

(2011) 08 MAD CK 0257
In the Madras High Court
Case No : A.S. No. 1049 of 2007

R. Manoharan

APPELLANT

Vs

N. Subbiah

RESPONDENT

Date of Decision : 22-08-2011

Acts Referred:

Contract Act, 1872 — Section 55
Evidence Act, 1872 — Section 101, 114
Specific Relief Act, 1963 — Section 16, 20
Transfer of Property Act, 1882 — Section 55(1), 55(5)

Citation : (2011) 08 MAD CK 0257

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : J.R.K. Bhavanantham, for the Appellant; Md. Ibrahim Ali, for the Respondent

Final Decision : Allowed

Judgement

T. Mathivanan, J.—Challenge is made in this appeal by the Defendant to the judgment and Decree dated 23.01.2007 and made in O.S. No. 1433 of 2006, on the file of the learned II Additional Judge, City Civil Court, and Chennai.

2. The facts, which absolutely necessary for the disposal of this appeal are as under:

The original legal characters of the parties to the suit may not be changed and be it as it is in the suit.

2.1. The suit is filed by the Plaintiff against the Defendant to execute the sale deed in respect of the suit schedule property after receiving the balance of sale consideration and in case the Defendant fails to execute the sale deed, the Court may execute the sale deed in respect of the suit schedule property in favour of the Plaintiff on deposit of balance of sale consideration.

2.2. That on 11.07.2005, the Plaintiff had entered into an agreement of sale with

the Defendant and thereby, the Defendant had agreed to sell the suit schedule property for a total sale consideration of Rs. 5,55,000/-. On the date of sale agreement, the Plaintiff had paid a sum of Rs. 1,50,000/- towards advance and it was mutually agreed to execute the sale deed in favour of the Plaintiff within a period of two months and the Plaintiff had also agreed to pay the remaining balance of Rs. 4,05,000/- at the time of registration of the sale deed.

2.3. Instead of executing the sale deed, the Defendant had demanded a further amount of Rs. 50,000/- to meet out the surgery expenses of his mother. Believing the words of the Defendant, the Plaintiff had parted with a sum of Rs. 60,000/ on 15.10.2005 and the Defendant had also acknowledged the receipt of the amount in the sale agreement.

2.4. In order to get approval for the suit property, the Plaintiff with the consent of the Defendant had applied for the approval through one Engineer Balasubramaniam. But, the Defendant had given a letter to the concerned authority saying that the approval should not be given.

2.5. That on 21.11.2005 another amount of Rs. 10,000/- was given by the Plaintiff to the Defendant on his request. The receipt of this amount had also been acknowledged in the suit sale agreement. Altogether the Plaintiff had paid a sum of Rs. 2,20,000/- to the Defendant. That on 15.12.2005, the Plaintiff had prepared a draft to execute the sale deed. But, once again, the Defendant had failed to act upon his promise.

2.6. At the time of execution of sale agreement, the Defendant had informed that there was no encumbrance in the suit property. But in fact, the suit schedule property was mortgaged with the Repco Bank and this fact was deliberately suppressed by the Defendant. Hence, the Plaintiff was constrained to issue a legal notice on 23.12.2005 and thereby, the Defendant was called upon to come and execute the sale deed in favour of the Plaintiff within one week. On receipt of the notice, the Defendant had also given a reply stating that he was ready to return the advance amount. The Plaintiff had also once again issued another notice to the Defendant on 04.01.2006 calling upon the Defendant to come and execute the sale deed. Since there was no response on the other end, the Plaintiff was left with no other option excepting to file the suit. The Plaintiff was always ready and willing to perform his part of contract and even ready to deposit the balance of sale consideration before the Court.

2.7. The Defendant has contended in his written statement that after the payment of Rs. 1,50,000/- towards advance at the time of execution of sale agreement, the Plaintiff had agreed to pay the balance of sale price on or before 10.09.2005. But he was dilly-dallying in paying the balance of sale consideration and was constantly seeking extension of time and upon such request of the Plaintiff, the Defendant had extended the time and upon such extension the Plaintiff had paid only a piecemeal amount of Rs. 60,000/- on 15.10.2005. That on 21.11.2005, the Plaintiff had approached the Defendant and informed about

his inability to mobilize necessary funds towards the balance of sale consideration and on that date, he had paid a sum of Rs. 10,000/- as further advance and again sought a last and final chance of 30 days to pay the balance of sale consideration and the receipt of this amount was also endorsed on the reverse of the sale agreement. Even so, on such extension of time, he had failed to pay the balance of sale price to the extent of Rs. 3,35,000/- within 20.12.2005. He had also failed to prepare the draft sale deed and to purchase the requisite stamp papers.

2.8. There is a clear covenant in the sale agreement that the Defendant has to execute the sale deed only on receipt of balance of sale consideration from the Plaintiff. In other words, the Plaintiff ought to have paid the balance of sale consideration to the Defendant before the registration of the sale deed. The sale agreement is also very clear and unambiguous with regard to time for performance of obligations by parties to agreement.

2.9. Although the necessary period for performance of the obligation under the agreement was fixed at two months, it was extended till 20.12.2005 on the specific request made by the Plaintiff. From the inception of the sale agreement, the Plaintiff was informed that the property was mortgaged with the Repco Bank and when the said fact was about to be incorporated in the sale agreement, the Plaintiff had refused to incorporate the same. The Plaintiff was well aware about the fact that the suit property was mortgaged with the Repco bank and in order to suppress his inability to mobilize the funds, he has taken such evasive stand.

3. Based on the pleadings of the parties to the suit, the Trial Court has formulated the following five issues for the better adjudication of the suit:

- i. Whether the Defendant did not disclose to the Plaintiff the subsisting mortgage of suit property with Repco Bank?
- ii. Whether agreement of sale could not be concluded due to breach of contract by the Plaintiff?
- iii. Whether the time stipulated is the essence of contract?
- iv. Whether the Plaintiff is entitled to the relief of specific performance?
- v. To what other relief the Plaintiff is entitled?

4. In order to substantiate their respective cases, the parties to the suit went for trial. The Plaintiff has i. Whether the Defendant did not disclose ii. to the Plaintiff the subsisting mortgage of suit property with Repco Bank? Whether agreement of sale could not be concluded due to breach of contract by the Plaintiff? examined himself as P.W.1 and one Mr. Ramachandran, who is the attest or of the suit sale agreement was examined as P.W.2. During the course of their examination Exs.A1 to A12 were marked. On the other hand, one Mr. Senthilnathan, who is none other than the son of the Defendant was examined as D.W.1. No documentary evidence was led on behalf of the Defendant.

5. On appraising the evidences both oral and documentary and on considering the submissions made on behalf of both sides, the Trial Court has proceeded to decree the suit directing the Defendant to execute the sale deed in respect of the suit property in favour of the Plaintiff after receiving the balance of sale consideration and directing the Plaintiff to deposit the balance of sale price viz. Rs. 3,35,000/- to the Court within a period of one month from the date of judgment and also directing Defendant to execute the sale deed within two months after receiving the balance of sale consideration.

6. While decreeing the suit, the Trial Court has concluded that:

(i) the time stipulation incorporated in the sale agreement to conclude the contract within a period of two months cannot be termed as "time is the essence of the contract" as the Defendant had accepted the part payments of sale consideration on 15.10.2005 and 22.11.2005 respectively by extending the period for the conclusion of the contract of sale, and

(ii) the Defendant had not disclosed the mortgage of property with the Repco Bank and it was not specifically agreed between the parties "that time is the essence of the contract".

7. Being aggrieved by the impugned judgment and decree, now the Defendant has approached this Court by way of this appeal.

8. Heard Mr. J.R.K. Bhavanantham, learned Counsel for the Defendant and Mr. Md. Ibrahim Ali, learned Counsel for the Respondent/Plaintiff.

9. Mr. J.R.K. Bhavanantham, learned Counsel for the Appellant/Defendant has placed his arguments only on the following two grounds:

i. the Plaintiff was not ready and willing to perform his part of contract from the date of agreement of sale and even through out the proceedings in compliance of the proviso to Section 16(c) of the Specific Relief Act; and

ii. the Plaintiff should have adhered to the strict terms of the agreement of sale dated 11.07.2005 and paid the balance of sale consideration within two months from the date of agreement of sale.

10. Admitted facts:

a. on the date of sale agreement i.e. on 11.07.2005, the Plaintiff had paid a sum of Rs.1,50,000/- towards the advance of sale price;

b. as evident from Ex.A2, the Defendant had received a sum of Rs. 60,000/- towards the balance of sale price on 15.10.2005;

c. Ex.A3 acknowledges the receipt of another sum of Rs. 10,000/- on 22.11.2005 by the Defendant from the Plaintiff;

Ex. A1 11.07.2005 Rs. 1,50,000/- Ex. A2 15.10.2005 Rs. 60,000/- Ex. A3 22.11.2005 Rs. 10,000/- ----- Rs. 2,20,000/- -----

Altogether, the Defendant had received a sum of Rs. 2,20,000/

d. No issue has been framed by the Trial Court in respect of readiness and willingness.

e. No objection certificate dated 13.12.2005 was obtained by the Defendant from the Recombine and given to Plaintiff on 20.12.2005.

11. Ground No. i, Readiness and Willingness:

Section 16 of the Specific Relief Act, 1963 reads as follows:

16. Personal bars to relief.-Specific performance of a contract cannot be enforced infamous of a person-Clause (c) to Section 16 of the Specific Relief Act reads as follows:

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the Defendant.

Explanation for the purposes of Clause (c):

i. where a contract involves the payment of money, it is not essential for the Plaintiff to actually tender to the Defendant or to deposit in court any money except when so directed by the court;

ii. the Plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

12. In *Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others, and Shri Rameshwar Prasad (d) By Lrs. Vs. Shri Basanti Lal*, in specific terms it is laid down that specific performance of contract cannot be forced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. The requirement of law is two folds:

(i) that the Plaintiff must aver in the plaint and

(ii) that he must prove by evidence that he was always been ready and willing to perform his part of the contract. The Plaintiff cannot be allowed to succeed if he fails to fulfill any of the two obligations enjoined by law.

13. In the above context, the Plaintiff has embarked to prove by evidence that he was always been ready and willingness to perform his part of the contract. The laws well settled that if he fails to fulfill any of the above stipulated two obligations enjoined by law viz. Section 16(c) of the Specific Relief Act, 1963, the Plaintiff cannot be allowed to succeed the suit.

14. It would also be quiet relevant to refer a recent decision of the Supreme Court in *Pramod Buildings and Developers (P) Ltd. Vs. Shanta Chopra*, . In this

case it is held that:

In a suit for specific performance, burden lies on Plaintiff to prove readiness and willingness to perform his obligations in terms of contract. If Plaintiff was not willing to pay balance amount at the time of sale as agreed, he could not claim that he was ready and willing to perform his obligations.

15. At Page No. 3 of the sale agreement, nine conditions have been stipulated. In the third condition, it is stated that barring the advance amount of Rs. 1,50,000/-, the purchaser (the Plaintiff) has agreed today the remaining balance of Rs. 4,05,000/- within the period of two months. Admittedly the balance of sale price as specified above was not paid by the Plaintiff within the period of two months. Ex.A2, (endorsement dated 15.12.2005) reveals that the Defendant had, on 15.10.2005, received an additional advance of Rs. 60,000/-. In total, he had received a sum of Rs. 2,10,000/-. But the endorsement on Ex.A2 does not have any reference to show that the time limit for the payment of balance of sale price was extended. It is significant to note here that the condition Clause No. 3 covenants that the remaining balance of Rs. 4,05,000/- was agreed to be paid by the Plaintiff within two months. But it is seen from Ex.A2 endorsement that he had paid a part of sale consideration of Rs. 60,000/- after three months. On a cursory perusal of Ex.A1 and Ex.A2 endorsement, it is crystal clear that the Plaintiff had not paid the balance of sale consideration of Rs. 4,05,000/-, as agreed by him within the period of two months. But after the expiry of the time stipulated, he was able to pay only Rs. 60,000/- after the lapse of three months.

16. Secondly, Ex.A3 endorsement reveals that another amount of Rs. 10,000/- was paid by the Plaintiff only on 21.11.2005. Though this endorsement is dated as 21.11.2005, the Defendant had acknowledged the receipt of this amount only on 22.11.2005. This has not been disputed by the Defendant. It also appears from Ex.A3 that he had extended the time by 30 days from 22.11.2005 to pay the remaining balance. It is pertinent to note here that adding this amount of Rs. 10,000/- to the amount already paid by the Plaintiff, the Defendant had received totally a sum of Rs. 2,20,000/-. This fact has also not been disputed by the Defendant in his written statement as well as in DW- 1's evidence. It is apparent that the Defendant had not entered the box to give evidence instead his son unessential had only entered into the box to depose on behalf of his father. The suit in O.S. No. 1433 of 2006 appears to have been filed on 30.01.2006 i.e., more or less after two months from the date of Ex.A3 endorsement. Under these circumstances, the question of "readiness" and "willingness" has been raised by Mr. J.R.K. Bhavanantham, learned Counsel for the Appellant at the time of advancing his arguments.

17. It is manifest that in Paragraph No. 5 of the plaint, the Plaintiff has pleaded that "the Defendant, instead of executing the sale deed in his favour had demanded a further amount of Rs. 50,000/- to meet out the surgical expenses of his mother and he had also informed that on account of the operation of his mother he had no time to execute the sale deed and also promised to execute

the sale deed after his mother's operation was over". He has also pleaded that believing his words he had parted with a further advance of Rs. 60,000/- on 15.10.2005. Nodoubt, the amount of Rs. 60,000/- has been acknowledged on 15.10.2005 by the Defendant under Ex.A3. But the reasons which are said to have been given by the Defendant for then on-execution of the sale deed have to be substantiated by the Plaintiff. Having come forward with a definite set of pleadings, it is the burden rests on the Plaintiff to establish this fact. But, it has not been proved by the Plaintiff.

18. D.W-1 in his proof affidavit in Paragraph No. 6 has stated that the Plaintiff had paid an advance of Rs. 1,50,000/- and though he had agreed to pay the balance of sale consideration, he was constantly seeking extension of time for paying the balance of sale consideration and upon such request and in order to oblige him, he had extended the time and upon such extension, the Plaintiff had paid only a piecemeal amount of Rs. 60,000/- on 15.10.2005. He has also stated that he had strictly warned the Plaintiff to get ready with the balance of sale consideration and also to prepare a draft sale deed so as to enable him to execute the sale deed in favour of the Plaintiff. But on 22.11.2005, the Plaintiff had come to the Defendant and pleaded his inability to mobilize necessary funds towards paying the balance of sale consideration and paid only Rs. 10,000/-, a further advance and again sought last and final chance of 30 days to pay the balance of sale consideration and the same was also endorsed on the reverse of the sale agreement, under Ex.A3.

19. From the evidence of D.W-1, it is seen that he had fairly admitted that he had received an amount of Rs. 10,000/- and extended a further period of 30 days for the completion of the sale transaction. But, even in spite of this, it appears from the records that the Plaintiff had not come forward to pay the balance of sale price.

20. On securitization of cross-examination of PW-1, he would state that since the Defendant had delayed in getting the approval of the plan and to sub-divide the site which was intended to be purchased he was not able to perform his part of contract within the stipulated time of two months. In this regard, this Court finds that it would be more relevant to place it on record that this fact has not been specifically pleaded by the Plaintiff in the plaint. It is settled proposition of law that without specific pleading, no amount of evidence could be considered or allowed to be received. It is also relevant to note here that with regard to the plea taken by the Plaintiff that the Defendant had demanded a sum of Rs. 50,000/- for the surgical expenses of his mother, the Defendant would contend that his mother had expired 40 years before and there was no necessity for him to demand a sum of Rs. 50,000/- showing the medical grounds of his mother. This Court also wishes to place it on record that as per the case of Plaintiff, the Defendant had demanded a sum of Rs. 50,000/- for his mother's medical expenses. But the Plaintiff had parted with a sum of Rs. 60,000/-. Though this was confronted by the Defendant, the Plaintiff had not chosen to give proper

explanation as to what made him to part with a sum of Rs. 60,000/- instead of Rs. 50,000/-.

21. In his cross-examination the Plaintiff has also stated that on 15.10.2005 he had approached the Defendant and informed him that he was ready to pay the remaining balance of consideration and requested him to come and execute the sale deed. He has also stated that the Defendant had replied that the suit property was mortgaged with Repco bank. This fact has also been not specifically pleaded in the plaint and the Plaintiff has also admitted this fact in his cross-examination. The Plaintiff in his cross-examination has continued to depose that after 15.10.1995 he had approached the Defendant for about 10 to 15 times and requested him to come and register the sale deed. He has also fairly admitted that no documentary evidence was adduced on his part to prove the fact that he had got the plan approved through one Engineer Balasubramanian. But the said Engineer Balasubramanian has also not been examined in this case.

22. He has also disclosed another fact that the Defendant had asked him through his son Senthil to part with a sum of Rs. 10,000/- on 20.11.2005 for getting approval of the plan. But this has also not been proved by the Plaintiff. Further he has also admitted that on 23.11.2005 he never requested the Defendant either through writing or in person to come and register the sale deed.

23. Ex.A10 and A11 are said to be draft sale deeds. In this connection, the Plaintiff has deposed in his chief-examination that in the month of September he had prepared a draft sale deed under Ex.A10 and handed it over to the Defendant and the Defendant had also effected corrections. He has also added that again in the month of October, he had prepared another draft sale deed and given to the Defendant but he did not get it back. He would state further that he had prepared another draft sale deed under Ex.A11 in the month of December and given to the Defendant and he had also effected corrections and returned the same back to him. In his cross-examination he has stated that the draft sale deed was given in the month of September, but he did not remember the exact date. He has also stated that when he had asked the Defendant as to when the registration could be fixed, the Defendant had replied that he would convey the date through phone after getting letter from the bank.

24. He would state further that till he was not aware about the mortgage of the property with the Repco bank. With regard to the mortgage of the suit property with Repcobank, the Plaintiff had deposed in his cross-examination that the Defendant for the first time had disclosed at the time of receipt of money of Rs. 60,000/- under Ex.A2. The Plaintiff has also admitted in his cross-examination that the disclosure of Defendant, on 15.10.2005, about the mortgage of property with Repco bank had not been specifically pleaded in the plaint. Even in his chief examination, the Plaintiff has stated that the Defendant has disclosed that the property was mortgaged with Recombine, T. Nagar Branch. But, this mortgage had not been shown in the encumbrance certificate and thereafter the Defendant had got a letter from the above said Bank permitting to sell an extent of 600

sq.ft., But, this fact has also not been pleaded in the plaint.

25. It is significant to note here that out of 2698sq.ft., the Defendant had agreed to sell away an extent of 600 sq.ft, viz. 20 X 30 sq.ft., The Plaintiff has also admitted this fact in his cross-examination. Ex.A12 is the no objection certificate issued by Repco Bank in respect of 600 sq.ft., In this regard, the Plaintiff has stated in his evidence that Ex.A12 was obtained from Repco Bank by the Defendant and handed it over to him only on 20.12.2005. D.W.1 has also admitted in his cross-examination that Ex.A12 dated 13.12.2005 (no objection to sell 600 sq.ft.,) given by the Repco Bank was obtained by him. But, he has strongly denied the suggestion that the delay in getting no objection from the Repco Bank had caused further delay in the registration of the sale deed.

26. Section 55 of the Transfer of Property Act deals with the rights and liabilities of the buyer and seller. It reads as follows:

55. Rights and liabilities of buyer and seller.-In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) Seller is bound-

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

Clause (b) to Sub-Section 5 of Section 55 of the Transfer of Property Act reads as follows:

5. Buyer is bound:

b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled there to.

27. On coming to the instant case on hand, the Plaintiff has stated in his cross-examination that when he had asked the Defendant as to when the registration

could be fixed, the Defendant had replied that he would convey the date through phone after getting a letter from the bank. He has also stated that till that date he was not aware of the fact that the property was mortgaged with the Repco Bank. In this regard, it is to be remembered that the Plaintiff in his cross-examination has fairly admitted that he did not remember the date on which he had handed over the draft sale deed to the Defendant in the month of September. But, he was also not able to specify the exact date till then he was not aware of the fact of the mortgage of the property with Repco Bank. But, the Defendant has been able to say that even the fact of mortgage of property was disclosed to the Plaintiff at the time of execution of the sale agreement and when he had insisted the Plaintiff to incorporate this fact in the sale agreement he had purposefully refused to incorporate.

28. D.W.1 in his cross-examination has stated that if the extent of the property is lesser than 800 sq.ft., it could not be sub-divided. In this connection, the learned Counsel for the Defendant would submit that since the extent of the property was lesser than 800 sq.ft., he was not able to sub-divide and hence the allegation that the delay was caused only on account of delay in getting the property sub-divided could not be sustained. He has also canvassed that even upon such extension and after receiving the no-objection letter from the Repco Bank, the Plaintiff had failed to pay the balance of sale consideration of Rs. 3,35,000/- within 20.12.2005 and also to come forward for registration.

29. The learned Counsel for the Defendant, while advancing his argument, has also made reference to Section 20 of the Specific Relief Act, 1963.

20. Discretion as to decreeing specific performance.

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

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

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the Plaintiff an unfair advantage over the Defendant; or

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

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

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

Explanation 2.-The question whether the performance of a contract would involve hardship on the Defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the Plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

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

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

30. In support of his contention, the learned Counsel for the Defendant has laid emphasis on the decision of the Apex Court in A.K. Lakshmipathy (Dead) and Others Vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and Others, . In this case, while writing the judgment on behalf of the Division Bench of the Apex Court, His Lordship Hon''ble Mr. JUSTICE TARUN CHATTERJEE has explained the scope and application of Section 55 specifically Section 55(1)(b) of the Transfer of Property Act, 1882. His Lordship has held that:

Section 55 is not applicable where there is a contract contrary to rights and liabilities of buyer and seller as provided for in Section 55. Appellant buyer entered into agreement for purchase of immovable property of Respondent Trust within six months, agreeing to obtain all required permissions/exemptions. Authorities permitted the purchase, subject to permission from Endowment Department. Despite Respondent's clarification that permission not required under law since Trust registered in West Bengal, Appellant insisting on completion of transaction subject to Respondent obtaining permission. As transaction not completed within agreed time, Respondent terminated said agreement, forfeiting advance money. Trial Courtland High Court dismissing plea for specific performance of the agreement.

The Order of dismissal both by Trial Court and High Court was questioned before the Apex Court in the above appeal. On hearing both sides, his Lordship has held that

Seller's liability towards buyer to furnish documents of title arises only in absence of "contract to the contrary". In instant case, there was a contract for sale stipulating that buyer had to obtain necessary permission or exemption from authorities. In addition, Section 55(1)(b) obliges seller to produce" documents of title relating to property", which are in his possession or power for examination

of buyer. Clearance or exemption certificate from Endowment Department is neither a "document of title relating to the property" nor was in possession of seller. Hence, there was no obligation on Respondent to get clearance or permission or exemption.

31. Mr. J.R.K. Bhavanantham, learned Counsel for the Defendant has also placed reliance upon a decision in *Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha*, , in support of his contention with regard to the readiness and willingness to perform the contract of sale. It may be relevant to note here that this decision has been distinguished by the Division Bench of the Apex Court in *Pramod Buildings and Developers (P) Ltd. Vs. Shanta Chopra*, .

32. In the earlier decision viz. *Pramod Buildings and Developers (P) Ltd. Vs. Shanta Chopra*, , the decision in *Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha*, was cited to support the contention of the Appellant that the Defendant did not state into the witness box and evidence was given only by her husband and that was insufficient. The said contention was considered and negative by both the Single Judge and the division Bench. *Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha*, . In this connection, the Division Bench has held that the decision viz. *Man Kaur(Dead) by Lars's* case has no bearing on the facts of the case.

33. While dealing with Section 16(c) of the Specific Relief Act, 1963 and Section 101 of the Evidence Act, 1872, the Hon'ble Mr. JUSTICE R.V.RAVEENDRAN speaks on behalf of the Division Bench that the suit in a specific performance the Plaintiff should not only plead and prove the terms of the agreement and also should plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract. In Paragraph No. 40 of the judgment His Lordship has held as follows:

40. There are two distinct issues. The first issue is the breach by the Defendant - vendor which gives accuse of action to the Plaintiff to file a suit for specific performance. The second issue relates to the personal bar to enforcement of specific performance by persons enumerated in Section 16 of the Act. A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the Defendant) is barred from claiming specific performance. Therefore, even assuming that the Defendant had committed breach, if the Plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the Plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the Respondent that readiness and willingness on the part of Plaintiff is something which need not be proved, if the Plaintiff is able to establish that Defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where

there is a contract for sale for a consideration of Rs. 10lakhs and earnest money of Rs. 1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs. 15 lakhs. In such a case there is a clear breach by Defendant. But in that case, if Plaintiff did not have the balance Rs. 9lakhs (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract had to be performed, the Plaintiff will not be entitled to specific performance, even if he proves breach by Defendant, as he was not "ready and willing" to perform his obligations.

34. On the other hand, Mr. Md. Ibrahim Ali, learned Counsel for the Plaintiff has drawn the attention of this Court to Clause 9 of Ex.A1 sale agreement dated 11.07.2005. In this connection, he would submit that the Defendant had specifically agreed to get the site sub-divided and approved and to sign the sale deed and he has also added that the sub-division of the property was a part of the agreement. But the Defendant in total negation of Clause 9 had delayed in getting the site approved after sub-division.

35. The contention of the learned Counsel for the Plaintiff is not able to be countenanced, because the Defendant had agreed to sell only an extent of 600 sq.ft. and this has also been admitted by the Plaintiff. A question was also put to D.W.1 when he was in the witness box and to that question, he has answered that he knew that if the extent of the property was lesser than 800 sq.ft., it could not be sub-divided. When such being the case, where is the question of delay in getting the property sub-divided and approved.

36. With regard to the readiness and willingness, the learned Counsel for the Plaintiff has also spoken to about Ex.A12, letter of no objection dated 13.12.2005 issued by Repco Bank and in this connection he would submit that the Defendant had caused an enormous delay in getting the no objection letter from the Repco Bank, wherein the property was mortgaged. In this connection, he has added that the delay was only on the part of the Defendant and not on the part of the Plaintiff. He has also added that no forfeiture clause was incorporated in the agreement of sale and hence the delay could not be attributed to the Plaintiff and on the other hand the Defendant himself was the reason for the delay in getting the sale transaction completed.

37. As observed earlier, the Plaintiff himself has admitted in his cross-examination that on 15.10.2005, he was ready to pay the entire balance of sale consideration and asked the Defendant to come and register the sale deed, for which the Defendant had informed him that the property was mortgaged with the Bank. He would go one step further and depose in his cross-examination that after paying a sum of Rs. 60,000/- towards the part of balance of sale consideration, the Defendant had informed as the property was mortgaged with the Bank. This portion of evidence adduced by the Plaintiff in his cross-examination is notable to be discerned, because it is true and admitted by Defendant also that on 15.10.2005 the Plaintiff had paid a sum of Rs. 60,000/- as evidenced by Ex.A2 endorsement. As spoken to by P.W.1, if he was ready to

pay the entire amount on 15.12.2005, what prevented him from paying the entire balance on that day. From his own conduct, it was established that he was only able to pay assume of Rs. 60,000/- out of the balance of Rs. 3,35,000/-. This has led the Court to presume adversely u/s 114(g) of the Indian Evidence Act, 1872 against the Plaintiff.

38. It is also quiet relevant to note here that the Trial Court itself has observed in Paragraph No. 6 of its judgment that "reading the issue Nos. 1 to 4 conjointly its evident that the Plaintiff had knowledge of subsisting mortgage of the suit property with the Repco Bank and that the Defendant had not suppressed any material facts i.e. on the date of making of endorsement under Ex.A2 pertaining to the payment of Rs. 60,000/- ". Then what about the subsequent conduct of the Plaintiff? Why the Plaintiff was not able to mobilize the amount of sale price and paid to the Defendant and get the sale deed registered in disfavor? Without performing his part of contract in making the balance of sale price in time as agreed by him under Ex.A3, does he deserve to indict the Defendant that he was the reason for the delay in registering the sale deed?

39. Of course, the Plaintiff in Paragraph No. 12 of the plaint has pleaded that he was always ready and willing toper form his part of the contract and was ready to deposit the balance of sale consideration before this Court. Having pleaded that he was ready and willing to perform his part of contract and even to establish his bonafide, he has stated that he was even ready to deposit the balance of sale consideration before the Court why he had not deposited the balance of sale price on the date of filing of the suit? This question has not been answered by the Plaintiff?

40. Ex.A7 is the reply notice issued by the Defendant to Plaintiff through his counsel, wherein in Paragraph No. 5, he has stated that the Plaintiff was not even prepared to pay the balance of consideration at a single point of time before 10.09.2005. But, on all times he had requested for extension of time and convinced by piece meal payments of Rs. 60,000/- on 15.10.2005 and Rs. 10,000/- on 21.11.2005 which were after the expiry of agreement dated 10.09.2005. At Page No. 2 in the first paragraph it is stated that after 15.10.2005 (date of Ex.A2), he had firmly and finally warned the Plaintiff to get ready with balance of consideration and to prepare a draft sale deed for the purpose of execution but on 21st November 2005, he came with empty hands but paid only Rs. 10,000/- and again requested alast and final chance of preparation for execution, within30 days only from 21.11.2005 and got endorsement.

41. In this connection, the learned Counsel for the Plaintiff would contend that the Plaintiff was really ready and willing to perform his part of contract and in order toper form his part of contract he had prepared the draft sale deeds under Exs.A10 and A11 and got it corrected by the Defendant and that the Defendant had only made delay in getting the property sub-divided and approved which is mandatory as per the agreement of sale under Ex.A1.

42. He has also contended that after the suit was decreed, the entire balance of sale consideration viz. Rs. 3,35,000/- was deposited by the Plaintiff before the Trial Court to the credit of the suit in O.S. No. 1433 of 2006 and hence the appeal filed by the Defendant is liable to be dismissed and the judgment and decree passed by the Trial Court be confirmed.

43. On coming to the instant case on hand, as contemplated u/s 16(c) of the Specific Relief Act, 1963, since the Plaintiff failed to prove that he had performed or he had always been ready and willing to perform the essential part of contract, which has to be performed by him, the specific performance of contract cannot be enforced in his favour. The readiness and willingness of the Plaintiff can even be inferred from the circumstances and averments of the plaint. The circumstances narrated by the Plaintiff in the plaint as well as in his evidence are not adequate to prove his readiness and willingness to perform his part of contract.

44. As decided in *Surati Devi v. Shyam Dei* 1987 RD 278, in a suit for specific performance, it is incumbent on the Plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the Defendant specifically to perform the agreement pleaded by him but the Defendant had not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement.

45. Having regard to the related facts and circumstances and on considering the averments of the plaint, written statement and oral and documentary evidences, this Court is of view that the Plaintiff has failed to establish his readiness and willingness to pay the balance of sale price and get the sale deed executed and registered in his favour.

46. Whether the time is essence of the contract:

Before we go to deliberate on this issue, as to whether the time is essence of the contract it may be quiet relevant to refer the proviso to Section 55 of the Indian Contract Act, 1872.

55. Effect of failure to perform a fixed time, in contract in which time is essential:

When a party to a contract promises to do a certain thing at or before specified time, or certain things at or before a specified time and fails to do such thing at or before a specified time, and fails to do such thing at or before a specified time, the contract so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.

47. On coming to the instant case on hand, Ex.A3 endorsement made on the reverse of the suit sale agreement under Ex.A1 would go to show that the Plaintiff had agreed specifically to pay the balance of sale consideration within the period of thirty days and get the sale deed registered in his favour. But, in fact, the Plaintiff had failed to adhere to the promise made by him under Ex.A3.

It is apparent that originally at the time of execution of the sale agreement on 11.07.2005 both parties to the contract viz. Plaintiff and the Defendant had agreed to complete the contract of sale within the period of two months on payment of balance of sale price at the time of registration. But, even after the expiry of two months, the Plaintiff had not complied with this condition. This would be evident from Clause No. 3 of Ex.A1 suit sale agreement. Clause No. 5 stipulates that on payment of entire amount, the vendor i.e. the Defendant agrees to execute sale deed or power of attorney in favour of the purchaser or in favour of his nominee. Strictly speaking Clause No. 5 enjoins the Plaintiff to pay entire amount and then only put the Defendant under obligation to execute either sale deed or power of attorney in favour of the Plaintiff or his nominee. The circumstances arising from the given case on hand, unambiguously established that the Plaintiff had miserably failed to pay the entire balance of sale price i.e. the condition precedent to execute the sale deed or power of attorney by the Defendant in his favour or in favour of his nominee and these circumstances are adequately displace the normal presumption in a contract of sale the time is not the essence of the contract.

48. It is general proposition of law that no presumption could be drawn as to the time being the essence of contract in a case of sale of immovable properties.

49. The learned Counsel for the Plaintiff while advancing his argument has sought the assistance of the decision in Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., . In this case, the Apex Court has held that:

As a general proposition of law, in the case of sale of immovable property time is not the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in reasonable time if the conditions are evident:

(i) from the express terms of the contract;

(ii) from the nature of the property; and

(iii) from the surrounding circumstances, for example: the object of making the contract.

50. On coming to the instant case on hand, the express term of the contract and from the surrounding circumstances. the object of making the contract assumes much importance. The general presumption that the time is not essence of the contract when it relates to the sale of immovable properties cannot be fastened to the instant case on hand. Because the intention of the parties to the contract has been clearly laid down under Ex.A3 that the sale should be completed on payment of entire balance of sale consideration within thirty days from 21.11.2005. But, the Plaintiff had not acted upon the promise given by him.

51. Under this circumstance, this Court finds it appropriate to place reliance upon the decision of the Division bench of this Court in Subbanna Gounder (deceased), Lakshmiammal and Palaniammal Vs. Subbayammal, Duraiswamy, Palaniswamy,

Sundaram (deceased), Swarnam, Sri Udayakumar and Gnanasekaran, . In this case, the Division Bench of this Court has held in Paragraph No. 18 as follows:

18. Normal presumption that time is not the essence of the contract when it relates to the sale of immovable property, cannot be applied to the present facts and circumstances of the case, in view of the language used in the agreement, which would indicate in unmistakable terms that the time was the essence of the contract. When the Plaintiff came forward with a request to extend time in view of her inability to perform her part of the first agreement due to lack of sufficient funds, the Defendants 1 and 2 were compelled to enter into the second agreement under Ex.A1, which is the basis for the suit. The intention of the parties to treat the time as the essence of the contract is clearly evidenced not only by the recitals under Ex.A1, but also by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale, time is not the essence of the contract. The available materials would amply demonstrate that the Plaintiff was not ready, nor had she the capacity to perform her part of the contract, since she had not the financial capacity to pay the consideration as agreed upon between the parties.

52. A person, who is seeking the equitable relief should not forget the principle that he should come forward with clean hands as the decree for specific performance is in the discretion of the Court. But, the discretion shouldn't be refused arbitrarily. The discretion should be exercised on sound principles of law capable of correction by an appellate Court as contemplated u/s 20 of the Specific Relief Act, 1963. It is settled law that the party who seeks to avail of the equitable jurisdiction of court and specific performance being equitable relief, must come to the Court with clean hands. In other words the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief. This principle is laid down in *Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others*, .

53. This Court has carefully evaluated the evidences both oral and documentary. This Court's attention was mainly focused and projected on Ex.A1 suit sale agreement. This Court can also infer the intention of the parties to the contract of the sale and the conditions stipulated therein for the execution of the contract of sale within the reasonable time. Since the Plaintiff had agreed and promised to pay the entire balance of sale consideration within the period of thirty days and having failed to do so to his own promise, this Court finds that he is not entitled to the relief of specific performance and consequently the conclusion of the Trial Court in granting a decree for specific performance in favour of the Plaintiff is absolutely erroneous and liable to be set aside.

54. As observed in *A.K. Lakshminath (Dead) and Others Vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and Others*, , the surrounding circumstances arising from the nature of the case lead the Court to presume the time is the essence of the contract and therefore this Court is also of the view that the Plaintiff having failed to perform his part of contract, he cannot be allowed to take advantage of his

own mistake and conveniently passes the blame on the Defendant.

55. In the above cited case, viz. A.K. Lakshmipathy (Dead) and Others Vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and Others, , in Paragraph No. 31, the Apex Court has made reference to the decision in K.S. Vidyadham and Others Vs. Vairavan, and held as follows:

In an agreement for sale of immovable properties, the readiness and willingness of the parties to perform their part of the contract is essential. Hence, we are of the view that the concurrent findings of fact arrived at by the High Court and the trial court on the question of readiness and willingness to perform their part of obligation, so far as the Appellants are concerned, cannot at all be interfered with. Accordingly, we are of the view that the High Court has rightly confirmed the concurrent findings of fact arrived at by the courts below on the question of readiness and willingness on the part of the Appellants to complete the agreement for sale.

56. Having regard to the observations made above, this Court is of considered opinion that the judgment and Decree of the Trial Court are liable to be set aside and the appeal filed by the Defendant deserves to be allowed.

57. In the result the appeal is allowed and the Judgment and Decree dated 23.01.2007 and made in O.S. No. 1433 of 2006, on the file of the learned II Additional Judge, City Civil Court, and Chennai is set aside. Consequently, connected miscellaneous petitions are closed. No costs.