perform his part of the obligation. Unless this is there, Section 16(c) creates a bar to the grant of this discretionary relief. As we have said for this it is not necessary to plea by any specific words, if through any words it reveals the readiness and willingness of the plaintiff to perform his part of obligation then it cannot be said there is non-compliance of the said section.

28. Strong reliance was placed on the decision of the Division Bench of Delhi High Court in Kamal Rani Vs. Chand Rani and Another, , wherein it was held at Paragraphs 16 and 19 as follows:

The rules enunciated in the above decisions are undoubtedly the law of the land. A careful reading of the decisions would, however, show that whether payment within a stipulated time is of the essence of the contract or not is to be gleaned from the phraseology of the terms of the contract. The intention about time being essence of the contract may be evidenced either by express stipulations or by circumstances which are sufficiently strong to displace ordinary presumption that in contracts for sale of land stipulation as to time is not of the essence. Indeed, in Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, , the Supreme Court has relied upon this dicta laid down by the Privy Council in Jamshed Kodaram Irani v. Burjorji Dhunjibhai AIR 1915 PC 83.

Therefore, the law, as we understand it, is that though generally in suits for agreements of sale of immovable property time will not be of the essence of the contract, it would, however, be held to be so even with regard to payment of consideration if from a reading of the agreement and the appreciation of the surrounding circumstances it appears that reciprocal promises had to be performed, in order that the transaction contemplated by the agreement is completed. Accordingly, the first thing that comes up for consideration is to construe Clause 1 of the agreement, Exhibit PW.8/28.

29. The Counsel for appellants also relied upon the decision in N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, , wherein the Apex Court at Paragraph 5 held as follows:

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

30. In His Holiness His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar, , at Paragraphs 2 and 3, the Apex Court observed as hereunder:

There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinized. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27-2-1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiffs part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the

consideration in cash as contracted and intended to bid for the time which disentitles him as time is of the essence of the contract.

It is sought to be contended by Mr. B.K. Mehta, the learned Senior Counsel for the petitioner, that the petitioner has performed the essential terms of the contract. Essential terms of the contract is that he has to return the approved draft sale deed which he has already returned to him. But amendment sought in the sale deed is not of material particulars and is not an essential term and, therefore, the High Court was in error in considering this aspect of the matter. We find no force in the contention. The essential term of the contract is executing the sale deed within the stipulated period. He did not perform his part of the contract within the stipulated time. The High Court was right in refusing to enforce the contract. It being discretionary remedy, the High Court has exercised sound judicial discretion to negate the relief of specific performance of the contract.

31. In *Ajaib Singh and Others Vs. Smt. Tulsi Devi*, , the Apex Court observed while dealing with readiness and willingness to perform under agreement, on facts, held that it cannot be said that the same had been proved where the record would clearly show that respondent had not made all the necessary installment payments under the agreement of sale.

32. It is no doubt true that the relief of specific performance is a discretionary relief and also an equitable relief as such.

33. The Counsel representing the legal representatives of the plaintiff, the contesting respondents in this appeal, placed strong reliance on the decisions reported in *Dr. Govinddas and Another Vs. Shrimati Shantibai and Others*, ; *Joginder Singh and others Vs. Nidhan Singh and others*, and *Kothurthi Krishna Bhaskara Rao Vs. Nadiminti Suryanarayana Murthy and Others*, .

34. The Apex Court in *Dr. Govind Das's* case (supra), held that where the evidence would go to show that the purchaser had express notice of prior agreement of sale, suit for specific performance on the strength of the agreement of sale to be decreed. The Apex Court in *R.K. Mohammed Ubaidullah and others's* case (supra), held that the question whether appellants are bona fide purchasers of the suit property in good faith, for value without notice, the subsequent purchasers to make enquiries about prior agreements, and the Apex Court also had discussed about the aspect of notice in the context of explanations to Section 3 of Transfer of Property Act, 1882. The learned Judge of Punjab and Haryana High Court in *Joginder Singh's* case held at Paragraphs 35 and 38 as follows:

It may be stated at the outset that where, on the land in respect of which an agreement to sell had been entered into, being sold by the vendor to another person in breach of contract of sale, the person in whose favour an agreement to sell was executed by the vendor earlier brings a suit for specific performance of the contract against the vendor and the transferee to prove that he had no notice

of the prior agreement to sell in favour of that person. This onus can only be discharged by the evidence led in the case. The mere denial by the transferee to the effect that he had no notice of the previous contract for sale will not discharge the onus that rests on him.

The onus was on the defendant transferee Nidhan Singh to prove that he had no notice of the prior agreement to sell Ex.PA in favour of the plaintiff-appellants. The onus being on the defendant, can only be discharged by the evidence led in the case. Though it was pleaded by the defendant-respondent Nidhan Singh that he was a bona fide purchaser for consideration without notice, yet he did not prove that defence. The learned lower Appellate Court has not referred to any evidence led by the defendants which could show that the defendant had no prior notice of the agreement to sell. The lower Appellate Court rather held that there was no need for the defendant-respondent Nidhan Singh to make enquiries from the plaintiff-appellants about the previous agreement to sell as he knew that the plaintiff-appellants were in possession as mortgagees. It has to be seen in this case as to whether there was sufficient evidence led by the defendant to prove that he had no prior notice of the execution of the agreement to sell Ex.PA by Puran Singh in favour of the plaintiff-appellants. The correct approach, according to the, is to find out as to whether the defendant in the instant case, has led evidence to show that he had no notice of the previous agreement to sell in favour of the plaintiff-appellants. The lower Appellate Court has not referred to any evidence led by the defendant-respondent Nidhan Singh to this effect. It merely came to the conclusion that the defendant had the notice of the agreement to sell Ex.PA without referring to any evidence on the file. I am fortified in my view by a Division Bench judgment of this Court in AIR 1934 68 (Privy Council) and AIR 1946 97 (Privy Council) , wherein it has been held that where, on the land in respect of which an agreement to sell had been entered into is being sold by the vendor to another person in breach of the contract of sale and a suit for specific performance of the contract against the vendor and the transferee is instituted, the onus is on the transferee to prove that he had no notice of the prior agreement to sell in favour of the plaintiff. The onus can only be discharged by the evidence led in the case. The mere denial by the transferee to the effect that they had no notice of the previous contract for sale will not discharge the onus that rests on them.

35. The Division Bench of this Court in Kothurthi Krishna Bhaskara Rao's case (supra), observed at Paragraph 23 as follows:

Admittedly, in the instant case, the full amount agreed between the parties was not paid when the Sale Deed was executed in favour of 6th defendant. Execution of pronote cannot be said to be full payment. What is specified in the provision was that the amount has been actually paid and that is the reason why Sub-clause (b) of Section 19(1) protects the bona fide purchaser, who had parted with his money and without notice of the prior agreement. Otherwise, the provision would allow unscrupulous purchasers to exploit the situation. They

could obtain the Sale Deed subsequent to the prior sale agreement, by reciting deferred payments and contemporaneous documents to secure the amount. Therefore, we are of the firm view that for invoking protection u/s 19(b) of Specific Relief Act, the subsequent purchaser should have entered into a transaction bona fide and that he ought to have paid the entire amount and that he had no notice. These ingredients have to be established by the subsequent purchaser and onus lies on him and in the instant case, these ingredients are totally lacking. Hence, the protection of Section 19(b) is also not available to the appellant-defendant No. 6.

36. Section 19 of the Specific Relief Act, 1963 deals with the relief against parties and persons claiming by a subsequent title. Section 19(b) of the Act aforesaid specifies except as otherwise provided by this Chapter, specific performance of a contract may be enforced against:

(a) ...

(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.

The words "who has paid his money in good faith and without notice of the original contract" would assume importance in appreciating the respective contentions of the parties.

37. On a careful analysis of the evidence of PW. 1, DW. 1 and DW.2 in particular, it is a clear case where defendants 2 and 3 had knowledge about the agreement of sale in question-Ex.A1 and purchased the property. There are repeated assertions relating to this aspect and hence the evidence is clear and categorical that they had knowledge about the agreement of sale and in fact DW.2 deposed that when he enquired about it, PW. 1 said that the notice was a formal one and apart from this aspect of the matter, even the evidence of DW.3 in a way would lend support to the stand taken by PW. 1. No doubt the evidence of DWs.2 and 3 would go to show that defendants 2 and 3 had been friendly with PW. 1 and subsequent thereto certain events had taken place. This Court need not dwell into these aspects in detail inasmuch as these aspects may not seriously alter the situation. In fact, DW.2 was further examined by the learned Principal Senior Civil Judge, Visakhapatnam, after a limited order of remand was made calling for a finding and the learned Judge recorded findings in detail commencing from Paragraphs 7 to 19. The findings, if carefully scrutinized, the whole evidence available on record had been appreciated by the learned Principal Senior Civil Judge, Visakhapatnam as well reflected from the order dated 11-11-2003. Hence, in the light of the clear admissions made by DW. 1 and also DW.2 as well, there cannot be any doubt whatsoever that the knowledge of the prior agreement of sale and being conscious of the existing transaction Ex. A1 the purchase was made. May be when the consideration paid to be taken into consideration, it may be a speculative deal as well. Be that as it may, the stand

taken by DW.2 in this regard cannot be believed that PW. 1 made assertions that it is only a formal notice and he did not worry about this problem.

38. The agreement of sale-Ex. A1 is not in dispute or controversy. It is true that except the evidence of PW. 1, there is no other evidence, but the admissions made by DW. 1 relating to the execution of Ex. A1 and also the payment of advance amount and the other conditions specified in Ex. A1 being self-explanatory, no further evidence need be produced in relation to the proof of execution of Ex. A1.

39. The only other question which may have to be decided is that in the light of the facts and circumstances, can it be said that the plaintiff to be non-suited on the ground that the plaintiff had not been ready and willing to perform his part of the contract. It is true that though the 1st defendant had not preferred the appeal, the defendants 2 and 3, the subsequent purchasers, may also put forth such contention. On a careful analysis of the exchange of notices and also the evidence of PW. 1 in this regard, it appears that because of some problem since he had entertained a doubt, PW. 1 had been making certain enquiries. Ex.A2 is the registered lawyer's notice dated 21-8-1984, Ex.A3 is dated 31-8-1984 and Ex.A4 is the office copy of the registered notice sent by plaintiff to defendants 1 and 2 dated 15-11-1984. The contents of Ex.A4 and also the contents of Ex.A5, the reply sent by 1st defendant dated 18-11-1984 and the Rejoinder dated 25-11-1984-Ex.A6 if carefully scrutinized, PW. 1-plaintiff always had been asserting that he was willing to perform his part of the contract. No doubt certain portions of this notice had been pointed out and it was stated that the readiness had been expressed, but the willingness had not been specifically made. Such technical interpretation cannot be given while appreciating the contents of the notices between the parties. On overall appreciation of the facts and circumstances, this Court is satisfied that the conditions specified in the agreement of sale-Ex. A1 cannot come in the way of the plaintiff claiming the relief of specific performance, which is otherwise within the period of limitation, since normally in a suit for specific performance in relation to immovable property time cannot be treated as essence of the contract and it may be true that the other party may put on notice bringing it to the notice of the plaintiff that time is the essence of the contract and the conditions to be complied with. It is pertinent to note that when a notice had been issued, the prompt stand taken by the plaintiff-PW. 1 was that he was willing to perform his part of the contract and it cannot be taken that the agreement stood cancelled. Even otherwise, if the conduct of the parties, if carefully analysed, here is a plaintiff who obtained an agreement of sale-Ex.A1 having parted with Rs. 90,000/- and defendants 2 and 3 being conscious of the fact that already there is an agreement of sale in favour of plaintiff-PW. 1 and further he had parted a sum of Rs. 90,000/- as advance and the remaining to be paid, purchased these properties. Hence, such parties cannot be said to be bona fide purchasers without notice of the prior agreement of sale.

40. As far as readiness and willingness to perform his part of the contract by the

plaintiff, this aspect is concerned, already findings had been recorded by this Court as specified above. Hence, viewed from any angle especially in the light of the findings which had been recorded in detail by the learned Principal Senior Civil Judge, Visakhapatnam, while answering the additional issue by order dated 11-11-2003, this Court is thoroughly satisfied that the appeal is devoid of merit and accordingly the findings recorded by the learned Judge not to be disturbed in anyway and the said findings are hereby confirmed.

Point No. 3:

41. In the light of the aforesaid findings, the appeal being devoid of merit, the same shall stand dismissed. However, in view of the respective contentions of the parties, the parties to bear their own costs.