

(2002) 06 MAD CK 0099

In the Madras High Court

Case No : O.S.A. No's. 12 of 1992, 32 of 1995 and 148 of 1999 and C.M.P. No's. 2888 of 1996, 17401 of 1997 and 7471 of 2002

Saradamani Kandappan

APPELLANT

Vs

Mrs. S. Rajalakshmi, Mr. S. Vijayakumar, Mrs. S. Uma and Mr. V.K.P. Sunkavalli

RESPONDENT

Date of Decision : 19-06-2002

Acts Referred:

Contract Act, 1872 — Section 51, 52, 53, 55
Evidence Act, 1872 — Section 92
Specific Relief Act, 1963 — Section 16
Transfer of Property Act, 1882 — Section 53A, 54

Citation : (2002) 4 RCR(Civil) 75

Hon'ble Judges : S. Jagadessan, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : Nalini Chidambaram, Counsel for S. Silambanan, for the Appellant; S. Gopalaratnam for S. Subbiah and G. Masilamani for Srinath Sridevan, for the Respondent

Judgement

K. Raviraja Pandian, J.—All the above three appeals are directed against the common judgment dated 29.11.1991 of the learned Single

Judge of this Court made in Civil Suits No.95 of 1984, 170 of 1984 and 302 of 1989.

2. All the three suits were filed by the appellant herein. The suit in C.S.No.95 of 1984, which is the subject matter of O.S.A.No.12 of 1992, was

one filed for the relief of passing a decree for specific performance of the agreement of sale dated 17.1.1981 directing the defendants 1 to 3 to

execute the sale in respect of the suit properties in favour of the plaintiff or her nominees after receiving the balance consideration and in default to

have the sale executed in the process of law through Court.

C.S.No.170 of 1984, which is the subject matter of O.S.A.No.148 of 1999, was filed for the relief of passing a decree directing the defendant

therein ie., V.K.P.Sunkavalli, the 4th respondent in C.S.No.95 of 1984 to return the sum of Rs.1,25,000/- being the amount received by him as

commission with interest from the date of agreement i.e., 17.1.1981 till the date of realisation. C.S.No.302 of 1989, which is the subject matter of

O.S.A.No.32 of 1995, was filed for passing of a decree for permanent injunction restraining the defendants from in any way interfering with the

peaceful possession and enjoyment of the plaintiff of the suit properties.

3. Though the relief sought for in the three suits are differently worded, the cause of action for such suits is one and the same i.e., agreement of sale

entered into between the parties on 17.1.1981 for the sale of the subject property and the letter issued by the fourth respondent on the even date.

In order to appreciate the controversy and resolve the same, the facts which are essential are as follows:

The suit properties are owned by defendants No.1 to 3 i.e., Mrs.Rajayalakshmi, Mr.Vijayakumar and Miss S.Uma. The fourth defendant is the

husband of the first defendant and father of defendants No.2 and 3. The agreement of sale was entered into between the plaintiff and defendants

No.1 to 3 on 17.1.1981 at Madras. The fourth defendant was instrumental in bringing out the agreement and for that purpose, he was given a sum

of Rs.1,25,000/- as commission subject to certain condition. The said agreement contains recitals to the effect that defendants No.1 to 3 would

sell the properties agreed therein, which is in an extent of 24.95 acres for a total consideration of Rs.3,75,000/- (at the rate of Rs.15,000/- per

acre approximately) and on the date of execution of the agreement, a sum of Rs.1 lakh was paid as advance. The agreement further contemplates

that the plaintiff should pay a sum of Rs.1 lakh on or before 28.2.1981 and another sum of Rs.1 lakh on or before 6.4.1981 and the balance of

Rs.75,000/- on or before 30.5.1981. The sale deed has to be executed as and when the plaintiff wants the defendants to execute the same either

in her name or in the name of her nominee/nominees. It is also stated in the agreement that the plaintiff has been constituted as a care taker of the

properties and she continued to be as a care taker till the defendants give possession of the entire property on payment of the sale amount i.e.,

after the entire sale amount is paid. It is the case of the appellant though the agreement states that the time is the essence of the contract, in law, it is not so. The appellant/plaintiff took possession of the property pursuant to and in part performance of the agreement and improved the land by applying much quantity of manure and fertilisers, raised sugarcane in ten acres and paddy in ten acres. Thus, the plaintiff continued to be in possession of the property.

4. Pursuant to the agreement, the plaintiff paid the first instalment of Rs.1 lakh on 28.2.1981 and in respect of the second instalment of Rs.1 lakh payable on or before 6.4.1981, only a sum of Rs.25,000/- was paid on 2.4.1981, because the fourth defendant, who promised to give original document within few days of the agreement so as to enable the plaintiff to scrutinise the document through their advisor and satisfy herself about the perfection of title and non-existence of encumbrance, failed to do so. In the end of March, 1981, the plaintiff's husband met the 4th defendant and had discussion in the presence of witnesses and it was agreed that the document in original would be made available as early as possible and that the plaintiff could pay the balance money and complete the transaction within a reasonable time after handing over of the original document. The plaintiff always keeping the balance amount ready and willing to complete the sale.

5. While that being so, defendants No.1 to 3 caused a notice issued through their advocate on 28.6.1981 thereby cancelled the agreement of sale by raising untrue and untenable contentions. The plaintiff sent a reply on 7.8.1981 through counsel and this reply dated 7.8.1981 elicited a rejoinder from defendants No.1 to 3 dated 26.8.1981. The plaintiff further sent a reply on 4.9.1981 for the rejoinder. The purported cancellation of the agreement unilaterally by the defendants 1 to 3 is illegal. Not contented with the unilateral and illegally purported cancellation of the agreement dated 17.1.1981, defendants No.1 to 4 set up undesirable element to disturb the possession and enjoyment of the property for the plaintiff, which constrained the plaintiff to file a suit for injunction on the file of the District Munsif's Court, Poonamallee in O.S.No.1709 of 1981 and obtained an order of injunction on 16.11.1981 in I.A.No.1804 of 1981 and subsequently it was made absolute on 15.12.1981.

6. It is the further case of the plaintiff that the defendants are unnecessarily delaying the execution of the sale deed. The plaintiff was always ready

and willing to perform her part of contract and she is possessed of necessary funds. The fourth defendant has received a heavy commission of

Rs.1,25,000/- under a separate receipt dated 17.1.1981, has agreed to return back the amount if the transaction of sale failed out. Since the

agreement of sale dated 17.1.1981 remains unconcluded, the plaintiff filed the suit as stated above for recovery of the said amount of

Rs.1,25,000/-. With the above said allegations, the appellant/plaintiff filed the suit for specific performance of the agreement dated 17.1.1981,

recovery of Rs.1,25,000/- with interest against the fourth defendant. The suit in O.S.No.1709 of 1981 filed for injunction on the file of the District

Munsif's Court, Poonamallee was transferred to the High Court to be heard along with the above suits and taken on file as C.S.No.302 of 1989.

7. The suits were resisted by the defendants by filing written statement and contended that the suit for specific performance is misconceived, not

maintainable on the plaintiff's own showing. The plaintiff having committed breach of terms and conditions of the agreement dated 17.1.1981 and

failed to perform her part of the agreement within the period agreed upon, is not entitled to sue for specific performance of the agreement. The

defendants further contended that time should be the essence of the contract and in view of admitted failure of the plaintiff to effect payment on the

due date in accordance with the agreement, the defendants are entitled to cancel the agreement as per terms of the agreement and accordingly the

said agreement was duly cancelled by defendants No.1 to 3. In any event, it was contended that there were laches on the part of the plaintiff in

filing the suit for specific performance, inasmuch as the plaintiff deliberately pursued remedy by way of injunction without seeking for the relief of

specific performance and as such the plaintiff is not entitled for the discretionary relief of specific performance.

8. It is the further case of the defendants that that the part consideration received in instalments could not be paid back in terms of the agreement,

because of the act of the plaintiff by filing false and frivolous suit. The defendants are ready and willing to refund the amount due under the

cancelled agreement to the plaintiff without even waiting for the sale of the plaintiff's scheduled property, provided the plaintiff did not create hindrance.

It is their further case that the plaintiff published in the local newspaper a mischievous and frivolous public notice as if she has already purchased the subject land. The said publication caused heavy damage to the defendants by creating adverse impression in the minds of the public as well as the intending purchaser as if the subject properties were already sold by a concluded sale. It is the further case of the defendants that the plaintiff is not possessed of sufficient funds and contended that is the precise reason for not honouring the payment schedule as agreed between them. Hence, the remedy of specific performance, being equitable, is not available to the plaintiff. With these averments, defendants No.1 to 3 controverted the claim of the plaintiff for specific performance.

9. The fourth defendant against whom a suit has been filed for recovery of an amount of Rs.1,25,000/- though admitted the receipt of the said sum in driblets, however, contended that the said amount is part of sale consideration and the letter dated 17.1.1981 was issued at the instance and instructions of the plaintiff since the amount could not be accommodated in the books of account at the relevant time because of the action taken by the Income Tax Department against the plaintiff. The defence in respect of injunction suit was that the plaintiff was never given possession of the suit property in part performance of the agreement of sale and she was placed only as a care taker in trust of the defendants. On the date of cancellation of the agreement of sale, the plaintiff's possession as a care taker ceased and she cannot claim to be in possession of the suit properties as part performance of the agreement of sale. With these pleadings, the parties went to trial.

10. Since the point to be resolved in all the above suits is one and the same, on consent of parties, a joint trial was conducted in the suits. The plaintiff examined herself as P.W.1 and marked documents in Exs.P.1 to P.20. One Thiru Babu was examined as P.W.2 and one Balaraman was examined as P.W.3. On behalf of the defendants, Thiru Rajendran was examined as D.W.1 and the fourth defendant Sunkavalli was examined as D.W.2 and Exs.D.1 to D.6 were marked.

11. The learned Single Judge after formulating the necessary issues and after taking into consideration of the material evidence, both oral and documentary made available before the Court, ultimately found that the plaintiff

failed to make out a case for specific performance on the ground that the time schedule as contemplated in the agreement for making the sale consideration has not been followed by the plaintiff. On the other hand, the plaintiff failed to pay the sale consideration on the agreed dates. The reason advanced for non-payment of the full amount of second and third instalments has been rejected as not proved and the learned Judge further held that the plaintiff failed to establish the readiness and willingness to perform her part of contract. The termination of the agreement by Ex.P.4 by the defendant was held to be perfectly valid. The learned Judge further held that the plaintiff was not entitled to claim the sum of Rs.1,25,000/- from the fourth defendant since it was found to be the sale consideration of the movables and finally the learned Judge found that the plaintiff was only placed as a care taker and never in possession of the property as part performance of the agreement. On the issuance of Ex.P.4 cancellation of the suit agreement, the plaintiff ceased to be a care taker of the property and as such not entitled for injunction.

12. The said common judgment is now put in issue in the above said three appeals.

13. The learned Senior Counsel Mrs.Nalini Chidambaram arguing on behalf of the appellant/plaintiff has contended that as per the terms of the

agreement, time shall be the essence of the contract and she made it very clear that she is not pressing the point that time is not the essence of the

contract as raised before the trial Judge. However, she contended that the plaintiff was not bound to perform her part of the contract, in the sense,

not bound by the time schedule agreed in the agreement in making the payment because the defendants did not perform their reciprocal obligations

on their part of the contract. In elaboration of this argument, she contended that the first instalment as agreed in the agreement was paid within the

due date. Prior to the due date for the second instalment, the plaintiff came to know that the defendants were not in possession of the original title

deeds of the subject properties and are pledged with Navarathan Chand Gulecha and State Bank of Mysore. After discussion with the fourth

defendant, it was agreed that the original documents would be made available within a short period and on that agreement and understanding,

instead of paying the second instalment of a sum of Rs.1 lakh in full, a sum of

Rs.25,000/- was paid, but however the defendants did not make available the original documents for the purpose of satisfying with the title and nil encumbrance over the property by the plaintiff and hence she contended that when the defendants were not ready and willing to perform their part of the reciprocal promises of the contract, they cannot complain that the plaintiff did not adhere to the schedule of payment of the balance sale consideration and unilaterally cancel the agreement by Ex.P.4. She further contended that in Ex.P.1, the sale agreement, there are two options for the defendants in the event of non-payment of sale consideration as agreed to. The first option is that if the plaintiff committed default in making the payment of sale consideration, the defendant has to conclude the sale of the property with any other person and in such a contingency, if the defendants were not able to realise the quantum of sale proceeds as agreed in Ex.P.1, the defendants would be entitled to deduct the deficiency from and out of the amount to be refunded by the defendants to the plaintiff. In the event of the defendants choose not to sell the land, they would have to return the entire amount advanced within three months from the date of cancellation of the agreement. The conduct of the defendants shows that they are only interested to sell the property to third parties. In these circumstances, the Court may direct the defendants to sell the property to the plaintiff herself. She further contended that as per Sections 51 to 53 of the Contract Act, the promisor need not perform his part of the contract unless the promisee is ready and willing to perform his reciprocal promise. Where the order of performance in which the reciprocal promises are to be performed is expressly fixed by the contract, that shall be performed in that order, and where the order of performance is not expressly fixed by the contract, they shall be performed in that order which the nature of transaction requires. According to her, the nature of transaction under the suit requires the production of original documents relating to the subject property so as to enable the plaintiff to satisfy herself as to the perfection of title and nil encumbrance. Admittedly, in this case, the original document has not been produced to the plaintiff in order to arrive at a satisfaction. Hence, it has to be construed that the plaintiff is always ready and willing to perform her part of the contract. It is the defendants, who failed to perform the obligation

on their part. In respect of the suit for recovery of the amount of Rs.1,25,000/-, she submitted across the bar that she is not pressing the appeal in

view of the finding that the same is part of sale consideration. In respect of the injunction suit, a faint attempt was made that the plaintiff was put in

possession as a part performance of the agreement of sale.

14. Mr.Gopalarathnam, learned Senior Counsel appearing for defendants No.1 to 3 has contended that the plaintiff is not entitled for specific

performance as she breached the promise in making the payment of sale consideration as agreed to in time. Then, the agreement is voidable at the

option of the promisee if the intention of the parties was the time should be the essence of the contract. The terms of the agreement made it clear

that time is the essence for making the payment of sale consideration and also provides for cancellation of the agreement in the event of the plaintiff

not adhering to the payment schedule and as such, the agreement has been cancelled under Ex.P.4 and in the factual situation, it is futile on the part

of the plaintiff to contend that the plaintiff could not perform her part of contract owing to the default on the part of the defendants in making

available the original document. The xerox copy of the document with encumbrance certificates up to March 1980 have been perused by the

plaintiff and expert legal opinion has been obtained and after satisfying herself as to the title and the encumbrance up to March, 1980, the

agreement in Ex.P.1 has been entered into. In such circumstances, the insistence on the part of the plaintiff for production of the original document

is only a ruse to protract the contract.

15. The learned Senior Counsel for defendants No.1 to 3 emphatically denied the argument as to reciprocal promise or reciprocity of anything in

the agreement. He further contended that the plaintiff was never ready and willing to perform her obligation and she did not come to the Court with

clean hands and as such, the discretionary relief of specific performance cannot be granted to her. As per Section 54 of the Transfer of Property

Act, a contract for the sale of immovable property shall take place on the terms settled between the parties. He further contended that the plaintiff

did not establish before the Court that she has possessed of the necessary funds to pay the sale consideration, which is manifestly clear from the

pass book, which the plaintiff has marked as Ex.P.15.

16. Mr.G.Masilamani, learned Senior Counsel appearing for the fourth defendant in all material facts supported the argument of Mr.Gopalaratnam, learned Senior Counsel appearing for defendants No.1 to 3. He very much concentrated his argument on repudiating the argument of reciprocal promise. He further contended that the unilateral interpolation of the satisfaction of the plaintiff as to the title of the defendants cannot be carried in the absence of any condition as to the production of the original deed in the agreement. Both the Senior Counsels appearing for the defendants very emphatically contended that the appellant cannot be allowed to beat retreat, in the sense, throughout the suit the stand of the plaintiff was that the time was not the essence of the contract and ultimately in the suit, a finding was given that time is the essence of the contract. In such circumstances, the appellant would not be allowed to beat retreat by allowing her to contend that the time is the essence of the contract. Even if allowed, the plaintiff is not gained anything since the time schedule was breached by her.

17. Now, let us consider the merits of the argument with reference to the materials made available. In order to resolve the controversy in issue, we feel it as necessary to refer here the relevant terms of the agreement of sale, which is marked as Ex.P.1:

1. The agreement has been entered into between the plaintiff and defendants NO.1 to 3 on 17.1.1981 for sale of agricultural land and other

immovables measuring nearly 25 Acres Minus 5 cents.

2. The sale consideration fixed was Rs.3,75,000/-. A sum of Rs.1 lakh was paid as advance on the date of agreement. The balance amount of

Rs.2,75,000/- has been agreed to be paid in three instalments, the first instalment in a sum of Rs.1 lakh on or before 28.2.1981, the second

instalment of Rs.1 lakh on or before 6.4.1981 and the remaining Rs.75,000/- on or before 30.5.1981.

3. Clause 5 of the agreement made it clear that if any of the above said three dates are subsequently declared as holidays, then the amount has to be paid on the next immediate working day.

4. Clause 6 specifically stipulates that the payment on due dates is the essence of this contract and in case of failure on the part of the plaintiff, the defendants shall cancel the agreement.

5. In the event the defendants cancelled the agreement owing to the failure on the part of the plaintiff regarding payment on due dates, the

defendants conclude the sale of the subject property with any other party.

6. On such conduction of sale with third parties, if the defendants could not realise the quantum of sale proceeds agreed in the sale agreement, the

defendants are entitled to deduct such dues out of the amount to be refunded to the plaintiff.

7. On failure of the plaintiff to make the payment on the agreed dates and in the event of the defendants choose not to sell the subject land to any

one, then the defendants shall return the entire amount advanced to the plaintiff within three months from the date of cancellation of the agreement.

8. If the plaintiff is unsatisfied about the title of the property, the plaintiff should put the defendant on notice revealing her intention not to conclude

the sale and in such event, if the defendants failed to satisfy the plaintiff as to their title, the defendants shall pay the plaintiff within three months of

the date thereof all the monies advanced by the plaintiff.

9. If the subject properties get affected by the land ceiling at the hands of the defendants, the defendants shall pay the entire amount received by

them within three months of the adjudication by the proper authorities under the Ceiling Act.

10. The defendants have a care taker at the time of execution of the agreement and from the date of agreement, it is agreed that the plaintiff shall

act as a care taker for the entire properties and be in trust of all the properties till the defendants give possession of the entire properties to the

plaintiff on payment of sale amount i.e., after the entire sale amount is paid.

11. Till the sale consideration is paid if the plaintiff as care taker causes either by her act or omission or negligence any damage either to the

immovable properties mentioned in the Schedule attached therewith, the plaintiff shall be liable to reimburse the loss caused thereby.

12. The sale deed shall be executed at the convenience of the plaintiff as and when she wants the defendants to be executed either in her name or

in the name of her nominee/nominees.

18. From the above said terms, it is clear that the remaining amount of sale consideration in a sum of Rs.2,75,000/- after adjusting the advance

amount paid on 17.1.1981 has to be paid on the dates agreed for the said

payment. The specific dates incorporated in the agreement makes it clear that the payments should be made on or before those dates. Clause (5) embedded in the agreement that ""if any of the date agreed for the payment was subsequently declared as a holiday, the next immediate working day shall be the date of payment"" would reinforce the intention of the parties that the payment should be made on the dates agreed. Though in the plaint as well as at the time of argument before the learned Single Judge of this Court, the core contention of the appellant was that the dates agreed to for making the payment was not essence of the contract and when found against the appellant, now the learned Senior Counsel appearing for the appellant contended across the bar that the time for making the payment is the essence of the contract. However, her contention is that on entertaining certain suspicion as to the non-availability of the original documents with the defendants and on discussion with the fourth defendant by the husband of the plaintiff, it was agreed that the original title deeds would be produced within a short period and was agreed to pay a sum of Rs.25,000/- instead of Rs.1 lakh as a second instalment. Though the payment of Rs.25,000/- was accepted, the discussion aspect of the matter was totally denied by the defendants. After taking into consideration of the evidence adduced by P.W.1 and P.W.s.2 and 3, the attesting witnesses of the agreement, the learned Single Judge found that the theory advanced viz., it was agreed between the husband of the plaintiff and the fourth defendant to receive the sum of Rs.25,000/- for the second instalment and agreed to produce the original document, has been proved against the plaintiff.

19. It is an admitted fact that before executing Ex.P.1 agreement, the xerox copies of the original title deeds were perused by the plaintiff as well as her counsel with encumbrance certificates up to March, 1980. Having satisfied with the title, Ex.P.1 was executed. If at all the plaintiff is unsatisfied or unaccepted about the title of the defendants, as per the clause 12 of the agreement, the plaintiff had to reveal her intention not to conclude the sale by putting the defendants on notice. Then only it is obligatory on the part of the defendants to satisfy the plaintiff about their title. Nowhere, it is averred in the plaint or adduced in the evidence on behalf of the plaintiff that the defendants are not title holders or their title to the suit property is

defective. The only thing that has been projected is that the properties are encumbered by deposit of title deeds with the State Bank of Mysore

and one Navaratan Chand Gulecha.

20. If really the plaintiff is intended to perform her part of contract by adhering to the payment schedule as agreed, nothing prevented the plaintiff to

call upon the defendants to produce encumbrance certificates up to date or take out an encumbrance certificate from the concerned Office of the

Sub-Registrar by themselves and find out the quantum of encumbrance. There is absolutely no materials adduced before the Court that the plaintiff

has taken such a step, particularly when there is a specific clause as stated above viz., clause 12 to put the defendants on notice. Further, there is

no obligation cast upon the defendants in terms of the agreement for production of original title deed for satisfying the plaintiff as to the title and as

to the encumbrance certificate. The relevant clauses in the agreement are clause 3 and clause 15. Clause 3 provides that ""the execution of the sale

deed shall depend upon the plaintiff getting herself satisfied regarding the title to the land, so also, the nil encumbrance"". Clause 12 provides that ""if

the plaintiff finds the title of the property to be unsatisfactory or unacceptable, the defendants shall be put on notice revealing the plaintiff's intention

not to conclude the sale and in such event if the defendants fail to satisfy the plaintiff regarding the title, the defendants shall pay to the plaintiff the

advance received within three months thereof. The conspectus of these two provisions clearly provides that it is for the plaintiff to get satisfied

regarding the title to the land and also as to nil encumbrance as per Clause (3). If the plaintiff is unsatisfied or unacceptable with respect to title of

the defendants, it is for her to put the defendants on notice about her intention not to conclude the sale and only thereafter it is for the defendants to

satisfy the plaintiff as to their title and if the defendants are not able to prove their marketable title they will have to repay the amount within three

months from the date thereof.

21. The entire case proceeds, as stated earlier, only on the encumbrance, in the sense, deposit of title deeds with the third party and Bank of

Mysore and not as to the title. It is explained by D.W.2 in his evidence that on receipt of the last instalment as agreed to, they would have

discharged the loan to the State Bank of Mysore. When it is admitted that the

xerox copy of the title deed and the encumbrance certificates up to March 1980 have been produced to the plaintiff and only after getting the legal advice, Ex.P.1 has been executed, the non-adherence of the payment schedule as agreed in the agreement, the total silence and inaction on the part of the plaintiff till the agreement was cancelled under Ex.P.4, and in the absence of any cogent material or evidence as to the oral agreement between the plaintiff's husband and the fourth defendant as to the acceptance of Rs.25,000/- for the second instalment on the assurance of production of original documents, so as to have a link with the silence and inaction on the part of the plaintiff, it is not possible to accept the contention of the appellant that non-production of original documents made the appellant to breach the payment schedule as agreed. Hence, our irresistible conclusion is that the plaintiff has committed the breach of the terms of the agreement in making the payment on due dates.

22. The terms of the agreement further provides that the payments on due dates is the essence of the contract, and in the case of failure on the part of the plaintiff, the defendants could cancel this agreement. By invoking the said term, under Ex.P.4 dated 2.8.1981, after the lapse of nearly four months, the defendants cancelled the agreement. Hence, we are of the opinion that the cancellation under Ex.P.4 is also validly made.

23. It is pertinent to note here the argument advanced by Mr.Gopalaratnam, learned Senior Counsel appearing for the defendants No.1 to 3 as to the entries in the pass book, which have been marked as Ex.P.15. The entries contained in the pass book are from May, 1977 to September, 1986. The perusal of the entries would make us to totally accept the contention of the learned Senior Counsel Mr.Gopalaratnam that the appellant was not possessed of with funds since none of the entries from 1981 to 1986 shows that the plaintiff was having sufficient funds. The learned Senior Counsel Mrs.Nalini Chidambaram appearing for the plaintiff half-heartedly placed an argument that the husband of the plaintiff was a two time Parliamentarian and thus the plaintiff need not show the amount in the pass book, but she would otherwise mobilise the funds. We are afraid to accept this submission, particularly when Ex.P.15 has been marked only at the instance of the plaintiff to prove her capability to meet the contingencies. Hence, we are of the view that the appellant is not always ready

and willing to perform her part of contract.

24. With regard to the plea of reciprocal promise, as canvassed before us, it is clear that this point was not taken before the learned Single Judge.

No plea was raised. No issue was framed and consequently, no evidence was let in and it was neither argued nor considered and a finding was

given by the learned Judge. Even in the grounds of appeal in O.S.A, not even a single ground has been raised or even suggested to have the effect

of reciprocal promise. As extracted already, in Ex.P.1, no condition has been incorporated for the production of title deeds. The only term of the

agreement in the aspect is that the plaintiff has to satisfy as to the title. As already stated, the xerox copy of the original title deed has been

produced and it is in evidence of D.W.2 that the document has been deposited with the State Bank of Mysore. In such circumstances, the

insistence of the production of original title deed cannot at all be sustained for not paying the sale consideration on the agreed date. Even assuming

for a moment there is a reciprocal promise, in breach thereof the remedy open to the affected party is to claim compensation for loss if any

sustained as provided u/s 53 of the Contract Act. On this ground also, we are of the opinion that the specific performance cannot be maintained.

25. When the agreement provides that the right to obtain a sale is subject to fulfilment of certain condition by the appellant i.e., as to the payment of

sale consideration on the agreed date, the right to purchase would only accrue upon the voluntary performance of the condition specified in the

agreement. The appellant cannot compel the specific performance of execution of the sale deed, without being performed her part of obligation to

pay the sale consideration at the agreed date. The jurisdiction to grant a decree for specific relief is discretionary and the Court can consider

various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the Court need not grant the

order for specific relief. However, this discretion shall not be exercised in an arbitrary or unreasonable manner.

26. Section 16(b) of the Specific Relief Act, 1963 provides that the person, who has become incapable of performing, or violates any essential

term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of,

the relation intended to be established by the contract is barred from seeking enforcement of the contract in his favour. In the case on hand, we

have already come to the conclusion that the appellant violated the essential term of contract ie., violated the condition of payment of the sale

consideration on agreed dates and as such the relief of specific performance cannot be granted. Useful reference can be had to the judgment of the

Supreme Court in A.C.ARULAPPAN VS. SMT.AHALYA NAIK reported in 2002 2 L.W.399.

27. As per the terms of the agreement, the payment of sale consideration as agreed is unqualified and unconditional and on the admitted non-

compliance of the payment schedule, the defendants are entitled to cancel the agreement and as such they have cancelled the agreement invoking

the specific terms of the agreement for cancellation. There is absolutely no evidence forthcoming from the plaintiff that after making the payment of

first instalment on due date and after entertaining a doubt as to the availability of the original document with the defendants, the plaintiff has called

upon the defendants to produce the original document. We have already rejected the theory of acceptance of Rs.25,000/- and assurance of the

fourth defendant to produce the original deeds after some time as the evidence adduced by P.W.1 and P.Ws.2 and 3, are contradictory to each

other in material part. Hence, we are of the opinion that the appellant has not made out any case for granting the decree of specific performance of

the contract.

28. The learned Senior Counsel for the appellant relied on a decision of Nathulal Vs. Phoolchand, to bring home the contention. That is a case in

which the land stood entered in the revenue records in the name of brother of the vendor and the appellant/vendor agreed to sell the land to

Phoolchand and put Phoolchand in possession. On the plea that Phoolchand had failed to pay on due date the balance of price, the appellant

Nathulal rescinded the contract and instituted action for recovery of possession. In the facts and circumstances of the case, the Supreme Court has

held that Nathulal has expressly undertaken to have the revenue records rectified by securing the deletion of his brother's name and it was an

implied condition of the contract that Nathulal would secure a sanction of the Collector to transfer u/s 70(4) of the Madhya Bharat Land Recovery

and Tenancy Act, 1950. There is no embargo in this case to sell the property so as to infer the production of original deed as implied condition of

agreement. There is no counter obligation of the part of the defendants in the facts and circumstances of the present case. Hence, the said judgment

would not in any way advance the case of the appellant.

29. The other decision in which heavy reliance was placed by the learned Senior Counsel appearing for the appellant is Motilal Jain Vs. Smt.

Ramdasi Devi and Others, for the reason that major portion of the sale consideration has been paid and in such circumstances, an inference has to

be drawn that the appellant has always been ready and willing to perform her part of the contract, presumably for this reason the appellant has

chosen to not press the appeal filed against the fourth defendant for recovery of a sum of Rs.1,25,000/-. In that case, the sale consideration was

fixed to Rs.25,000/-. Of the said sum, the appellant paid Rs.17,000/- at the time of execution of the contract. The balance was to be paid within

five months. According to the appellant therein, the respondents would not accept the balance amount due and did not execute the sale deed.

Therefore, the appellant sent three notices in March, April and November, 1978 and thereafter filed a suit for specific performance, in the

alternative for damages for a sum of Rs.38,000/-. In that case, the Apex Court as a matter of fact, on perusal of paragraphs No.6 to 11 of the

plaint held that the said paragraphs clearly indicate the readiness and willingness of the plaintiff. The only obligation which he had to comply with

was payment of balance consideration. It was stated that the plaintiff demanded the defendant to receive the balance of consideration of Rs.8000/-

and execute the sale deed. The defendant was in Patna (Bihar) at the time of notices and when he came back to his place, the plaintiff filed the suit

against him. In support of his case, the plaintiff adduced the evidence of P.W.1 and P.W.2. The plaintiff had parted with two-thirds of the

consideration at the time of execution of Ext.2. In the facts and circumstances of the case, the Supreme Court was of the view that there was no

reason why the plaintiff would not pay the balance of one-third consideration of Rs.8000/- to have the property conveyed in his favour. But the

facts of the present case are totally different. Further, the amount of Rs.1,25,000/- paid to the fourth defendant has been held to be sale

consideration of the movable properties which have not been valued and shown separately. Here, the sale considerations are agreed to be paid on

a particular day and further provide that the non-payment on the agreed date would entitle the defendants to cancel the agreement. The defaulted

instalments were never been offered by the plaintiff. Hence, even in this case also, we are of the view that the facts of the decision reported are not

applicable to the facts of the present case.

30. The last of the decision relied on by the learned Senior Counsel appearing for the appellant is A. Abdul Rashid Khan (Dead) and Others Vs.

P.A.K.A. Shahul Hamid and Others, . This case instead of advancing the case of the appellant rather support the case of the respondents/

defendants, wherein the Supreme Court observed that there are pleas by both parties beyond the said written agreement. The law in this regard is

well settled in view of Section 92 of the Indian Evidence Act that any contract is required by law to be reduced in writing, then no oral evidence or

understanding to the contrary or what is apart from the said contract would be admissible in law and ultimately concluded that the pleadings

beyond written agreement for sale could not be considered.

31. As per Section 55 of the Contract Act, if the party to the contract failed to do or perform their part as agreed in the contract, the contract or

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. Useful reference can be had to the decision reported in AIR 1928 PC 208. Hence, we are not able to countenance any of

the arguments placed on behalf of the appellant, so as to interfere with the finding of the learned Single Judge as to the plaintiff is not entitled to the

specific performance agreement.

32. As stated already, the learned Senior Counsel appearing for the appellant submitted that she is not pressing the appeal in O.S.A.No.No.148 of

1999 filed against the suit in C.S.No.170 of 1984, which has been filed for recovery of the money of Rs.1,25,000/- from the fourth defendant.

This brings us to consider the finding given in the last of the suit that the appellant has not been in possession of the property and was only a care

taker which requires the consideration of Clauses 15 and 16. The said two clauses provide that the defendants prior to entering into the agreement

had a care taker to the suit property. From the date of agreement, the plaintiff was allowed to act as care taker for the entire properties, be in trust

of the property till the possession of the property given by the defendants to the appellant/plaintiff on making payment of the entire sale amount. If

the care taker causes either commission or omission or damages to the property, care taker is liable for the same. The language employed in these

two clauses are very clear and unambiguous to the effect that the plaintiff has been allowed to act as a care taker in the place of the previous care

taker. The plaintiff was allowed to be in trust of the property on behalf of the defendants. It further signifies that the possession would be given to

the plaintiff only after the entire sale amount has been paid as agreed.

33. A mere reading of the above clauses would clearly indicate that the appellant was allowed to be only as a care taker to manage the affairs of

the property in trust for the defendants. She was not given possession pursuant to the agreement as part performance of the contract as

contemplated u/s 53A of the Transfer of Property Act. No evidence, much less any worth mentioning has been let in on the part of the appellant

even to suggest that she was put in possession of the property as a part performance of the agreement of sale. P.Ws.2 and 3, who are the attestors

of Ex.P.1 have not made out anything as to possession in their evidence. Even P.W.1 has stated in her evidence that originally she objected for

employment of the word as a care taker in the clause. However, she has signed it. But the fact remains, the agreement has been signed with the

clauses 15 and 16 without any alteration. There is no oral evidence so as to prove that possession has been given or the parties are intended that

the appellant was in possession of the property and possession has been given as part performance of contract. The evidence of D.Ws.1 and 2 is

very clear that the plaintiff was allowed to act as a care taker only. Even assuming that the appellant is in possession of the property pursuant to

part performance of agreement u/s 53A of the Transfer of Property Act for the sake of argument, that can be taken only as a defence in an action

taken for recovery of possession and the possession can be used as a shield and not as a sword is the well settled proposition of law.

34. Section 53A of the Transfer of Property Act provides that where any person contracts to transfer for consideration any immovable property

by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and

the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in

possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee

has performed or is willing to perform his part of the contract then he is entitled to protect his possession in respect of the property of which he has

put in possession in part performance of the agreement to sell. The Section provides for protection of the possession of the transferee. The

necessary conditions for invoking Section 53A are

(1) there must be a contract to transfer for consideration any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherance of the contract; and;

(6) the transferee must have performed or be willing to perform his part of the contract.

Though we have already concluded that the appellant has acted only as a care taker and not in possession of the subject land on account of part

performance of the contract, we are further strengthened in our decision that the appellant is not entitled to the benefit of Section 53-A of the Act

since the conditions as stated above are not available to the appellant. Useful reference can be had to the decisions of the Supreme Court in

MOOL CHAND BAKHRU AND ANOTHER VS. ROHAN AND OTHERS reported in 2002 (1) C.T.C. 433 and SHRIMANT SHAMRAO

SURYAVANSHI VS. PRAHLAD BHAIROBA SURYAVANSHI(d) BY L.RS reported in JUDGMENT TODAY 2002(2) S.C. 24.

35. Lastly, we will have to consider whether the appellant has to go without any relief. Admittedly, a sum of Rs.3,50,000/- has been parted with

by the appellant for the transaction. A sum of Rs.1,25,000/- was paid to the

fourth defendant, Sunkavalli, which has been admitted by the learned counsel for the appellant as part of sale consideration, a sum of Rs.1 lakh was paid on 28.2.1981 towards the first instalment as agreed and a sum of Rs.25,000/- was paid on 2.4.1981 and the receipts of which have been admitted by the respondents herein. Since we have concluded that the appellant is not entitled to the relief of specific performance of the agreement, she should be given back the amount parted with by her without driving her to take recourse to other remedy. Admittedly, in the written statement, the respondents herein have agreed to repay the same. Hence, we direct the respondents to repay the said amount of Rs.3,50,000/- with interest at the rate of 9 percent per annum for the period in which the appellant was not acted as care taker till the payment is made.

36. In the light of the fore-going discussion, we are of the considered view that there is absolutely no infirmity or irregularity in the judgments under appeals so as to interfere with the same. Hence all the Original Side Appeals are dismissed, however, with a direction to the respondents to repay the amount as stated above. No costs.

C.M.P.No. 2888 of 1996 was filed for appointment of an Advocate Commissioner to note the existing conditions and physical features of the suit property forming the subject matter of the suit in C.S.No.95 of 1984. In view of the disposal of the main O.S.A.No.12 of 1992, no order is necessary in the said C.M.P and the same is closed.

C.M.P.No.17401 of 1997 was filed by the son of the appellant to implead him as a party to the proceedings in O.S.A.No.12 of 1992. When the matter is taken up for orders, neither the counsel nor the petitioner is present. His claim is that his father's ancestral property, which is part of Hindu Undivided property, was sold in the year 1981 to purchase the suit property. Substantial purchase money given by the appellant was from the sale of ancestral property and as one of the legal heirs, he has more interest than any one else in safeguarding his legitimate right and interest.

On that plea, he wanted to implead himself as a party to the proceedings. We are of the view that there is absolutely no reason to implead a person, who is not a party to the agreement in a suit for specific performance. Hence C.M.P.No.17401 of 1997 is dismissed.

C.M.P.No.7471 of 2002 is filed by the appellant to receive additional evidence

viz., a judgment rendered by the Supreme Court in a suo moto contempt proceedings, letter from the appellant's counsel to the Bank of India, Mylapore Branch and reply from Bank of India. The entire reading of the contempt proceedings suggested that the defendants intended to offer the subject property as security for payment to the Bank of India as ordered in another proceedings. However, subsequently, the petitioner expressed their inability because of the pendency of these proceedings before this Court. That judgment would not in any way relevant for the issue to be decided in these appeals, so is the letter addressed by the counsel for the appellant to the Manager of Bank of India and the reply sent by the Bank of India. Hence, C.M.P.No.7471 of 2002 is also dismissed.