
(1984) 06 AP CK 0008

In the Andhra Pradesh High Court

Case No : Civil Rev. Petition No. 2415 of 1983 and C.M.A. No. 764 of 1984

Government of Andhra Pradesh and Another

APPELLANT

Vs

Bactchala Balaiah Vs OVERRULED

RESPONDENT

Date of Decision : 25-06-1984

Acts Referred:

Arbitration Act, 1940 — Section 17

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Limitation Act, 1963 — Section 5

Citation : AIR 1985 AP 52

Hon'ble Judges : Ramachandra Raju, J;Punnayya, J

Bench : Division Bench

Advocate : V. Lakshmi Devi, Govt. Pleader, for the Appellant; N.V.B. Shankara Rao, for the Respondent

Judgement

This Judgment has been overruled by : Union of India and Others Vs. Manager, M/s. Jain and Associates, AIR 2001 SC 809 : (2001) 2 JT 286 : (2001) 1 SCALE 635 : (2001) 3 SCC 277 : (2001) 1 SCR 889 : (2001) 2 UJ 1040 : (2001) AIRSCW 607 : (2001) 1 Supreme 593

S.V. Maruthi, J.—The appeal by the defendants arises out of a suit in OS No.1159 of 1989 on the file of the V Additional Judge, City Civil Courts, Hyderabad. The plaintiff M/s. Pratap Steels Limited, a company incorporated under the Companies Act, filed the suit for (1) specific performance of the suit contract by execution of sale within a time to be specified and in default the Court to execute the same or in the alternative to appoint a Receiver on their behalf to execute the sale deed and deliver possession; (2) for a mandatory injunction directing the defendants to apply to the Government for permission to sell under the Urban Land (Ceiling and Regulation) Act, 1976 (for short "the Act") and to the Income Tax Authorities for permission to convey or to appoint a Receiver to effectuate the same; (3) in the alternative for compensation of Rs.40,25,000/- u/s 21 of the Specific Relief Act, or any other relief u/s 22 of the Specific Relief Act; and (4) compensation with future interest at 12% p.a.

2. The plaint averments in brief are that the defendants are the owners of the suit schedule property comprising of houses and appurtenant vacant land with a compound Wall and offered to sell the same for a total consideration of Rs.40,25,000/-. The plaintiff agreed to purchase the same and paid Rs.51,000/- on 6-3-1986 by a DD No.414143 drawn on Punjab National Bank, Secunderabad; Rs.2,49,000/- vide cheque No.49880, dated 23-9-1986 drawn on Punjab National Bank, Secunderabad; and Rs.3,00,000/- vide cheque No.965258, dated 29-10-1987 drawn on Punjab National Bank, Sanathnagar. Rs.51,000/- and Rs.2,49,000/- were received by the 1st defendant and Rs.3,00,000/- were received by the 2nd defendant. On 31-10-1987, a written agreement of sale on a stamp paper was executed. Under the said agreement of sale, it was agreed that a further sum of Rs.2,00,000/- be paid before 15-12-1987 and the balance sale consideration of Rs.32,25,000/- be paid to them before the Registering Officer at the time of registration of sale deed. The plaintiff issued two cheques bearing Nos.965073, dated 30-11-1987 and 965646, dated 15-12-1987 drawn on Punjab National Bank, Sanathnagar Branch, Hyderabad, for Rs.1,00,000/- each and the defendants acknowledged the receipt of the same.

3. Under the agreement of sale, it is provided that the defendants will, at their own costs and on their own responsibility, if necessary, obtain exemption from the State Government under the provisions of the Act for the entire house property and the surrounding site and also the permission of the competent authority, if necessary, for the house property together with all the buildings standing thereon before 30th June, 1988. It is also provided under clause 7 of the Agreement that the time for obtaining the said exemption and permission will, if necessary, be extended by mutual agreement by both the parties. The defendants shall also obtain income tax certificate to register the sale deed. It was also provided in the agreement that the defendants, within 15 days from obtaining the clearance under the Act, shall intimate the same to the plaintiff and within three months from the date of such intimation the plaintiff shall pay the balance of sale consideration and obtain the sale deed in their favour or their nominees. The plaintiff was ready and willing and was anxious to proceed with the transactions as they were in an urgent need of accommodation. The defendants did not intimate them about making any application for permission or exemption to sell or of the steps or outcome thereof. After serving their purpose with the advance of money received from the plaintiff, the defendants neither moved the Government nor the Income Tax Authorities to obtain necessary clearance for the same. The defendants appear to intend to take advantage of clauses 7 and 9 of the Agreement under which it is provided that in case the defendants are not able to get the Urban Land Ceiling sanction within the original stipulated time or the extended period as may be mutually be agreed, then the amount of advance may be refunded to the plaintiff together with interest at 12% and the agreement shall be avoided. The plaintiff is also willing to extend the time that may really be necessary for obtaining the permission and also to sign the affidavit or petition that may be required in this behalf.

4. On 22nd June, 1988, the plaintiff wrote a letter to the 1st defendant under Certificate of Posting informing that the plaintiff granted him another one year time for arranging the exemption from the appropriate authorities for which there was no reply. Again the plaintiff wrote another letter dated 2nd January, 1989 under registered post extending the time and requesting the defendants to intimate the latest development in the matter and also to arrange to deliver possession of the property by accepting the balance of sale consideration to which the 1st defendant replied on 12-1-1989 stating ignorance of the contents of the letter dated 22-6-1988 and sought for personal discussions. On 11th February, 1989, the plaintiff wrote a letter expressing their intention to complete transaction and handing over the possession after receiving the full sale consideration to which the defendants have not replied. The plaintiff is ready and willing to pay the balance sale consideration and obtain the possession immediately and to obtain conveyance at the appropriate occasion. The defendants taking advantage of the rise of market value to the extent of double the contracting rate are negotiating to alienate it to others at a higher price and, therefore, a public notice was published on 6-11-1989 in Deccan Chronicle and in Eenadu Newspaper on 7-1-1989 warning the public against purchase of the suit property.

5. The defendants filed a written statement admitting that they are the owners of the suit schedule property and the execution of the written agreement of sale for a consideration of Rs.40,25,000/-, but denied the interpretations sought to be placed by the plaintiff on the said agreement. That the plaintiff could not comply with the terms and conditions of the earlier agreement of the year 1986 including the plaintiff having failed to pay the balance sale consideration within the period stipulated thereon. That a fresh agreement i.e., the suit agreement was executed for a considerable higher amount which was the prevalent market value on the date of the said agreement. The other allegations were denied as fabricated. It is further stated that the declarations filed by the defendants before the ULC authorities have not been disposed of in spite of the efforts of the defendants in that direction. It is false to state that the suit agreement does not make the time as the essence of the contract. The declarations filed by the defendants under the Act were pending and were not disposed of by determining the extent of the property protected under the provisions of the said Act and the defendants did everything at their command. In fact it was known to the plaintiff that in the event of the suit property not being cleared under the provisions of the Act within the stipulated time under the agreement, the transaction would not be completed and the defendants would be liable to be returned the entire advance amount without interest or otherwise as provided under the said agreement. The agreement also provided that in the event of delay in returning the amount paid as advance, interest is to be paid on the said amount by them. It is also provided under the agreement that after the period stipulated between the parties, the plaintiff shall have no claim whatsoever under the agreement or to the suit property and further that the defendants shall be entitled to sell or dispose of the

suit property to others which indicate that time is the essence of the contract. There was no mutual agreement between the parties to extend the period stipulated in the agreement which fact was made known to the plaintiff by the defendants by the letter of the defendants dated 1-12-1988 sent under the registered post with acknowledgment due along with two cheques totalling to Rs.2,00,000/-. The said two cheques were sent towards refund of the amount received from the plaintiff under the agreement. The said letter has been returned back with an endorsement "factory is under lock". It is only after having come to know of the contents of the letter, the plaintiff sent a registered letter dated 2-1-1989 to create evidence to support his untenable claim as set out in the suit. The 1st document is the registered letter of the plaintiff dated 2-1-1989 and the contents are false. On 12-1-1989, the defendants replied to the plaintiff stating that the letter dated 22-6-1988 was never received by the defendants. It is only later on by another registered letter of the plaintiff dated 11-2-1989 that the plaintiff sent a copy of the letter dated 22-6-1988. The letter dated 22-6-1988 is concocted and antedated. The plaintiff was never ready and willing to perform his part of contract nor the plaintiff showed his willingness and readiness at any time within the stipulated period and due to lapse of time the agreement stood rescinded and except the return of the amount without interest, the plaintiff is not entitled to make any claim whatsoever in the suit. The plaintiff neither had money nor was he ready and willing to proceed with the transaction. Further, the defendants on 16-8-1989 sent Rs.9,12,000/- by two cheques which includes a sum of Rs.8,00,000/- paid under the agreement and a sum of Rs.1,12,000/- towards interest which was returned by the plaintiff. The plaintiff is not entitled for the relief of specific performance which is a discretionary relief on account of the fact that the plaintiff had manipulated, antedated and created records after he came to know of the defendants letter dated 1-12-1988. The plaintiff has no bona fides and, therefore, the plaintiff is not entitled for any relief and the suit is liable to be dismissed with costs.

6. On the basis of the above pleadings, the trial Court framed the following issues :

1. Whether the plaintiff is entitled to specific performance of agreement of sale dated 31-10-1987 as prayed for, or in the alternative for compensation of Rs.40,25,000/- with future interest at 12% p.a. as prayed for ?

2. To what relief?

7. In support of their case, the plaintiff examined PW1, the Senior Manager of the plaintiff-company and filed Exs.A1 to A14. The defendants examined on their behalf DW1, the 1st defendant and DW2, the Secretarial Manager of Cheno Finance Company Limited, Hyderabad, and filed Exs.B1 to B7.

8. On the basis of the evidence, both oral and documentary, adduced by the plaintiff and the defendants, the learned Judge decreed the suit with costs for specific performance of the agreement of sale dated 31-10-1987. According to

the learned Judge time is not the essence of the contract in view of the conduct of the parties coupled with the contents of the document Ex.A1. The learned Judge directed the defendants to obtain the necessary permission as stated in the agreement Ex.A1 within six months from the date of judgment and thereafter within 45 days the plaintiff has to pay the balance of sale consideration and obtain the registered sale deed in respect of the suit schedule property from the defendants. Aggrieved by the same, the defendants have filed the present appeal.

9. Since the learned Judge directed the plaintiff to pay the balance sale consideration to the defendants and obtain registered sale deed and since the plaintiff had not complied with the said direction inspite issuing a notice by the defendants intimating them by a letter dated 18-5-1992 that the ULC clearance has been granted and that there is no surplus land, the plaintiff had not complied with that part of the decree by paying the balance sale consideration, they have filed a petition IANo.515 of 1995 to rescind the suit contract u/s 28 of the Specific Relief Act read with Section 151 of CPC. The said petition was filed on 1-2-1995 which was dismissed on the ground that the appeal filed by the defendant in the High Court in CCCA No.80 of 1993 is pending. Aggrieved by the same, CRP No.1960 of 1996 by the defendants.

10. The learned trial Judge while decreeing the suit observed that there was an earlier agreement between the parties in 1976 and thereafter the present agreement-Ex.A1 was executed to sell the suit schedule property for a consideration of Rs.40,25,000/-. Under clause 11 of the agreement-Ex.A1, the present agreement Ex.A1 supercedes the earlier agreements, if any. The defendants have not taken any steps for getting the ULC clearance and since the time is not the essence of the contract and the defendants have failed to pay the money back soon after the stipulated period was over and since the money was sent through cheques after filing the present suit, the plaintiffs are entitled for a decree for specific performance of the contract.

11. Hereinafter, the defendants will be referred to as the appellants and plaintiff as respondent.

12. The learned senior Counsel for the appellants Mr. T. Ananta Babu raised the following contentions:

(1) That the suit is not maintainable as the pleadings do not conform to the requirements of Forms 47 and 48 of the Schedule I of the CPC and that there is no pleading that he is ready and willing to specifically perform his part of the suit contract and continues to do so; that the pleadings in the plaint that the respondent is ready and willing to pay the balance of the sale consideration and obtain the possession immediately and to" obtain conveyance at the appropriate occasion indicates that the readiness and willingness is not to perform the suit contract but a contract with different terms. In support of this contention, the learned Counsel relied on the following decisions :

(a) Abdul Khader Rowther v. Sara Bai, 1989(43) ELT797(SC) ;

- (b) Ouseph Varghese Vs. Joseph Aley and Others, ;
- (c) Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, ;
- (d) Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others, ;
- (e) N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao 1995 (5) SCC 155;
- (f) His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar, ;
- (g) Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., ;
- (h) Sardar Amarjeet Singh Vs. Nandu Bai and Others, .

(2) That under the agreement dated 31-10-1987-Ex.A1 it is expressly agreed that the appellants will obtain, if necessary, exemption from the State Government under the provisions of the Act and also permission of the competent authority under the said Act, if necessary, for the sale of the entire house property, before 30th June, 1988. Clause 7 of the agreement provides for extension of time by mutual agreement of both the parties. However, if the appellants are not able to get the ULC sanction they shall return the said earnest money paid within 3 months thereafter or within 3 months after the expiry of the said extended time, if any, without any interest. The purchaser shall not have any claim or demand against the vendors. Further under clause 9 of the Ex.A1, if the requisite exemption or permission under the Act is not forthcoming by 30th June, 1988, or within such extended period as may be mutually agreed to, the agreement shall become inoperative and unenforceable. In view of clause 3 read with clauses 7 and 9 under which the parties have categorically expressed their intention that if the clearance under the Act is not forthcoming, the agreement becomes inoperative and unenforceable. In view of the unequivocal expression of their intention that the agreement becomes inoperative and unenforceable and also providing for the consequences of non-clearance under the Act not forthcoming, the respondent is not entitled for specific performance of the agreement the movement there was no clearance on or before 30th June, 1988.

(3) There is no plea that the respondent is ready and willing to perform his part of the contract. Further the conduct of the respondent viz., that though the agreement was entered into on 31-10-1987, the respondent had written for the first time a letter dated 2nd January, 1989 under Ex.A7 followed by public notices Exs.A10 and A11 dated 6-1-1989 and 7-1-1989 and a letter Ex.A13 dated 11-2-1989, indicates that the respondent was neither ready nor willing to perform his part of the contract. The respondent has concocted the letter Ex.A5 dated 22-6-1988 to create an impression that he was ready and willing to perform his part of the contract and the said letter is not genuine and cannot be relied upon.

(4) Grant of specific performance is a discretionary relief. If the grant of specific performance results in an unfair advantage to the respondent, the Courts need not grant it. In support of this contention, the learned Counsel relied on the

following decisions :

- (a) Parakunnan Veetill Joseph"s Vs. Nedumbara Kuruvila"s and Ors, ;
- (b) Rangaraj Naidu v. Thiruvarakkarasu 1995 (2) Suppl. SCC 680;
- (c) M/s. P.R. Deb and Associates Vs. Sunanada Roy, ;
- (d) G. Rosaiah Vs. C. Balarami Reddy and Another, ;
- (e) K.S. Vidyanadam and Others Vs. Vairavan, ;
- (f) Kallahil Sreedharan v. Komath Pondyala Prasanna 1995 (6) Scale 311; and
- (g) Kanshi Ram Vs. Om Prakash Jawal and others, .

(5) The respondent has not approached this Court with clean hands and, therefore, the specific performance being an equitable relief, he is not entitled for the said relief on account of the fact that he has not acted fairly and justly, but created fabricated evidence under Ex.A5. The learned Counsel relied on the following decisions in support of his contention :

- (a) Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others, ; and
- (b) Krovidi Kameswaramma and others Vs. Kudapa Balaramayya and another, .

(6) The respondent is not financially sound and, therefore, not in a position to perform his part of the contract as a reference is made to the Board for Industrial and Financial Reconstruction (for short "BIFR") and the BIFR by its order dated 14-10-1996 declared the respondent-company as a sick company and directed the promoters to furnish a proposal for revival of the company. In view of the declaration declaring it as a sick company, the respondent is not entitled for a decree of specific performance.

13. While the learned senior Counsel for the respondent Sri P.M. Gopal Rao, raised the following contentions :

(1) Under Ex.A1, it is incumbent on the appellants to apply for seeking exemption under the Act. The appellants had neither applied nor taken any steps to obtain exemption from the provisions of the Act. In view of the inaction on the part of the appellants, they cannot be permitted to resist specific performance of the agreement as a party cannot be permitted to take advantage of his own fault; that the appellant has not produced the documents of title to the satisfaction, of the respondent though under clause 10 of the agreement there is an obligation to produce the documents of title and income tax clearance certificate. The appellants are guilty of suppression of facts. DW1 in his deposition stated that the case before the ULC authorities is pending whereas the order of the ULC is dated 22-12-1989. After the suit was decreed the respondent obtained a certified copy of the order of the authorities under the Act. Though the order was communicated to the appellants in 1989, they had suppressed the

said order in order to avoid the performance of the agreement. Ex.A5 is a letter written from the Camp Office at Haryana. Time is not the essence of the contract where there is a provision for extension of the time of the contract. In support of his contention, he relied on the following decisions :

- (a) Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, ;
- (b) Mirza Wali Khader Baig v. Deepak Kumar 1987 (2) ALT 18; and
- (c) Sudhir Kitmar v. Baldev Krishna Thappar (1970) 2 SCJ 377.

Failure on the part of the appellants to comply with the decree under appeal does not disentitle him to seek enforcement of the decree for the reason that the letter dated 18-5-1992 alleged to have been written is a concoction. Further in the letter dated 18-5-1992, it is stated that they are offering to perform their part of the contract without prejudice to their right of appeal and, therefore, it is a conditional offer. In view of the conditional offer, failure to comply with the decree by paying the sale consideration does not disentitle the respondent from seeking specific performance of the agreement. The fact that the matter is pending before the BIFR is irrelevant as the assets of the company are 1100 crores and, therefore, they are in a position to comply with the terms of the decree. Ex.A5 is a letter written from the Camp Office. The respondent has a factory at Patancheru and Administrative office at Delhi and Haryana. PW1 is to shuttle from Hyderabad to Delhi to Haryana. Therefore, because the letter Ex.A5 was written from Haryana, it does not make it a concocted or not genuine.

(2) By virtue of the failure on the part of the appellants in not replying to the copy of the Ex.A5, there is an acquiescence, and therefore, there is an implied consent. The appellant cannot seek recession of the contract as the appropriate time for recession is if the respondent failed to deposit the money as per the direction in the decree. Pendency of the matter before the BIFR is not a determining factor in granting recession of the contract. In support of this contention, the learned Counsel relied on :

- (1) Currimbhoy and Co. Ltd. Vs. L.A. Creet and Others, ; and
- (2) Jennings Trustee v. King 1952 (2) ALLER 608;

(3) That as per the agreement-Ex.A1, clearance under the Act is not obtained on or before 30th June, 1988. The respondent under Ex.A5 wrote to the appellants extending the time for obtaining clearance. The contention of the appellants is that the said letter is not received. Even accepting the contention that the said letter has not been received, a copy of the same has been sent to the appellants on 23rd August, 1990 along with Ex.A13 letter. Though the appellants had received a copy of the letter on 23-8-1990, they neither repudiated the letter nor taken any steps informing the respondent that they are not agreeable for extending the contract. In the absence of expressing any view on the said letter dated 22nd June, 1988, the inference that can be drawn is that there is an implied consent for extending the date for obtaining the clearance under the Act.

(4) There is nothing wrong in the respondent seeking the relief of possession as u/s 22(a), recovery of possession should be specifically claimed. The respondent is ready and willing to perform his part of the contract and in the plaint all the requirements necessary for the purpose of seeking the relief of specific performance has been categorically mentioned. Therefore, the appeal is liable to be dismissed and it may be dismissed accordingly.

14. On the basis of the contentions raised by the learned Counsel for the appellants and the respondent, the following issues arise for consideration :

- (1) Whether the suit is maintainable ?
- (2) Whether by virtue of not obtaining the clearance under the Act, the agreement becomes inoperative and unenforceable ?
- (3) Whether the respondent is ready and willing to perform his part of the contract ?
- (4) Whether there is an acquiescence on the part of the appellants resulting in an implied consent extending the time for obtaining the clearance under the Act?
- (5) Whether time is the essence of contract ? and
- (6) Whether the respondent is entitled for the relief of specific performance ?

15. Before considering issue Nos.1, 3, 4 and 6, we would like to deal with issue Nos.2 and 5 which are interconnected, in the first instance. Issue No.2 is whether by virtue of not obtaining the clearance under the Act, the agreement becomes inoperative and unenforceable ? and issue No.5 is whether time is the essence of contract ?

16. Clause 3 of the agreement says that the vendors will at their own costs and on their own responsibility obtain, if necessary, exemption from the State Government under the provisions of the Act before 30th June, 1988. Clause 7 provides for extension of time by mutual agreement. It also provides that in the event of not obtaining the required clearance from the ULC authorities within the time stipulated, the appellants have to refund the earnest money paid under the agreement. The undisputed fact is that an amount of Rs.8.00 lakhs was paid under the agreement and the amount is lying with the appellants. It is categorically mentioned that in the event of not obtaining the clearance under the Act, the purchaser shall not have any claim or demand except for the refund of the earnest money paid to them. Clause 9 of the agreement stipulates that in the event of clearance under the ULC Act is not forthcoming, the agreement shall become inoperative and unenforceable and only after refund of the earnest money without any interest within a period of 3 months, the vendors shall be at liberty to sell the property to any 3rd party.

17. From a reading of clauses 3, 7 and 9 of the agreement, it is clear that if clearance is not forthcoming within the stipulated period, the agreement falls to the ground and becomes inoperative and unenforceable, unless the parties have

mutually agreed to extend the time for obtaining the clearance under the Act. In other words, in the absence of mutual agreement between the parties, the agreement automatically comes to an end and it becomes inoperative and unenforceable. The parties have unequivocally expressed their intention that the agreement falls to the ground if the clearance under the Act is not obtained. Perhaps the parties are clear in their view that it is a 3rd party namely the Government which has to grant the clearance under the Act and neither the appellants nor the respondent have control over the action or inaction of the 3rd party viz., the Government, they have provided in the agreement that it becomes inoperative and unenforceable. It is true clause 7 of the agreement provides that "the vendors will obtain, if necessary exemption from the State". However, the expression "will" is followed by "if necessary". Therefore, the failure on the part of the appellants to apply for exemption is irrelevant. Further the parties were aware that in the event of declaring the property as non-surplus, the question of applying for exemption does not arise. By virtue of the order of the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 dated 22-12-1989 it is found now that the appellants were not in possession of the excess land and that there was no surplus land for applying for exemption to the State Government. Therefore, since the subsequent events can be taken into account, by virtue of the order declaring the appellants as non-surplus holders, the question of applying for exemption or permission from the State Government does not arise. The contention of the learned Counsel for the respondent that along with the declaration filed by the appellants they should have sought for exemption under the Act cannot be sustained having regard to the fact that by virtue of the order of the competent authority holding the appellants as non-surplus holders, the question of applying for exemption or permission does not arise. Further the agreement categorically says that the time for obtaining clearance under the Act if not obtained before 30-6-1988 is to be extended by mutual agreement, otherwise the consequences provided under the agreement is refund of earnest money with interest. It also imposes an embargo on the appellants from selling the property to third parties unless the earnest money with interest is refunded to the respondents. In view of the embargo imposed on the appellants from alienating the property, the only inference that can be drawn is that the intention of the parties is that the agreement becomes inoperative and unenforceable if the clearance under the Act is not obtained before 30-6-1988.

18. But the time limit stipulated in the agreement Ex.A1 is not relevant if the general principle of law that time is not the essence of the contract in the case of Immovable property is applicable.

19. Sri P.M. Gopal Rao, learned Counsel for the respondent contended relying on Chandnee's case (supra) that time is not the essence of the contract while Sri Ananta Babu, learned Counsel for the appellants contended that time is the essence of contract and relied on Vidyanadam 's case (supra).

20. It is necessary to refer to the facts of both the cases viz., the facts in Chandnee's case (supra) and the facts in Vidyanadam's case (supra) as the learned Counsel have vehemently contended relying on the above two decisions in support of their respective cases.

21. The facts in Chandnee's case (supra) are as follows :

It is a case where the plaintiffs entered with a contract of sale of a house belonging to the defendant on the plot granted by the Government. One of the terms of the contract was that the vendor shall obtain necessary permission of the Government for the sale within two months of the agreement and if the permission was not forthcoming within that time, it was open to the vendees to extend the date or to treat the agreement as cancelled. The vendor made an application for permission but for the reasons of her own, withdrew the same. In the suit filed by the vendees for specific performance of the contract or in the alternative for damages it was found that the vendees were always willing and ready to perform their part of the contract, that it was the vendor who wilfully refused to perform her part of contract and that the time was not of the essence of the contract. Under the agreement, option was given to the vendees to treat the agreement as cancelled if permission is not forthcoming within the time prescribed in the agreement. It was found that the vendor was responsible for not obtaining the permission from the Government as she withdrew the application made to the Government for permission for the reasons of her own; it was held that time is not the essence of the contract.

22. The above judgment is by a Bench consisting of three Judges viz., B.P. Sinha, CJ., J.C. Shah and N. Rajagopala Ayyangar, JJ. According to the learned Judges, notwithstanding the agreement stipulating that if permission is not forthcoming within the time prescribed under the agreement, the agreement is to be treated as cancelled, still the agreement is enforceable as time is not the essence of the contract in the case of Immovable properties. On the facts of the present case, the agreement stipulates that if the clearance from the Urban Land Ceiling is not forthcoming on or before 30-6-1988, the agreement ceases and becomes inoperative and unenforceable. In other words, the agreement is similar to the agreement in Chandnee's case (supra). The judgment in Chandnee's case (supra) is on all fours with the facts of the present case. Therefore, notwithstanding the fact that the agreement stipulates that if the clearance under the ULC Act is not obtained on or before 30-6-1988, it becomes unenforceable and inoperative, still in view of the principle that time is not the essence of the contract in the case of Immovable properties, the agreement is enforceable. The learned Judges in Chandnee 's case categorically held that time was not the essence of the contract and the Court has to enforce the terms of contract.

23. Coming to the decision of the Supreme Court in Vidyanadam's case (supra), it is a case where there was an agreement of sale dated 15-12-1978 between the defendant and the plaintiff under which the defendants agreed to sell a house

property in Madurai for a consideration of Rs.60,000/-. After a period of more than 2 1/2 years on 11-7-1981, the plaintiff issued a notice to the defendants 1 to 3 stating that he has always been ready and willing to perform his part of the contract and that though in the agreement of sale 6 months time was stipulated time was not the essence of the contract and that the tenant has not vacated the premises agreed to be sold. The defence that was set up was time was the essence of the contract, that the prices of the property were substantially increasing day by day, that the tenant was ready and willing to vacate the property and that it was the plaintiff who was not ready and willing to complete the transaction, in that context, the following observations were made:

"It has been consistently held by the Courts in India, following certain early English decisions, that in the case of agreement of sale relating to Immovable property, time is" not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property. 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). In the case of urban properties in India, it is well known that their prices have been going up sharply over the last few decades - particularly after 1973. Court cannot be oblivious to this reality. It is not possible to agree with the decision of the Madras High Court if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the Court by law. The rigor of the rule evolved by Courts that time is not of the essence of the contract in the case of Immovable properties - evolved 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, the Courts do so."

24. The judgment in Vidyanadam's case (supra) is distinguishable on facts, in that the plaintiff since the prices were raising, having kept quiet for more than 2 1/2 years though the agreement stipulated 6 months time for completing the transaction, issued notice stating that he is ready and willing to perform his part of the contract and time is not the essence of the contract. Whereas on the facts

of the present case, the agreement is dated 31-10-1987 and the clearance under the ULC Act was to be obtained on or before 30-6-1988 and the suit was filed on 28-6-1989 within one year from 30-6-1988, the last date stipulated for obtaining the clearance under the Act. Further, the learned Judges have not laid down as a principle that time was the essence of contract in case of urban Immovable properties. Therefore, notwithstanding the stipulation that under the agreement Ex.A1 dated 31-10-1987 if the ULC clearance is not obtained before 30-6-1988, the agreement becomes enforceable and operative since time is not the essence of the contract.

25. Further if the reasoning of the learned Judges that in the case of urban Immovable properties the principle that time is not the essence of the contract is to be relaxed the provisions under the Limitation Act, 1963 providing 3 years period of limitation for filing a suit for specific performance of agreement becomes otiose. It is now well settled that by virtue of the interpretation placed by the Courts no provision of law should become otiose. Therefore even though we agree with the view expressed in Vidyanadam's case (supra) that in case of urban Immovable properties time should be the essence of contract in view of the earlier larger Bench judgment in Chandnee's case (supra) and in view of the above reasonings, we hold that time is not the essence of the contract.

26. Having regard to the facts and circumstances of the case and having regard to the fact that time is not the essence of the contract in the case of Immovable properties, the agreement is enforceable. It is also pointed out that judgment in Chandnee's case (supra) is by a Bench consisting of three Judges whereas the judgment in Vidyanadam's case is by a Bench of two Judges.

27. Therefore, we agree with the V Additional Civil Judge that time is not the essence of the contract and we answer these two issues against the appellants.

28. However, even if the agreement under Ex.A1 is enforceable under the law, still the respondent is not entitled for specific performance of the agreement unless he establishes that he is ready and willing and always ready and willing to perform his part of the contract and the suit is maintainable.

29. The next issue is whether there is an acquiescence on the part of the appellants resulting in an implied consent extending the time for obtaining the clearance under the Act ?

30. The respondent relies on Ex.A5 dated 22-6-1988 and contends that in view of Ex.A5 a copy of which was sent along with the letter dated 23-8-1990-Ex.A13 and since there is no repudiation of the contents of the letter, there is acquiescence by the appellants and therefore, there is an implied consent by the appellants. While the appellants contend that the letter Ex.A5 dated 22-6-1988 is not genuine and even if it is genuine, still the copy was sent on 23-8-1990 by which time the appellants had already intimated to the respondent that the agreement is ceased to be operative as no clearance was given under the Act and returned the cheques for Rs.2-00 lakhs as evidenced by the copy of the

letter Ex.B4 dated 1st December, 1998. The question, therefore, is whether Ex.A5 is genuine. It is dated 22-6-1988. It was sent under Certificate of Posting from Camp Post Office. Ex.A6 certificate issued by the Post Office does not disclose the place from which it is issued. PW1 in his evidence says that they are functioning from Nazir Archade near Ravindra Bharti i.e., Hyderabad and they have their Head Office at Haryana; that their administrative office is functioning within the factory premises at Patancheru; that the registered office is at Delhi, and that he signed the letter at Delhi and on the date of Ex.A5 letter there was no lock out in their factory. He admits that Ex.A5 does not contain despatch number and reference number. He also says that there is lock out in their factory from August, 1988 till January, 1989. The very fact that it is posted from a Camp Office from a State not known creates a doubt as to the genuineness of Ex.A5 dated 22-6-1988. PW1 also says that there is an office at Nazir Arcade. Ex.A5 could have been posted from Nazir Arcade, Hyderabad. They have not done so. Since it does not contain a reference number nor the place from which it is posted and there is no reason why it should not be posted from the factory when there is no lock out in the factory at Patancheru at Hyderabad, Ex.A5 is not a genuine document. Further an important letter extending the time under the agreement for obtaining the clearance under the Act is sent under Certificate of Posting while the letter under Ex.A7 dated 2-1-1989 is sent under a registered post acknowledgment due from their registered office at Delhi. Ex.A7 is after a period of six months from the date of Ex.A5. The approach of the respondent is casual and not serious and sincere. We may also refer to the contents of the letter Ex.A5. It says that:

"In this regard we may like to say that we are still interested to give effect to the said agreement and hereby grant you another one year for arranging the said exemption from the appropriate authorities. You are requested to arrange the said exemption on or before 30th June, 1989. However, the renewing terms and conditions of the agreement regarding the payment of interest after three months from the new date will operate accordingly with the same rights and liabilities."

31. The tenor of the above letter indicates that the respondent was aware of the fact that the clearance was not given under the Act. Further there is no evidence that the appellants received the letter and agreed for extending the time for obtaining the clearance under the Act. The letter is unilateral and the agreement does not provide for unilateral extension of time. It is true that in Ex.A13 dated 23-8-1990 a reference is made that they are sending a copy of the letter dated 22-8-1990. However by that time i.e., by 22-8-1990 the appellants have already expressed that the agreement ceased to be operative and unenforceable and returned Rs.2-00 lakhs by means of cheques under Ex.B4 dated 1-12-1988. In other words, the appellants have already communicated to the respondent that the agreement ceased to be operative. Therefore, fact that the appellants have not repudiated the contents of the copy of the letter Ex.A5 dated 22-6-1988 sent alongwith Ex.A13 dated 22-8-1990 is of no consequence and it does not advance

the case of the respondent that there is acquiescence and therefore there is implied consent. It is no doubt true that original Ex.B3 of the Ex.B4 dated 1-12-1988 was returned with an endorsement that the factory is under lock out. PW1 admits in his cross-examination that they did not inform the postal authorities to redirect the post from the administrative office to their office at Nazir Arcade at Ravindra Bharathi, Hyderabad and that their administrative office was functioning within the factory premise at Patancheru. Therefore, the respondent cannot plead that he was not aware of the contents of the letters-Exs.B3 and B4. We, therefore, reject the contention of the respondent that there is implied consent in view of Exs.B3 and B4 coupled with the evidence of PW1.

32. The next issue that arises for consideration is whether the respondent is ready and willing to perform his part of the contract.

33. There is no issue framed in this regard though there were pleadings on this issue in the plaint as well as in the written statement. We are extracting below the arguments advanced by the Counsel for the appellants in support of his contention that respondent is not ready and willing to perform his part of the contract and the argument of the learned Counsel for the respondent that the respondent is ready and willing to perform his part of the contract. We are also referring to the subsequent events which the Counsel urged for taking into account for the purpose of determining the issue as to whether the respondent is ready and willing to perform his part of the contract. Similarly, we are referring to the arguments advanced in support of the contention that the suit is not maintainable.

34. It is contended by the learned Counsel for the appellants that the respondent has not purchased the stamps for the purpose of executing the sale deed and there is no pleading that the respondent has the necessary amount payable to the appellants or that he is in a position to raise the monies. No draft sale deed was furnished. Further it is contended that the sequence of events indicate that after the agreement was executed the respondent, except Ex.A5 alleged to have been written on 22nd June, 1988 and Ex.A7 on 2-1-1989 nearly 6 months after the expiry of the period stipulated in the agreement for obtaining the clearance under the Act and public notices issued under Exs.A10 and A11 on 6-1-1989 and 7-1-1989 and Ex.A13 letter dated 11-2-1989, had not made any attempt to meet the appellants and enquire about the stage at which the clearance under the Act is pending, though the respondent stated in Ex.A13 that he is anxious to finalise the deal and will be calling on the 1st appellant for personal discussion. Abruptly, without any prior notice the suit was filed on 29-6-1989. When there was no response from the appellants to the alleged letter under Ex.A5 dated 22-6-1988, in the normal circumstances, the respondent should have rushed to the appellants and meet them personally and enquire as to what has happened to the clearance to be obtained under the contract.

35. That the respondent-company is declared as a sick industrial company and the BIFR by its order dated 14-10-1996 (filed as an additional evidence) declared

the company to be a sick company. Therefore, the respondent is not financially viable and is not in a position to pay the sale consideration under the Act.

36. While the learned Counsel for the respondent contended that the company is declared as sick does not mean that the respondent is not in a position to pay the sale consideration agreed upon as the assets of the respondent-company is worth Rs.1100 crores and the declarations of the company as sick is only for the purpose of carrying on business as such and it has no bearing on the capacity of the company to pay the sale consideration.

37. That the trial Court by its decree directed the appellants to obtain necessary permission under the ULC Act within 6 months from 12-3-1992 and, thereafter within 45 days the respondent had to pay the balance sale consideration to the appellants and obtain the registered sale deed in respect of the suit schedule property. The appellants contend that they have communicated to the respondent by its letter dated 18-4-1992 Ex.A intimating that the clearance under the Act was obtained and enclosed Form Nos.37-I under Rule 48-L of the Income Tax Act requesting the respondent to fill up the same and return them as they are required for the purpose of obtaining No Objection Certificate u/s 230A of the Income Tax Act. The respondent did not comply with the decree and therefore that it is contended that he is not entitled for any relief.

38. While the learned Counsel for the respondent denies the receipt of the letter dated 18-4-1992, in addition he also contended that the offer in the letter dated 18-4-1992 is conditional, viz., in that he says that "we are writing this letter without prejudice to our right of appeal and raising all the contentions available to us". Therefore, it is conditional offer and failure on the part of the respondent to deposit the amount is of no assistance to the appellants. The learned Counsel for the appellants contended that even if the letter dated 18-4-1992 was not received by the respondent, still in the grounds of appeal it is categorically mentioned that the declaration filed by the appellants before the ULC authorities has been decided as not surplus and that without prejudice to the filing of the appeal the appellants had indicated that they would send the necessary papers for IT clearance as they are required to be signed by both the parties. While the Counsel for the respondent contended that the grounds of appeal were not served on them.

39. As regards the issue relating to the maintainability of the suit, the main argument of the leaned senior Counsel for the appellants is that the plaint is not in conformity with the requirements of law under the specific relief and also with the Forms 47 and 48 of the I Schedule to the Civil Procedure Code. While the learned Counsel for the respondent contends that the relevant facts are mentioned in the pleading and, therefore, there is no infirmity in the pleadings.

40. There is no plea in the written statement that the suit for specific performance is not maintainable for non-compliance with Forms 47 and 48 of the Schedule I to CPC and requirements of law for granting the specific relief. There

was no issue framed by the Court.

41. Since we are of the view that time is the essence of the contract and therefore the agreement is enforceable and operative and since no issues are framed as to the maintainability of the suit and the readiness and willingness on the part of the respondent to perform his part of the contract and since no evidence was adduced and since there are subsequent events namely declaration by B1FR declaring the respondent as sick company and assertion by the respondent that it is worth Rs.1100 crores, and the effect of the failure by the respondent to comply with the direction in the decree which have a bearing on the issue and since the appellants filed the order of the BIFR as additional evidence and since the issue is to be decided in the light of the evidence to be adduced and in the light of the subsequent events which are to be established and proved, we refrain to express any opinion on these two issues.

42. We, therefore, allow the appeal and remand the same to the Additional Judge, City Civil Courts, Hyderabad and direct him to frame" the following issues viz.,

(1) Whether the suit is maintainable; and

(2) Whether the plaintiff is ready and willing to perform his part of the contract; and

(3) Whether the plaintiff is entitled for specific relief of the contract. It is open to the parties to adduce such evidence as is necessary in support of their respective contentions in the light of the above discussion without amending the pleadings. While considering the issues, it is open to the Court to take into account the subsequent events as it is a settled principle of law that subsequent events can be taken into account which are relevant for the purpose of determining the issue.

43. In the light of the view which we have taken, it is not necessary to express any view on the contentions raised by the learned Counsel for the respondent that since the appellants are the defaulting parties, they cannot take advantage of their own fault; and that the appellants suppressed the fact of receipt of the order of the ULC authorities dated 22-12-1989 and, therefore, they cannot resist the decree for specific performance. We also refrain to express any view on the contention of the learned Counsel for the appellants that the relief of specific performance begin a discretionary remedy, the respondent is not entitled for the same. It is also not necessary to refer to various judgments relied on by the learned Counsel for the appellants and the respondent. The appeal is accordingly allowed and the judgment and decree are set aside and the suit is remanded to the V Additional Judge, City Civil Courts, Hyderabad. Costs will abide the result. Court fee is directed to be refunded to the appellants.

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The civil revision petition is also allowed and the matter is remanded to the trial

Judge to be decided along with the suit. The learned Judge is directed to dispose of the suit within four months from the date of receipt of a copy of this judgment and the records.

44. The office is directed to despatch the records forthwith.