REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7306 OF 2013

(Arising out of SLP (C) No. 20367 of 2009)

I.S. SIKANDAR (D) BY LRs. & ORS. ... APPELLANT(S)

VERSUS

K. SUBRAMANI & ORS. ... RESPONDENT(S)

J U D G M E N T

V. GOPALA GOWDA, J.

Leave granted.

2. This civil appeal is directed against the judgment and order dated 08.12.2008 passed in Regular First Appeal No. 97 of 2001 by the High Court of Karnataka, Bangalore, urging certain relevant facts and legal contentions, whereby the High Court has reversed the judgment and decree passed in the Original Suit No. 2012 of 1985 dated 25.09.2000 by the X1th Additional City Civil Judge, Bangalore City, Bangalore and has modified the decree by allowing the appeal, granting the decree for specific performance of the Agreement of Sale in favour of the respondent No.1/plaintiff in relation to the suit schedule property. Further, it has granted the decree of permanent injunction against the defendants restraining them from interfering with the respondent No.1/plaintiff's peaceful possession and enjoyment of the suit schedule property.

3. Necessary facts and legal contentions urged on behalf of the parties are stated herein with a view to find out as to whether the impugned judgment and decree in granting the relief of specific performance of the sale of the suit schedule property in favour of the plaintiff requires to be set aside by allowing this appeal. In this judgment for the sake of brevity, we would like to refer to the ranking of the parties as assigned in the plaint presented before the trial court. Since there is incongruence in the mentioning of exhibits in the judgments of the trial court as well as of the High Court, we will refer to the documents as per the annexures presented along with this appeal. The plaintiff (respondent No.1 herein) instituted O.S. No. 2012/85 before the Additional Civil Judge for grant of a decree of specific performance in respect of suit schedule property on the basis of the Agreement of Sale dated 25.12.1983 (Annex.P-1) and also for grant of permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit schedule property. The suit property covered in the Agreement of Sale was a vacant site measuring 54 ft. from East to West and 42 ft. from North to South carved out of survey Nos. 18/2, 19, 20 and 21 of Agrahara Thimmasandra village, known as C.K. Chinnappa Garden, Bangalore North Taluk, within the territorial jurisdiction of the Bruhat Bangalore Mahanagara Palike (for short "BBMP"). It is the case of the plaintiff that he entered into an agreement with defendant Nos. 1-4 for sale of the suit property in his favour for consideration of Rs.45,000/-. A sum of Rs.5000/- was paid towards part sale consideration to the defendant Nos.1-4 and they delivered original title deeds and put the plaintiff in physical possession of the suit schedule property. They had agreed to receive the balance sale consideration amount of Rs.40,000/- at the time of registration of the sale deed to be executed in favour of the plaintiff within five months after securing necessary permission from the Urban Land Ceiling Authority under the provisions of Urban Land (Ceiling and Regulation) Act, 1976 (for short ' ULCR Act ') now repealed, and Income Tax Act, 1961 and also to get change of khata of the suit schedule property in their names from that of the deceased husband of the first defendant in the property register maintained by the BBMP at the cost of the plaintiff. Further, the plaintiff had an obligation to pay the layout and conversion charges to the BBMP and bear the vendors cost for securing the permission from the aforesaid authorities. Further, it is the case of the plaintiff that the time for

completion of the sale of the suit property was agreed to be extended by two months in case of delay in securing the permission from the above referred authorities which might in turn cause delay in payment of the conversion charges.

4. It is the case of the plaintiff that on being put in possession of the suit property, he erected cattle shed to tether cattle and paid betterment charges on 25.04.1984 to the concerned authorities. There is an acknowledgement to this effect and he also secured change of khata on 02.05.1984 and paid the property taxes to the BBMP for the period 1977 to 1983-84 and thereafter, he also paid the property tax to the BBMP for the future years.

5. The case of the plaintiff is that the defendant Nos.1-4 got issued legal notice dated 06.03.1985 (Annex. P-2) through their counsel calling upon the plaintiff to comply with his part of the contract by paying the balance sale consideration on or before 18.03.1985 failing which legal action would follow, for which the plaintiff had issued a reply dated 16.03.1985 (Annex. P-3) calling upon the defendant Nos.1-4 to execute the conveyance deed and receive the balance sale consideration on 23.05.1985 by securing the draft sale deed five days prior thereto. By another letter dated 04.05.1985 (Annex. P-5) he requested the vendors to go to the sub-Registrar's office on 23.05.1985 and execute the deed of conveyance in his favour. He further pleaded in the plaint that the vendors by a telegram dated 18.05.1985 declined to accede to his request and stated that the Agreement of Sale was rescinded by the defendants by a letter dated 28.03.1985, which is a legal notice sent by them through their advocate to the plaintiff, wherein he was called upon to return the original documents of suit property given to him at the time of execution of the Agreement of Sale and on his failure to do so on or before 10.04.1985, the said agreement dated 25.12.1983 would stand terminated vide the aforesaid notice.

6. After institution of the original suit by the plaintiff for specific performance and permanent injunction against the defendant Nos.1-4, the vendors who were served with the suit summons and notices, remained absent and unrepresented in the proceedings, and therefore they were placed ex-parte. An interlocutory application was filed by the appellant to implead himself as 5th defendant to the original suit proceedings pleading that he is the proper and necessary party to the original suit proceedings, claiming that he had purchased the suit schedule property under a sale deed dated 30.05.1985 from his vendors viz. defendant Nos.1-4 (Annex. P-6). The said application was allowed by the trial court. He was permitted to be impleaded as defendant No.5 in the original suit proceedings and he resisted the suit by filing a written statement dated 13.12.1989, inter alia, admitting that defendant Nos. 1-4 were the owners of the suit schedule property and further he denied the plea of the plaintiff that he is being in possession of the suit property. It is further stated that the deed of conveyance in respect of the suit schedule property was executed by the defendant Nos. 1-4 in his favour after obtaining necessary permission from the competent authority under the ULCR Act by letter dated 25.05.1985 and therefore, he has pleaded that the reliefs sought for by the plaintiff in the suit filed on 26.06.1985 became infructuous. It is further pleaded that because of default committed by the plaintiff, he is disentitled to get the decree for specific performance of sale of the property on the basis of the Agreement of Sale.

7. The trial court on the basis of pleadings of the parties framed six issues: 1) Whether the plaintiff proves that defendant Nos.1-4 have executed Agreement of Sale dated 25.12.1983 and delivered possession of the same? 2) Whether the plaintiff proves that he is in lawful possession of the suit property? 3) Whether the 5th defendant proves that he purchased the property under sale deed dated 30.05.1985 and is in possession of it? 4) Whether plaintiff was always ready and willing to perform his part of the obligation? 5) Whether the 5th defendant proves that plaintiff is the defaulter and is not ready and willing to perform his part of the obligation? 6) Whether the defendant proves that plaintiff put up construction after the completion of the sale?

8. The original suit went for trial; plaintiff was examined as PW-1 and marked 27 documents as Exhs. P1- to P-27. On behalf of the defendants, the 5th defendant was examined as DW-1 and another witness named K.N.Prakash as DW-2 and marked 4 documents as Exhs.D-1 to D-4 to prove his case. The trial court on appreciation of the pleadings, documentary and oral evidence on record has recorded the findings of fact in the affirmative on the issue Nos. 1, 2 and 5 and answered issue No.3 partly in affirmative and issue Nos. 4 and 6 in the negative. The trial court in its judgment has recorded the finding of fact holding that 5th defendant is the owner of the suit property pursuant to sale deed dated 30.05.1985 and he is entitled to take possession of the same from the plaintiff in accordance with law and accordingly, partly decreed the suit in his favour vide judgment and decree dated 25.09.2000.

9. Aggrieved by the said judgment and decree, the plaintiff preferred Regular First Appeal before the High Court of Karnakata which was registered as RFA No. 97/2001, urging various legal contentions and prayed to set aside the same in so far as dismissal of the suit for grant of the decree for specific performance in respect of suit schedule property on the basis of sale deed is concerned.

10. The legal contention urged before the High Court on behalf of the plaintiff is that the trial court has erroneously recorded its findings on the above contentious issue Nos. 1, 2, 3, 4 & 5 without appreciating the plaint averments and the evidence on record having regard to the undisputed fact that the Agreement of Sale dated 25.12.1983 and the covenants of the said agreement provide limited obligation on the part of the plaintiff to pay the layout charges and expenses required to be incurred by him to enable the defendant Nos. 1- 4, to secure the permission from the authorities under the ULCR Act and Income Tax Act for execution and registration of the deed of conveyance in his favour. It is further contended on behalf of the plaintiff that he paid the betterment charges and property taxes to the BBMP within the stipulated time, and in addition to that he got secured the change of khata in favour of the defendant Nos.1-4 in respect of the suit schedule property as agreed upon by him in the agreement. He further contended that the trial court has recorded an erroneous finding of fact holding that the plaintiff did not secure the permission from the competent authority under the ULCR Act and the Income Tax Authority to execute and register the sale deed as agreed by the defendant Nos.1-4. Therefore, it is contended that the defendant Nos. 1-4 committed breach of Agreement of Sale and therefore the plaintiff is entitled for the decree for specific performance of execution of the sale deed on the basis of the Agreement of Sale. It is further contended that the plaintiff has been ready and willing at all material times, and even as on 28.03.1985, to pay the balance sale consideration amount to defendant Nos. 1-4 on execution of the deed of conveyance of the suit property. He further urged in the appeal that execution of the sale deed dated 30.05.1985 in favour of the 5th defendant for a sale consideration of an amount of Rs.48,000/- that is, Rs.3000/- in excess of what was agreed upon with the plaintiff, would demonstrate that the defendant Nos.1-4 took undue advantage and committed the breach of the terms and conditions of the contract. Further, it is urged that the above aspects of the matter has not been properly appreciated by the trial court while dismissing the suit for not granting the relief of specific performance in respect of the suit schedule property in favour of the plaintiff. It is also urged in the R.F.A. before the High Court that defendant Nos. 1-4 were required to secure permission under the ULCR Act and Income Tax Department to convey the suit property in favour of the 5th defendant, which further demonstrates that without such a permission, the registration of deed of conveyance in favour of the 5th defendant was impermissible, thereby the defendant Nos. 1-4 committed a serious breach of the obligation in terms of Agreement of Sale dated 25.12.1983. It was further contended that the plaintiff was carrying cash with him to prove that he had necessary funds to pass on consideration to the defendant Nos.1-4 at the time of registration of the sale deed and the learned counsel has placed reliance on the reported decision of this Court in Sukhbir Singh & Ors. Vs. Brij Pal Singh & Ors. [1] It is further contended with reference to para 24 of the judgment of the trial court, that the trial court fell into error in recording the finding of fact on the contentious issue No.3 holding that the 5th defendant is the owner of the suit schedule property in pursuant to the sale deed dated 30.05.1985 although he had knowledge of the Agreement of Sale dated 25.12.1983 in favour of the plaintiff and therefore he is not the bona fide purchaser.

11. The said legal contention was seriously contested on behalf of the 5th defendant justifying the finding and reasons recorded by the trial court on the above contentious issue No.3 contending that the trial court on proper appreciation of pleadings and evidence on record has rightly answered in his favour and against the plaintiff. He has further contended that the reply notice dated 16.03.1985 which was issued by the plaintiff shows the delay and inconvenience caused by the plaintiff to the vendors of the 5th defendant. The vendors waited patiently by extending time for registration of the sale deed in respect of the suit schedule property and the plaintiff was called upon by them to get the sale deed executed in his favour by paying the balance sale consideration, but he had avoided the same on one pretext or the other leading to the conclusion that he was not ready and willing to perform his part of contract and therefore they rescinded the contract and executed the sale deed dated 30.05.1985 in favour of the 5th defendant in respect of the suit schedule property. He has also sought to justify the findings on issue Nos. 4 and 5 by placing strong reliance upon the evidence of PW-1, the plaintiff to show that the findings of fact recorded by the trial court on the above contentious issues holding that the plaintiff was not ready and willing at any point of time to pay the expenses to

the defendant Nos. 1-4. He has further contended that though they made a demand by legal notice dated 06.03.1985 to get the sale deed executed on or before 18.03.1985, failure on the part of the plaintiff to do the same would demonstrate the fact that he was not ready and willing to perform his part of the contract by paying the balance sale consideration amount to the defendant Nos. 1-4 as agreed upon by him and further placed reliance on the Agreement of Sale dated 25.12.1983 of the suit property to show that defendant Nos. 1-4 were in dire necessity of money, due to the death of the husband of the first defendant who was the bread winner, and therefore they had agreed to sell the suit schedule property to the plaintiff. Further, it is contended by the learned counsel on behalf of the 5th defendant that time was the essence of the contract as per Section 55 of the Contract Act as agreed upon by the parties in the agreement which has not been performed by the plaintiff and therefore the trial court has rightly declined to grant the decree of specific performance in favour of the plaintiff.

12. Therefore, the learned counsel on behalf of the 5th defendant placed reliance on the reported decisions of the Division Bench of the Karnataka High Court and this Court in the cases of Saraswathi Ammal Vs. V.C. Lingam[2]; Manjunath Anandappa Vs. Tammanasa[3] and His Holyness Acharya Swamy Ganesh Dassji Vs. Shri Sita Ram Thapar[4], in justification of the findings and reasons recorded by the trial court on the contentious issues framed by it.

13. The first appellate court, on the basis of factual and rival legal contentions urged on behalf of the parties, has framed the following points for its determination: i) On issue No.3, whether the 5th defendant purchased the property under the sale deed dated 30.05.1985? ii) Whether the 5th defendant was entitled to take possession of the suit schedule property in accordance with law? iii) On issue Nos. 4 & 5 – whether the 5th defendant has proved the plaintiff to be a defaulter, who is not ready and willing to perform his part of the obligation?

14. The High Court in exercise of its appellate jurisdiction has answered in favour of the plaintiff and passed the impugned judgment and decree after adverting to Section 16 (c) of the Specific Relief Act, 1963 and sub-sections (1) and (2) of Section 20 regarding discretionary power to be exercised by the court for grant of a decree of specific performance in his favour. It is observed by the High Court that the court is not commonly bound to grant such relief, if merely it is lawful to do so, and such discretion cannot be arbitrarily refused but on sound and reasonable grounds, guided by judicial principles and capable of correction by the court of appeal. He has referred to the judgment in the case of Parakunnan Veetill Joseph's son Mathew Vs. Nedumbara Kuruvila's son & Ors.[5], in support of the proposition of law that the court must meticulously consider all the facts and circumstances of the case for grant of a decree for specific performance and the court should take care to see that it is not used as an instrument of oppression to have an unfair advantage. Further reliance is placed upon another judgment of this Court in Nirmala Anand Vs. Advent Corporation Pvt. Limited & Ors. [6], wherein this Court has held that specific performance is an equitable relief and the Court has to strike a balance of equities between the parties keeping in view the relevant aspects, including the lapses that occurred in the facts of the case. Further, the High Court has held that the parties are respectively responsible and though the plaintiff- purchaser always remained ready and willing to perform his part of the contract, the defendant Nos.1-4 have not performed their part of contract. Therefore, the High Court has set aside the findings of fact on the contentious issues recorded by the trial court against the plaintiff. Further, the learned Judge of the High Court has held that Section 53-A of the Transfer of Property Act, 1882 provides protection to a transferee on certain conditions, one of which is that transferee has performed or is willing to perform his part of the contract. It is further held that once a party to a contract has repudiated the contract, it is not necessary for the other party to tender the amount payable under the contract in the manner provided in the contract in order to successfully claim the specific performance of the contract by placing reliance upon the judgment of this Court reported in International Contractors Ltd. Vs. Prasanta Kumar Sur (Deceased) & Ors [7]. wherein this Court has explained the above legal position. In another decision in A. Maria Angelena Vs. A.G. Balkis Bee[8], this Court has made observations with reference to the plea that for grant of a decree for specific performance would result in serious hardship to the vendor or the subsequent purchaser and that the plaintiff should be compensated in terms of money must be taken at the earliest stage. Further, the High Court with reference to the deed of conveyance in favour of the 5th defendant executed by defendant Nos. 1-4 raised the question as to whether the defendant No.5 was a bona fide purchaser for consideration without notice of the earlier Agreement of Sale in favour of the plaintiff is examined and answered against the 5th defendant. The defendant Nos. 1-4 have remained absent and unrepresented in the original suit proceedings, hence they were placed

ex-parte, and therefore, the plea of the 5th defendant that the plaintiff must always be ready and willing to perform his part of the contract under such circumstances is wholly untenable in law. In view of the said factual position, the plea that the plaintiff has not been ready and willing to perform his part of contract as per the agreement, is available to the 5th defendant under the concluded contract between the plaintiff and defendant Nos. 1-4, as per Agreement of Sale dated 25.12.1983. In this regard, the High Court has placed reliance upon the judgment of this Court in MMS Investments, Madurai & Ors. Vs. V. Veerappan & Ors. [9] in support of the proposition of law that the 5th defendant stepped into the shoes of the vendors, and that the question of readiness and willingness cannot be pressed into service at all in facts of the case. The learned Judge of the High Court while recording his findings and reasons on the contentious issues has re-appreciated the pleadings and evidence on record with reference to rival legal contentions, and he has placed reliance upon the catena of decisions of this Court and the Division Bench of the Karnataka High Court and has held that not granting of the decree for specific performance in favour of the plaintiff is held to be bad in law and he has set aside the judgment and decree of the trial court and the same was modified granting decree for specific performance as per Agreement of Sale in favour of the plaintiff and modified the judgment restraining the defendant Nos.1-4 not to disturb the possession and enjoyment of the suit schedule property of the plaintiff.

15. The legality and validity of the impugned judgment and decree are challenged in this appeal by the deceased 5th defendant, subsequently, he is substituted by his legal representatives, by framing certain questions of law and urged various grounds in support of the same. The questions of law and grounds urged in this appeal would be adverted while answering the points that are framed in this judgment.

16. After perusal of the impugned judgment of the High Court and the questions of law framed by the defendant No.5 in this appeal, the following points would arise for determination of this Court: 1) Whether the original suit filed by the plaintiff seeking a decree for specific performance against the defendant Nos. 1-4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the Agreement of Sale vide notice dated 28.3.1985, rescinding the contract, is maintainable in law? 2) Whether the reversal of the findings of the trial court on the issue Nos. 3, 4 and 5 by the High Court and answering the same in favour of the plaintiff in the impugned judgment and granting the decree for specific performance in favour of the plaintiff in respect of the schedule property is legal and valid? (3) Whether the grant of decree of specific performance in favour of the plaintiff despite Clause 12 of the Agreement of Sale dated 25.12.1983 is legal and valid? (4) Whether the grant of the decree is in conformity with sub-sections (1) and (2) of Section 20 of the Specific Relief Act and whether the learned Judge of the High Court has exercised his discretionary power reasonably in granting the same in favour of the plaintiff? 5) What decree or order to be passed?

17. Answer to Point No.1 The first point is answered in favour of the defendant No. 5 by assigning the following reasons: It is an undisputed fact that there is an Agreement of Sale executed by defendant Nos. 1-4 dated 25.12.1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs. 45,000/- by receiving an advance sale consideration of Rs.5,000/- and the plaintiff had further agreed that the remaining sale consideration will be paid to them at the time of execution of the sale deed. As per Clause 6 of the Agreement of Sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by the defendant Nos.1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission. In the instant case, permission from the above authorities was not obtained from defendant Nos. 1-4. The period of five months stipulated under clause 6 of the Agreement of Sale for execution and registration of the sale deed in favour of the plaintiff had expired. Despite the same, the defendant Nos. 1-4 got issued legal notice dated 06.03.1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the Agreement of Sale by not paying balance sale consideration to them and getting the sale deed executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18.3.1985. The plaintiff had issued reply letter dated 16.3.1985 to the advocates of defendant Nos. 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23.05.1985 to get the sale deed executed in his favour. Another

legal notice dated 28.03.1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed executed on or before 10.04.1985, and on failure to comply with the same, the Agreement of Sale dated 25.12.1983 would be terminated since the plaintiff did not avail the time extended to him by defendant Nos. 1-4. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the plaintiff and defendant Nos. 1-4 w.e.f. 10.04.1985. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the defendant No.5.

18. Answer to Point No. 2 Even if we assume that the Agreement of Sale dated 25.12.1983 is subsisting, we have to answer point No. 2 in favour of defendant No.5 for the following reasons :- It would be very much relevant for us to extract Clause 6 of the Agreement of Sale which reads thus: “The time fixed for execution and completion of the sale transaction is five months from the date of the agreement of sale. The first parties have agreed to get the necessary permission for registration from the competent authorities such as the Urban Land Ceiling authorities and Income Tax Authority within the said period of five months at the cost and expenses of the Second Party. The Second Party has agreed to pay the necessary layout and conversion charges of the suit property to the concerned authorities. The first party have further agreed with the second party that if in case the necessary permission from the aforesaid authorities is delayed and as a consequence thereof the payment of layout charges is delayed, the time for due performance of the agreement shall stand extended for a further period of 2 months from the date of grant of such permission.” This position of law is well settled by this Court in the Constitution Bench judgment in Smt.Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani(dead) by LRs.[10]; wherein this Court has held that it is well settled principle of law, that in a case of sale of immovable property, time is not the essence of the contract. However, If the parties agreed to a specified time in the agreement to perform their part of the contract, then time is the essence of the contract and parties shall adhere to the same. To emphasize the fact that time is the essence of the contract before the High Court, the counsel for the 5th defendant has placed reliance upon the judgment of this Court in Chand Rani’s case (supra), the relevant portions of which are extracted below: “19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.” 20. “…… Section 55 of the Contract Act which deals with the consequences of failure to perform an executory contract at or before the stipulated time provides by the first paragraph: ‘When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, 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 the essence of the contract.’ It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property,

it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In Jamshed Khodaram Irani v. Burjorji Dhunjibhai the Judicial Committee of the Privy Council observed that the principle underlying Section 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land."

22. In Hind Construction Contractors case quoting Halsbury's Laws of England, this Court observed at pages 1154-55 as under: (SCC pp. 76-77, paras 7 & 8) "In the latest 4th edn. of Halsbury's Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol. 4, para 1179, which runs thus: '1179. Where time is of the essence of the contract. — The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental; time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion. Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed.' It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract."

19. The legal principle laid down by this Court in the above case squarely applies to the facts of this case for the following reasons. In the instant case, undisputedly, the plaintiff did not get Agreement of Sale executed by paying the remaining consideration amount to the defendant Nos. 1-4 within the stipulated period of 7 months as agreed upon by him under Clause 6 of the agreement by asking the defendant Nos. 1-4 to get the necessary permission from ULCA and Income Tax Department after paying the layout charges to the concerned authorities for getting the sale deed executed in his favour. The plaintiff has not complied with the condition within the original stipulated period of five months and extended period of two months and even if the delay occurs in getting permission from the authorities, that period was over by July,

1984. It is an undisputed fact that the date of the institution of the original suit was nearly 11 months after expiry of the limitation period stipulated in the agreement to get the sale deed executed in favour of the plaintiff.

20. Both the trial court as well as the appellate court have not examined this important aspect of the case though the parties have agreed to perform their part of contract within seven months from the date of execution of the agreement as stipulated in clause

6. We have considered this aspect of the case on the basis of the period of 7 months stipulated in the Agreement of Sale and the same is answered in favour of the defendants.

21. Answer to Point No. 3 Point No. 3 is also required to be answered in favour of the 5th defendant by assigning the following reasons: The learned Senior Counsel Mr. P. Vishwanatha Shetty appearing for the defendant No.5 has placed strong reliance on the findings of fact recorded by the trial court on the contentious issue Nos. 4 and 5 in the negative against the plaintiff, by recording its reasons at paragraphs 12 and 13 of the judgment of the trial court. Therefore, he submits that the said findings of fact are based on facts and evidence on record. Further, he placed

reliance upon Section 16(c) of the Specific Relief Act, which provision makes it mandatory on the part of the plaintiff to prove his readiness and willingness to get the decree for specific performance of the suit schedule property in his favour. The learned Senior Counsel for the 5th defendant also placed strong reliance upon the judgment of this Court in the case of N.P.Thirugnnam (dead) by Lrs. vs Dr. R. Jagan Mohan Rao & Ors.[11] in support of the findings of the trial court on the above contentious issues wherein this Court has held that the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the original suit along with other attending circumstances and further the amount of consideration which he has to pay to the defendant Nos. 1-4 must be proved by the plaintiff. Further, the plaintiff is required to prove the fact that right from the date of execution of the Agreement of Sale till the date of passing the decree he must prove that he is ready and has always been willing to perform his part of the contract as per the agreement. Further, he rightly contended the same by placing reliance upon another judgment of this Court in the case of P.R.Deb & Associates Vs. Sunanda Roy [12] wherein this Court held that the plaintiff in a suit for specific performance must be ready and willing to carry out his part of the agreement at all material times.

22. The correctness of the findings of fact recorded by the trial court on the contentious issue Nos. 4 & 5 is examined by us keeping in view the law laid down by this Court in the above referred case with reference to the undisputed facts in the case on hand namely, that the letter dated 16.03.1985 sent by the plaintiff would clearly go to show that the plaintiff was a defaulter and another letter dated 04.05.1985 sent by the plaintiff to the defendant Nos.1-4, would go to show that the plaintiff was not ready and willing to perform his part of contract to purchase the suit schedule property by paying remaining sale consideration amount to the defendant Nos.1-4 as per the sale agreement as he had been seeking time without justification. Further, the trial court has held that the court has to see conduct of the party as well as the attending circumstances of the case regarding whether readiness and willingness of the plaintiff can be inferred and further the learned trial Judge rightly relied upon the provision of Section 16(c) of the Specific Relief Act and appreciated evidence of PW-1, the plaintiff and came to the right conclusion and held that the plaintiff had not produced any document to show that he had the balance sale consideration amount of Rs.40,000/-, to pay to the defendant Nos.1-4 to get the sale deed executed in his favour. Further, there is nothing on record to show that the plaintiff could have made arrangement for payment of the balance consideration amount to them. But, on the other hand the trial court has recorded the finding of fact to the effect that the correspondence between the parties and other circumstances would establish the fact that the plaintiff had no money for payment of balance sale consideration to the defendant Nos. 1-4 though they demanded the same from him through their legal notices dated 06.03.1985 and 28.03.1985 which notices were served upon the plaintiff and despite the same he did not approach the defendant Nos.1-4 to get the sale deed executed in his favour even after service of notice, and, prior to issuance of the legal notice to him, he never offered to pay the balance consideration as agreed upon by him to them even though defendant Nos. 1-4 have complied with all the formalities required. The learned Judge, on the question of readiness and willingness on the part of the plaintiff to perform his part of the contract to get the sale deed executed in his favour stated that performance of his obligation is mandatory as per Section 16 (c) of the Specific Relief Act and the law laid down in this regard by this Court which are referred to supra upon which the trial court has rightly relied upon and answered the contentious issues against him by recording valid and cogent reasons. In view of the foregoing reasons, we are of the view that the learned trial judge has applied his mind consciously and correctly to the admitted facts and on proper analysis and appreciation, he has correctly recorded the finding of fact holding that the plaintiff has failed to perform his part of the contract in paying the remaining sale consideration and made sincere efforts to get necessary permission from the Urban Land Ceiling Authority and the Income Tax Department by paying the conversion charges of the land to get the sale deed executed in his favour from the defendant Nos. 1-4 within the stipulated time of five months and further extended period of two months as per clause 6 of the agreement. The same has been erroneously set aside by the appellate court by recording its reasons by placing reliance upon the judgments of this Court in Nirmala Anand's case (supra), Jawahar Lal Wadhwa Vs. Haripada Chakroberty [13]; and A.Maria Angelena's case (supra).

23. The learned senior counsel has rightly submitted that the findings of fact on issue Nos.4 & 5 have been erroneously set aside by the learned Judge of the High Court by recording his reasons which are not supported by pleadings and legal evidence on record. The findings of the learned Judge of the High Court are contrary to the admitted facts and legal evidence on record.

24. We have carefully scrutinised the findings recorded by the trial court on the issue Nos.1,3,4 and 5 with reference to the pleadings of the case and legal evidence on record and the same have been erroneously set aside by the learned Single Judge in the impugned judgment and therefore, the same cannot be allowed to sustain in law.

25. The first appellate court has committed serious error both on facts and in law in reversing the findings of fact recorded on the contentious issues by referring to the decisions of this Court in the impugned judgment on the aforesaid points which are totally inapplicable to the fact situation, and has erroneously set aside the findings of fact recorded by the trial court. Therefore, we are of the considered view that the submissions made by learned Senior Counsel on the basis of the findings and reasons recorded by the trial court in its judgment are well founded and the same must be accepted and accordingly we answer the point No. 3 against the plaintiff and in favour of the defendant No.5.

26. Answer to the Point No.4 The point No. 4 is also required to be answered in favour of the 5th defendant for the reason that sale consideration of Rs.48,000/- in respect of the suit schedule property has been paid to the defendant Nos. 1-4 after the termination of the earlier agreement with the plaintiff on 10.04.1985 vide notice dated 28.03.1985. Therefore, the contention urged on behalf of the plaintiff, that 5th defendant is not the bona fide purchaser, does not arise at all for the reason that the earlier agreement executed in favour of the plaintiff by the defendant Nos.1-4 was not subsisting, is the finding recorded by us in answer to the point No.1 and we have held that there is termination of Agreement of Sale dated 25.12.1983 by letter dated 28.03.1985 sent to him by them. Therefore, the findings recorded by the appellate court on this aspect stating that the defendant No.5 is not a bona fide purchaser cannot be allowed to sustain. Accordingly, we set aside the same in the above aspect.

27. Further, the High Court should have considered the relevant and important aspect of the case namely that the plaintiff is entitled to compensation as agreed upon by him under clause 12 of the Agreement of Sale which is in favour of defendant Nos. 1-4. It provides that the defendant Nos.1-4 have agreed that in the event of their failure to comply with the terms of the agreement they shall pay sum of Rs.10,000/- to the plaintiff and also such sum which is spent by him towards conversion charges and building plan charges. Similarly, the plaintiff had agreed that in the event of his failure to comply with the terms of the agreement the defendant Nos. 1-4 are entitled to forfeit the advance amount. This important aspect of the terms of the Agreement of Sale has not been noticed by the learned Judge of the High Court while reversing the judgment and decree of the trial court and granted the decree for specific performance in favour of the plaintiff in exercise of his discretionary power under sub-sections (1) and (2) of Section 20 of the Specific Relief Act. Further, in view of the foregoing reasons and statutory provisions of Sections 16(c) , 20 (1) and (2) and 21(2) of the Specific Relief Act , the plaintiff is not entitled for a decree of specific performance in respect of the suit schedule property and also he had lost the right to seek a decree of specific performance.

28. The learned High Court Judge has gravely erred in reversing the findings of fact recorded on the issue Nos. 3, 4 and 5 by the trial court in favour of the defendants. He has also failed to take into consideration the very important aspect of the matter, namely, that the Agreement of Sale in favour of the plaintiff was terminated and he had not sought declaratory relief to declare that the termination of agreement in the original suit is bad in law and therefore the suit for specific performance is not maintainable. Even assuming for the sake of argument that agreement was subsisting, the suit for specific performance is not maintainable in law in view of the breach of the terms and conditions of the agreement by the plaintiff. Keeping in view the purpose for which the Agreement of Sale was executed and the time stipulated in the agreement as per clause 6 of the agreement, the contract should have been complied with within seven months including the extended period and that has not been done by the plaintiff. The findings recorded by the trial court on issue Nos. 4 and 5 and with regard to the readiness and willingness on the part of the plaintiff, the appellate court should have exercised its discretionary power under sub-sections (1) and (2) of Section 20 of the Specific Relief Act, and for this reason also we hold that the grant of the decree for specific performance by the High Court in the impugned judgment is wholly unsustainable in law. The trial court has come to the right conclusions on the contentious issues framed by it and has held that even though Agreement of Sale is proved, the plaintiff is not entitled for the decree of specific performance in respect of the suit schedule property in view of the findings of fact and reasons recorded in the contentious issues by it in its judgment and we are in

agreement with the same.

29. Accordingly, we allow this civil appeal and set aside the impugned judgment and decree of the High Court of Karnataka, Bangalore passed in Regular First Appeal No.97 of 2001 dated 08.12.2008 and restore the judgment and decree passed by the X1th Additional City Civil Judge, Bangalore City, Bangalore dated 25.09.2000 in O.S. No. 2012 of 1985, but, in the facts and circumstances of the case, no costs are awarded in these proceedings. ……J. [G.S. SINGHVI]
……J. [V. GOPALA GOWDA]

.....J.
[G.S. SINGHVI]

.....J.
[V. GOPALA GOWDA]

New Delhi,
August 29, 2013