Saradamani Kandappan vs S. Rajalakshmi & Ors on 4 July, 2011

Equivalent citations: AIR 2011 SUPREME COURT 3234, 2011 (12) SCC 18, 2011 AIR SCW 4092, AIR 2011 SC (CIVIL) 1812, (2012) 90 ALL LR 706, (2011) 2 WLC(SC)CVL 632, (2011) 4 MAD LW 97, (2011) 6 SCALE 768, (2011) 2 CLR 366 (SC), (2011) 4 CIVILCOURTC 271, (2012) 1 LANDLR 187, (2011) 6 MAD LJ 149, (2013) 120 REVDEC 564, (2011) 5 ANDHLD 100, 2011 (3) KLT SN 43 (SC)

Bench: K S Radhakrishnan, R V Raveendran

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 7254-7256 OF 2002

And

Contempt Petition (C) No. 28-29 of 2009

Mrs. Saradamani Kandappan ... Appellant

Vs.

Mrs. S. Rajalakshmi & Ors. ... Respondents

With

CIVIL APPEAL NOS. 4641-42/2002

Mrs. S. Rajalakshmi & Ors. ... Appellants

Vs.

Mrs. Saradamani Kandappan & Anr. ... Respondents

J U D G M E N T

R. V. Raveendran J., These appeals by special leave (CA Nos.7254 to 7256 of 2002) are directed against the common judgment and decree dated 19.6.2002 passed by the Madras High Court in O.S.A. Nos.12 of 1992, 32 of 1995 and 148 of 1999 filed by the appellant herein against the common judgment dated 29.11.1991 passed by a learned Single Judge of that court in Civil Suit Nos. 95/1984, 302/1989 and 170/1984 and filed by the respondents herein. The appellants and respondents herein who were the plaintiffs and defendants respectively in the three suits, will be referred, for the purpose of convenience, by their ranks in the suit also.

2. Respondent Nos.2, 3 and 4 are respectively the son, daughter and husband of first respondent. The first respondent is the owner of Survey Nos. 13, 14 and 15, the second respondent is the owner of lands bearing Survey Nos. 16 and 18 and the third respondent is the owner of Survey Nos. 19 and 20, all situated in Chettiaragaram Village, Saidapet Taluk, Chingleput District in all measuring 24 acres 95 cents. The said lands along with the trees, wells, pump-houses, farm godowns, perimeter fence and some furniture, are together referred to as the `schedule properties'.

Respondents 1 to 4 entered into agreement of sale dated 17.1.1981 with the appellant herein for sale of the schedule properties, at a price of Rs.15,000 per acre (in all Rs.3,74,250 rounded off to Rs.3,75,000). On the date of the agreement, Rs.1,00,000 was paid as advance to respondents, which was duly acknowledged in the agreement. Clauses 3, 4, 5, 6, 7, 12 and 15 of the agreement which are relevant for our purposes are extracted below :-

"3. The execution of the sale deeds shall depend upon the party of the second part getting satisfied regarding the title to the land, so also the nil encumbrance.

4. The mode of payment of the balance of Rs.2,75,000/- (Rupees Two lakhs and seventy five thousand only) shall be as under :

(a) Rs.1,00,000/- (one lakh) on or before 28.2.1981

(b) Rs.1,00,000/- (one lakh) on or before 6.4.1981

(c) Rs.75,000/- (seventy five thousand) on or before 30.5.1981

5. If however any of the above mentioned dates are subsequently declared as holidays then the next immediate working day shall be the day of the payment.

6. The payments on due dates is the essence of this contract and in case of failure on the part of the party of the second part, the party of the first part shall cancel this agreement.

7. The sale deed shall be executed at the convenience of the party of the second part as and when she wants them to be executed either in her name or in the name of her nominee or nominees.

12. If the party of the second part finds the titles of the properties herein above mentioned to be unsatisfactory or unacceptable, the party of the first part shall be put on notice revealing her intention not to conclude the sale and in such event if the party of the first part, fails to satisfy the party of the second part regarding the title the party of the first part shall pay to the party of the second part within three months the date there of all the monies advanced by the party of the second part till then.

15. The party of the first part has a caretaker at present. From the day of this agreement the party of the second part shall act as a caretaker for the entire properties and be in trust of all the properties till the party of the first part given the possession of the entire properties to the party of the second part on payment of the sale amount i.e. after the entire sale amount is paid.

(emphasis supplied)

3. On the same day (17.1.1981) the fourth respondent, in a letter addressed to the appellant, acknowledged the receipt of Rs.1,25,000 paid on various dates as commission for the said transaction relating to sale of the said 24.95 acres of land. By the said letter, he agreed that in case the transaction of sale remained unconcluded or got cancelled because of the default on the part of the sellers or buyers under the agreement dated 17.1.1981 or because of defective title, the entire amount of Rs.1,25,000 received by him as commission would be refunded within three months thereof.

4. In pursuance of the said agreement the appellant paid further advances of Rs.1,00,000 on 28.2.1981 and of Rs.25,000 on 2.4.1981. The balance of 75,000 in regard to the instalment payable on 6.4.1981 and the last instalment of Rs.75,000 payable on or before 30.5.1981 was not paid by the appellant.

5. Respondents 1 to 3 caused a notice dated 2.8.1981 to be issued through their counsel to appellant, cancelling the agreement dated 17.1.1981, on the ground of default in paying the balance of the sale consideration, in exercise of their right to cancel the agreement on such default, under clause 6 of the agreement. The relevant portion of the cancellation notice is extracted below:

> "My clients state that even at the time of entering into the said agreement of sale, you looked into the documents of title and satisfied yourself about the title of my clients to the said property. My clients were always ready and wiling to conclude the sale and

> expected you to pay the balance of sale consideration of Rs.2,75,000/- in accordance with clause 4 of the said agreement. Now that you have committed defaults in the payment of the balance of consideration. Not withstanding the fact that you have not even sent any communication whatsoever to my clients as to whether you were ready and willing to pay the balance of consideration under the said agreement, my clients waited for a long time and in the circumstances my clients have no other alternative except to invoke clause 6 of the said agreement. Accordingly, my clients hereby cancel the said agreement dated 17th January 1981 entered into between yourself and my clients in view of your failure to have paid the balance of sale consideration according to clause 4 of the said agreement, as the payment of the instalment on due dates was agreed to be the essence of the contract. Please take notice that the said agreement dated 17.1.1981 has been cancelled and my clients will be refunding the sum of Rs. 2,25,000/- only so far received by them as aforesaid on their concluding the sale with any third party and ascertaining the deficit, if any, in the sale price for deducting the same from the amounts refundable to you in receipt of which you may expect a communication from my clients on their concluding the sale with third party".

6. The appellant sent a reply dated 7.8.1981 through counsel contending that time was never intended to be the essence of the agreement though it was formally mentioned in the agreement that time was of the essence; that respondents had failed to produce the original documents of title in spite of repeated demands and therefore it was agreed between the appellant's husband and the fourth respondent during discussions held in March 1981 in the presence of witnesses, that the original documents would be made available as soon as possible and the appellant should pay the balance only thereafter, and that sale should be completed within a reasonable time of handing over the documents; and that as a token of such understanding, a further advance of Rs.25,000 was received on 2.4.1981. The appellant also denied the claim of the respondents that the appellant had got examined the documents of title and satisfied herself about that title at the time of entering into the agreement of sale. The appellant asserted that there was no default on her part and contended as follows :-

> "The allegation that your client was always ready and willing to conclude the sale and expected my client to pay the balance of the sale consideration of Rs. 2.75 lakhs in accordance with clause 4 of the said agreement etc. is not correct. The very attitude your client is not giving the documents of title for scrutiny from January 1981 for the past 6 months will prove the hollowness of the claim. The further allegation that my client has committed default in payment etc. is also not true, because my client has already paid Rs. 2,25,000/- and on 2.4.1981 when the sum of Rs. 25,000/- was paid it was specifically understood that the balance of money will be paid and the sale will be completed within a reasonable time as soon as the documents of title were handed over to her. Therefore, the question of default in payment of the instalment does not arise. Moreover, it is very unreasonable on the part of your client to allege that default has been committed when the truth is otherwise. My client is ready and willing to pay the balance of sale consideration and have the sale completed provided the documents are handed over to her immediately for scrutiny and approval. Once

> again in the circumstances set out above, there is no default on the part of my client and she is always ready and willing to perform her part of the agreement provided your client hands over the documents for scrutiny and the title is found good to the satisfaction of my client's legal advisers.
>
> My client therefore stated that the purported cancellation of the agreement by the said notice is not legal and valid and your client is called upon to perform her part of the obligation, viz., the handing over of the original documents forthwith and without any undue delay, so that the transaction may be completed. I hope that your client will see the reasonableness in the offer and will not precipitate the matter any further. My client expects an early reply in this regard."

7. This brought forth a rejoinder dated 26.8.1981 from respondents 1 to 3 through their counsel. They denied the claim of the appellant that there was a variation in the term regarding payment of balance consideration in specified instalments. They also denied that such a variation was agreed at a meeting held in March 1981. They reiterated that the time was the essence of the contract and that the agreement was executed only after the appellant had satisfied herself about their title and the respondent's husband had in fact taken true copies of all the documents together with the encumbrance certificate upto 1980, and in those circumstances, the question of appellant again seeking any document of title did not arise. They contended that they were not bound to deliver the original documents before payment of the entire price. It was pointed out that payment of instalments relating to sale consideration stipulated in the agreement did not depend upon the appellant satisfying herself about the title after scrutinising the documents of title and that the appellant had unconditionally agreed to pay the entire consideration on the due dates mentioned in clause (4) of the agreement. It was further pointed out that as appellant was already in possession of xerox copies of the documents of title, if she wanted inspection of the originals, she could have addressed a letter seeking inspection.

8. This brought forth a second reply dated 4.9.1981 from the appellant, reiterating the averments in the reply notice dated 7.8.1981.

Thereafter the appellant got a public notice published in the newspaper `Hindu' dated 11.11.1981 through her counsel, informing the public that she had purchased the schedule properties (as also Sy. Nos.20/1, 21 and

24) from respondents 1 to 3 through the fourth respondent and that she was in possession thereof and was cultivating them. The notice further stated that pending completion of documentation, she had learnt that respondents were trying to resell the properties and issued a warning that if any third party enters into any agreement with the owners, they will be doing so at their own risk, and the same will not bind her. This public notice brought forth two responses. The first was a notice dated 14.11.1981 from one Gulecha stating that the documents relating to Sy.

Nos. 16 and 18 were deposited with him by the second respondent as security for a loan taken from him and that if appellant purchased the said lands, she will be doing so at her risk. The second was a

notice dated 14.11.1981 from respondent Nos. 1 to 3 through their counsel stating that the claim of the appellant that she had purchased the lands bearing Nos.8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 20/1, 21 and 24 and was in possession thereof was false; the survey numbers mentioned were erroneous; that after the agreement dated 17.1.1981 was cancelled, they had entered into an agreement with a third party which fell through because of the public notice, causing loss to them; that the appellant had been appointed only as a caretaker of the lands under the agreement dated 17.1.1981 and the said appointment was cancelled and a new caretaker had been appointed. Respondents 1 to 3 called upon the appellant to hand over all movables on 19.11.1981 to the new caretaker.

9. In this factual background the appellant filed the following three suits:-

> (i) O.S. No. 1709/1981 on the file of the District Munsif, Poonamallee against respondents 1 to 4 for a permanent injunction restraining the respondents, their men and agents from in any way interfering with her peaceful possession and enjoyment of the suit properties. (This suit was subsequently transferred to Madras High Court and renumbered as C.S. No.302 of 1989).
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> ii) C.S. No. 95/1984 on the file of Madras High Court, filed on 19.6.1982, against respondents 1 to 4 seeking a decree for specific performance of the agreement of sale dated 17.1.1981 and a direction to respondents 1 to 3 to execute a sale deed after receiving the balance.

iii) C.S. No. 170 of 1984 on the file of the Madras High Court, filed on 12.1.1984 against the fourth respondent for return of Rs.1,25,000/- paid as commission along with the interest at market rate from 17.1.1981 to date of payment.

10. The first two suits were resisted by the defendants contending that time was of the essence of the term regarding payment of sale price and that the agreement was cancelled as a consequence of default committed by appellant in paying the balance sale price in terms of the agreement. It was alleged that appellant's husband knew even before the agreement was signed that the original documents were with State Bank of Mysore and Gulecha and that the release of the documents could be obtained only on payment of amounts due and that could have been done only if the appellant had paid the instalments in terms of the agreement.

11. The four respondents contested the third suit (C.S. No.170 of 1984) filed against him by denying that he had received a commission of Rs.1.25 lakhs and contending that it was received as security for due performance of the contract in terms of the agreement dated 17.1.1981.

12. The following issues were framed in the injunction suit :

> (i) Whether the plaintiff is entitled to the permanent injunction as prayed for against the defendants?

(ii) To what reliefs, the plaintiff is entitled to?

The following issues were framed in the specific performance suit :

(1) Whether the plaintiff has committed breach of the contract by way of default in payment and thus was lacking in readiness and willingness to perform his part of the contract? (2) Is the time essence of the contract?

(3) If so, whether the termination of the contract by the defendant is valid?

(4) Is not the plaintiff entitled to specific performance?

(5) To what relief is the parties entitled?

Addl. Issue (1) : Whether the fourth defendant is a necessary and proper party to the suit?

Addl. Issue (2) : Whether by reason of filing of C.S. No. 170 of 1984, is the plaintiff entitled to specific performance?

In the suit for refund of Rs.1,25,000/-, the following issues were framed:

(1) Whether the payment of Rs. 1,25,000/- made by the plaintiff to the defendant on 17.1.1981 was towards the commission charges as per the letter given by the defendant or towards part of consideration for the sale in question?

(2) Whether the plaintiff is entitled to return of the said amount of Rs.1,25,000/-.

(3) To what other relief, if any, the plaintiff is entitled?

13. Common evidence was recorded in the three suits. On behalf of the plaintiff, three witnesses were examined, that is plaintiff as PW1 and one Babu as PW-2 and one Balaraman as PW-3. Ex P-1 to P-20 were marked on behalf of the plaintiff. On behalf of the defendants, two witnesses were examined, that is one Rajendran as DW-1 and fourth defendant as DW-2. Ex.D-1 to D-6 were marked on behalf of the defendants. After considering the oral and documentary evidence, a learned Single Judge of the High Court, by his common judgment dated 29.11.1991, dismissed all the three suits.

14. Aggrieved by the said judgment, the appellant filed three original side appeals. A Division Bench of the Madras High Court dismissed the said appeals by common judgment dated 19.6.2002, affirming the judgment of the trial court. The Division Bench however directed the respondents to repay Rs.3,50,000 (i.e. Rs.2,25,000 paid to defendants 1 to 3 and Rs.1,25,000 paid to defendant No. 4) with interest at 9% per annum for the period during which the appellant was not acting as caretaker till the complete payment was made. While disposing of the said three appeals, the

Division Bench also dismissed three applications. The first (CMP No.2888/1996) was an application filed for appointment of an Advocate Commissioner to note the existing condition and physical features of the suit property. The second (CMP No.17401/1997) was an application filed by the appellant's son to implead him as a party alleging that the substantial part of the amounts paid to defendant came from him.

The third (CMP No.7471/1002) was an application by the appellant to receive by way of additional evidence, a judgment rendered by this Court in suo moto contempt proceedings, as also a letter from the appellant's counsel to the Bank of India, Mylapore Branch and a reply thereto.

15. The learned Single Judge and the Division Bench, after exhaustive consideration of the evidence, have recorded the following findings of fact :

> (a) Respondents 1 to 3 entered into an agreement dated 17.1.1981 agreeing to sell 24 acres 95 cents of land to the plaintiff for a consideration of Rs.3,75,000/- and received in all, Rs.2,25,000 as advance.
>
> (b) Plaintiff had paid an additional consideration of Rs.1,25,000 for the movables and taken a letter from the fourth respondent describing it as `commission', by way of security, with the understanding that if the sale did not take place, the amount should be refunded.
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> (c) The time for payment of the balance sale price stipulated in Clause (4) of the agreement of sale was the essence of the contract.
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> (d) Plaintiff's claim that in March, 1981, clause (4) regarding payment schedule was modified by oral agreement under which it was agreed that the instalments due on 6.4.1981 and 30.5.1981 could be paid after the defendants satisfied the plaintiff about their title to the property agreed to be sold, was not established by plaintiff. The terms of the agreement remained unaltered.
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> (e) Plaintiff committed breach by failing to pay the sum of Rs.1,00,000 due on 6.4.1981 (except Rs.25,000 paid on 2.4.1981) and the sum of Rs.75,000 due on 30.5.1981 and the defendants were therefore justified in cancelling the agreement on 2.8.1981.
>
> (f) The defendants did not deliver possession of the properties agreed to be sold, to the plaintiff in part performance of the agreement of sale dated 17.1.1981. The defendants delivered the property to the plaintiff in trust to hold the same as caretaker, until the vendors received the entire sale price and delivered possession. Therefore when the agreement was cancelled and consequently the appointment as caretaker came to an end, the plaintiff became liable to return the suit schedule properties to the defendants.

(g) The plaintiff and her husband had knowledge of the existence of mortgage, before entering into the agreement of sale on 17.1.1981; and the case put forth by the defendants that as per the understanding between the parties, the defendants had to discharge the mortgage debts and secure the original title deeds after receiving the entire consideration, merited acceptance. As per the term of the agreement, the defendants had no obligation to produce the original title deeds or proof of clearance of loans, before plaintiff paid the entire sale consideration.

(h) The plaintiff failed to establish her readiness and willingness to complete the sale in terms of the agreement and she was not entitled to the relief of specific performance.

16. Feeling aggrieved by the judgment of the division bench, the appellant has filed these appeals (CA Nos. 7254 to 7256 of 2002), challenging the findings of fact arrived at by the High Court and also raising some legal contentions. Where findings of fact recorded by the learned single Judge (trial court) are affirmed by the appellate bench of the High Court in appeal, this court will be reluctant to interfere with such findings in exercise of jurisdiction under Article 136 of the Constitution, unless there are very strong reasons to do so. On the contentions urged, the following questions arise for our consideration:

(i) Whether the time stipulated for payment of balance consideration was the essence of contract and whether the defendants were justified in cancelling the agreement, when the time schedule stipulated for such payment was not adhered to?

(ii) Whether the parties had agreed upon sequence of performance, which required payment of balance consideration by appellant, as stipulated in clause (4) of the agreement, only after the respondents satisfied the appellant regarding their title to the lands?

(iii) Whether the respondents had failed to disclose the encumbrances over the properties and thereby committed fraud, entitling the appellant for extension of time stipulated for payment corresponding to the delay caused by the fraud and consequently the cancellation of the agreement by notice dated 2.8.1981 is illegal and invalid?

(iv) Whether an adverse inference ought to be drawn on account of the non-examination of defendants 1 to 3 who were the vendors under the agreement of sale?

Re: Question (i)

17. The appellant contends that time is not the essence of the agreement of sale dated 17.1.1981. She contends that where the vendors fail to give the documents of title to satisfy the purchaser about their title, and the purchaser is ready and willing to perform the contract, the termination of the

agreement of sale by the vendors is illegal and amounts to breach of contract. They submit that High Court had failed to apply section 55 of the Contract Act, 1872. Section 55 of Contract Act deals with the effect of failure to perform at a fixed time, in contract in which time is essential. Said Section is extracted below :

> "Section 55. Effect of failure to perform at a fixed time, in contract in which time is essential.-- When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time, and fails to do such thing at or before a 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 essence of the contract.
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> Effect of such failure when time is not essential: If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. Effect of acceptance of performance at time other than agreed upon: If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he give notice to the promisor of his intention to do so."

The above section deals with the effect of failure to perform at a fixed time, in contracts in which time is essential. The question whether time is the essence of the contract, with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.

18. Relying upon the observation of this court in N.Srinivasa v.

Kuttukaran Machine Tools Ltd. [2009 (5) SCC 182] that "in the contract relating to immovable property, time cannot be the essence of the contract", the appellant put forth the contention that in all contracts relating to sale of immovable property, time stipulated for performance, even if expressed to be the essence, has to be read as not being the essence of the contract and consequently the contract does not become voidable by the failure to perform before the specified time. A careful reading of the said decision would show that the sentence relied on (occurring in para 31) apparently was not the statement of legal position, but a conclusion on facts regarding the contract that was being considered by the court in that case, with reference to its terms. In fact the legal position is

differently stated in para 27 of the said decision, thus:

> "27. In a contract for sale of immoveable property, normally it is presumed that time is not the essence of the contract. Even if there is an express stipulation to that effect, the said presumption can be rebutted. It is well settled that to find out whether time was the essence of the contract. It is better to refer to the terms and conditions of the contract itself."

19. The legal position is clear from the decision of a Constitution Bench of this court in Chand Rani v. Kamal Rani [1993 (1) SCC 519], wherein this court outlined the principle thus:

> "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."

Relying upon the earlier decisions of this court in Gomathinayagam Pillai v. Pallaniswami Nadar [1967 (1) SCR 227] and Govind Prasad Chaturvedi v. Hari Dutt Shastri [1977 (2) SCC 539], this Court further held that fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. Where the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract.

Thereafter this court held that even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time : (i) from the express terms of the contract; (ii) from the nature of the property and (iii) from the surrounding circumstances as for example, the object of making the contract. The intention to treat time as the essence of the contract may however be evidenced by circumstances which are sufficiently strong to displace the normal presumption that time is not the essence in contract for sale of land. In Chand Rani, clause (1) of the agreement of sale required the balance consideration to be paid as under:

> "Rs.98,000/- will be paid by the second party to the first party within a period of ten days only and the balance Rs.50,000 at the time of registration of the sale deed....". This court held that time regarding payment of Rs.98,000 was the essence, on the following reasoning:
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> "The analysis of evidence would also point out that the plaintiff was not willing to pay this amount unless vacant delivery of possession of one room on the ground floor was given. In cross-examination it was deposed that since income-tax clearance certificate

had not been obtained the sum of Rs. 98,000 was not paid. Unless the property was redeemed the payment would not be made. If this was the attitude it is clear that the plaintiff was insisting upon delivery of possession as a condition precedent for making this payment. The income-tax certificate was necessary only for completion of sale. We are unable to see how these obligations on the part of the defendant could be insisted upon for payment of Rs. 98,000. Therefore, we conclude that though as a general proposition of law time is not the essence of the contract in the case of a sale of immovable property yet the parties intended to make time as the essence under Clause (1) of the suit agreement."

The intention to make time stipulated for payment of balance consideration will be considered to be essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement. If for example, the vendor discloses in the agreement of sale, the reason for the sale and the reason for stipulating that time prescribed for payment to be the essence of the contract, that is, say, need to repay a particular loan before a particular date, or to meet an urgent time bound need (say medical or educational expenses of a family member) time stipulated for payment will be considered to be the essence. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract.

20. Let us consider the terms of the agreement of sale in this case to find out whether time was the essence. The standard agreements of sale normally provide for payment of earnest money deposit or an advance at the time of execution of agreement and the balance of consideration payable at the time of execution/registration of the sale deed. In the absence of contract to the contrary, the purchaser is bound to tender the balance consideration only at the time and place of completing the sale [see clause (b) of section 55(5) of Transfer of Property Act, 1882 `TP Act' for short]. In this case we find that there is a conscious effort to delink the terms relating to payment of balance price (clauses 4, 5 and 6) from the term relating to execution of sale deed (clause 7) and making the time essence only in regard to the payment of the balance sale consideration. There is also a clear indication that while time would be the essence of the contract in regard to the terms relating to payment of balance price, time would not be the essence of the contract in regard to the execution of the sale deed. The intention making time essence of the contract for payment of balance price is clear from the following : (a) clause 4 requires the balance consideration to be paid in three instalments that is Rs.1,00,000 on or before 28.2.1981; Rs.1,00,000 on or before 6.4.1981; and Rs.75,000 on or before 30.5.1981; (b) Clause 5 makes it clear that if any of the abovementioned dates of payment is subsequently declared as a holiday, then the next immediate working day shall be the date of payment. This shows a clear intention that payment should be made on the stipulated dates and even a day's delay was not acceptable unless the due date was declared to be a holiday; (c) Clause 6 specifically stipulates that the payments on due dates is the essence of the contract and in case of failure on the part of the purchaser the vendors shall cancel the agreement.

21. On the other hand, if we look at the terms relating to performance of sale, there is a clear indication that time was not intended to be the essence, for completion of the sale. Clause 3 provides

that the execution of sale deed shall depend upon the second party (purchaser) getting satisfied regarding the title to the lands, so also the nil encumbrance. It is significant that the said clause does not say that payment of balance consideration shall depend upon the purchaser getting satisfied regarding title or nil encumbrances. Clause 7 provides that the sale deed shall be executed at the convenience of the purchaser, as and when she wants them to be executed either in her name or in the name of her nominee or nominees. Clause 12 provides that if the second party (purchaser) finds the title of the properties to be unsatisfactory or unacceptable, the vendors shall be put on notice about her intention not to conclude the sale and in such an event, if the vendors fail to satisfy the purchaser regarding their title, the vendors shall pay to the purchaser within three months from that date, all monies advanced by the purchaser till then. It is thus evident from clause 12 also that the payments of balance sale price in three instalments on the specified due dates were not dependent upon the further examination of title or the satisfaction of the purchaser about the title. It is clear that the purchaser on the basis of whatever initial examination she had taken of the documents, had unconditionally agreed to pay the amounts in three instalments of Rs.1,00,000 on or before 28.2.1981; Rs.1,00,000 on or before 6.4.1981 and Rs.75,000 on or before 30.5.1981; and if the purchaser was not thereafter satisfied with the title or found the title unacceptable and if the vendors failed to satisfy her about their title when she notified them about her dissatisfaction, the vendors had to refund all payments made within three months. Thus it is categorically made clear in the agreement that time regarding payment of balance price was the essence of the contract and such payment was not dependent upon the purchaser's satisfaction regarding title.

22. Apart from the above, the plaintiff in her evidence admitted that time for performance was the essence of the contract vide the following questions and answers :

> Q : The payment of the due date and in case of failure on the part of the party of second part, the party of the first part shall cancel the agreement. Is this in the agreement or not?
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> Ans. Yes. The dates and the title are important.
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> Q : Do you know that everywhere in this agreement one thing is made clear that time is the essence of the agreement ?
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> Ans. Yes. Time is the essence of the contract and also the title must be proved in the agreement.
>
> Her evidence also shows that she apparently did not have the funds to pay the balance of Rs.75,000 due on 6.4.1981 and Rs.75000/- due on 30.5.1981 as was evident from the Bank pass book. It was therefore possible that being not ready to perform the contract in terms of the agreement, the appellant had invented a modification in the terms of the agreement. The learned Single Judge and the Division Bench have recorded a concurrent finding that the time was the essence of the contract and that no change was agreed in respect of the agreement terms as alleged by the appellant. The appellant is unable to place any material which calls for

reversal of the said findings. Therefore it has to be held that time regarding payment stipulated in clauses (4), (5) and (6) of the agreement of sale was the essence of the contract and failure of the appellant to adhere to it, justified cancellation of the agreement by the respondents.

An aside regarding the principle "time is not of the essence" for future consideration

23. It is of some interest to note that the distinction between contracts relating to immovable properties and other contracts was not drawn by section 55 of Contract Act (or any other provisions of Contract Act or Specific Relief Act, 1963). Courts in India made the said distinction, by following the English law evolved during the nineteenth century. This Court held that time is not of the essence of the contracts relating to immovable properties; and that notwithstanding default in carrying out the contract within the specified period, specific performance will ordinarily be granted, if having regard to the express stipulation of the parties, nature of the property and surrounding circumstances, it is not inequitable to grant such relief. [vide Gomathinayagam Pillai (supra), Govind Prasad Chaturvedi (supra) and Indira Kaur v. Sheo Lal Kapoor -

1988 (2) SCC 188 and Chand Rani (supra) following the decision of Privy Council in Jamshed Khodaram Irani v. Burjorji Dhunjibhai - AIR 1915 PC 83 and other cases]. Of course, the Constitution Bench in Chand Rani made a slight departure from the said view.

24. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor-defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds.

Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or

non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and `non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

26. It is now well settled that laws, which may be reasonable and valid when made, can, with passage of time and consequential change in circumstances, become arbitrary and unreasonable.

26.1) In Rattan Arya v. State of Tamil Nadu - (1986) 3 SC 385, this Court held:

> "We must also observe here that whatever justification there may have been in 1973 when Section 30(ii) was amended by imposing a ceiling of Rs. 400 on rent payable by tenants of residential buildings to entitle them to seek the protection of the Act, the passage of time has made the ceiling utterly unreal. We are entitled to take judicial notice of the enormous multifold increase of rents throughout the country, particularly in urban areas. It is common knowledge today that the accommodation which one could have possible got for Rs. 400 per month in 1973 will today cost at least five times more. In these days of universal day to day escalation of rentals any ceiling such as that imposed by Section 30(ii) in 1973 can only be considered to be totally artificial and irrelevant today. As held by this court in Motor General Traders v. State of A.P. (1984) 1 SCC 222, a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14."

(emphasis supplied) 26.2) In Malpe Vishwanath Acharya v. State of Maharashtra - (1998) 2 SCC 1 a three Judge bench of this court considered the validity of determination of standard rent by freezing or pegging down the rent as on 1.9.1940 or as on the date of first letting, under sections 5(10)(B), 7, 9(2)(b) and 12(3) of the Bombay Rents, Hotel and Lodging House Rates Control Ac, 1947. This court held that the said process of determination under the Act, which was reasonable when the law was made, became arbitrary and unreasonable in view of constant escalation of prices due to inflation and corresponding rise in money value with the passage of time.

This Court held:

> "In so far as social legislation, like the Rent Control Act is concerned, the law must strike a balance between rival interests and it should try to be just to all. The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society. When there is shortage of accommodation it is desirable, nay, necessary that some protection should be given to the tenants in order to ensure that they are not exploited. At the same time such a law to be revised periodically so as to ensure that a disproportionately larger benefit than the one which was intended is not given to the tenants..... Taking all the facts and circumstances into consideration, we have no doubt that the existing provisions of the Bombay Rent Act relating to the determination and fixation of the standard rent can no longer be considered to be reasonable....."

The principle underlying the said decisions with reference to statutes, would on the same logic, apply to decisions of courts also.

27. A correct perspective relating to the question whether time is not of the essence of the contract in contracts relating to immovable property, is given by this court in K.S. Vidyanadam and Others vs. Vairavan - (1997) 3 SCC 1 (by Jeevan Reddy J. who incidentally was a member of the Constitution Bench in Chand Rani). This Court observed:

> "It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect.
>
> In the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973. .....We cannot be oblivious to the reality and the reality is constant and continuous rise in the values of urban properties - fuelled by large scale migration of people from rural areas to urban centres and by inflation.
>
> Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so."

(emphasis supplied) Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and

other cases. Be that as it may.

28. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam (supra) :

> (i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.
>
> (ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was `ready and willing' to perform his part of the contract.
>
> (iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also `frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.

Re: Question (ii)

29. Before the learned Single Judge, the appellant had concentrated on the contention that time for payment was not the essence of the contract and therefore the failure to pay the second instalment on or before 6.4.1981 and the final instalment on or before 30.5.1981 did not entitle the vendors to cancel/terminate the agreement. As that contention was rightly rejected by the learned Single Judge, the emphasis before the Division Bench was on the contention that the term regarding payment was altered by an oral understanding. It was contended that though time was the essence of the contract in regard to payments, it was equally necessary for the defendants to produce original title deeds to show that there were no encumbrances over the suit properties; that after paying the first instalment of Rs.1,00,000 on 28.2.1981, the plaintiff and her husband got doubts about the original title deeds as they learnt that the properties had been mortgaged; that therefore the plaintiff's husband along with his friends Babu (PW2) and Balaraman (PW3) went to defendants' house in March, 1981 and made inquiries and then the defendants requested for some more time promising that they would get original title deeds for verification and therefore on 2.4.1981 only Rs.25000 was paid towards the second instalment of Rs.1,00,000 due on 6.4.1981 with the understanding that the balance of Rs.75,000 towards the second instalment as also the third instalment would be paid only after the production of original title deeds. Therefore the contention was that though time regarding payment was essence of the contract and the balance consideration of Rs.2,75,000 had to be paid in three instalments of Rs.1,00,000, Rs.1,00,000 and Rs.75000 on 28.2.1981, 6.4.1981 and 30.5.1981 respectively, there was an alteration in those terms, as per an oral understanding in March, 1981 to postpone payment of the second and third

instalments, till the original documents of title were produced by the defendants. In short the emphasis of the plaintiff was on an oral agreement altering the time schedule and the terms which made time for payment the essence of the contract. Neither the Single Judge nor the Division Bench accepted the claim of appellant that there were any such discussions or oral understanding in March 1981 leading to variation in terms or that the time for payment was postponed.

30. Before this court there was again a significant shift in the stand of the appellant. Faced with the finding that time for payment was the essence and that there was no change in the terms relating to payment, the emphasis is on a different contention based on section 52 of the Contract Act. The appellant contended that the agreement of sale laid down the order in which the reciprocal promises were to be performed; that it first required respondents 1 to 3 as vendors, to furnish the original title deeds and a nil encumbrance certificate to satisfy the appellant about their title;

that the appellant had to pay the balance of the sale price only after the vendors discharged their said obligation; that the appellant was entitled to withhold the balance sale price till the vendors discharged their liabilities, secured the original title deed and delivered them to her and satisfied her about their title; and that without performing their obligation by producing the original title deeds, the vendors cannot expect performance by the purchaser, to pay the balance price. The appellant contended that courts below failed to appreciate the scope of section 51 to 54 of Contract Act. To appreciate the said contention it is necessary to refer to sections 51 to 53 of the Contract Act.

31. Section 51 provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise, unless the promisee is ready and willing to perform his reciprocal promise. For example, if the contract provides that the balance of sale consideration shall be paid by the purchaser to the vendor against execution of sale deed within a period of three months, the purchaser need not pay the balance sale consideration if the vendor was not willing to execute the sale deed. Similarly the vendor need not execute the sale deed unless the purchaser is ready to pay the balance sale consideration.

32. Section 52 relates to the order of performance of reciprocal promises. It provides that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. Let us illustrate with reference to an agreement of sale which provides that the vendor shall make out to the satisfaction of the purchaser a good, marketable and subsisting title and provide all documents as required by the purchaser to satisfy him about the title of the vendor, that the vendor shall obtain a certificate of clearance from a specified authority for the sale, that the sale shall be completed within a period of four months of receipt of the clearance certificate and the purchaser shall pay the balance sale price at the time of registration of the sale. It is evident that the vendor will have first to make out a title by producing the documents required by the purchaser and also obtain the clearance certificate. Only thereafter the sale deed shall have to be executed and payment of the sale consideration will have to be made at the time of registration of the sale deed. The vendor cannot seek payment of the balance sale price without performing his obligations as per the agreement.

33. Section 53 provides that when a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-

performance of the contract. Let us take by way of illustration an agreement which provides that out of the sale price Rs.10,00,000, Rs.1,00,000 was paid as advance, Rs.4,00,000 was to be paid within one month to enable the vendor to purchase an alternative property and shift his residence from the property agreed to be sold, and the sale deed has to be executed within three months from the date of agreement of sale and vacant possession of the premises should be given, against payment of balance price. If the purchaser failed to pay Rs.4,00,000 within one month and thereby prevented the vendor from purchasing another property and shifting to such premises, the vendor will not be able to perform his obligation to deliver vacant possession. Thus the contract becomes voidable at the option of the vendor.

34. Section 54 of Contract Act provides that when a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. The agreement in this case provides a good illustration for this section. The purchaser cannot claim that the vendors should produce the original title deeds and satisfy her regarding their title, or claim execution of the sale deed, unless and until she paid the entire consideration within the time stipulated in clause (4) of the agreement, which would enable the vendors to repay the loans and obtain release of the original title deeds.

35. The appellant contends that clause (3) of the agreement provides that execution of the sale deed shall depend upon the purchaser getting satisfied regarding (vendors') title to the lands and that the property is not subject to any encumbrance; that the said clause precedes clause (4) requiring payment of balance consideration of Rs.2,75,000 in three instalments; and that shows that the intention of parties was that the satisfaction of the purchaser in regard to the vendors' title to the land and encumbrance, was a condition precedent for payment of the balance consideration. In other words, it is contended that the contract provides the order in which reciprocal promises are to be performed, by placing clause (3) before clause (4), that is the vendors should first satisfy the purchaser regarding title of the vendors and only when that promise is performed by the vendors, the question of purchaser performing her promise to pay the balance consideration would arise.

36. The order of performance of reciprocal promises does not depend upon the order in which the terms of the agreement are reduced into writing. The order of performance should be expressly stated or provided, that is, the agreement should say only after performance of obligations of vendors under clause (3), the purchaser will have to perform her obligations under clause (4). As there is no such express fixation of the order in which the reciprocal promises are to be performed, the appellant's contention is liable to be rejected. We have already noticed that the contract contains two different streams of provisions for performance. One relates to payment of the balance

consideration by the purchaser in the manner provided, which is not dependent upon any performance of obligation by the vendors. It is significant that clause (4) of the agreement did not say that the balance of the sale price shall be paid only after the vendors satisfied the purchaser in regard to title or that the purchaser shall pay the balance of sale price only after she satisfies herself regarding title of the vendors to the lands. Nor does clause (3) contain a provision, after stating that execution of the sale deed shall depend upon the purchaser getting satisfied regarding title to the land as also the nil encumbrance, that the payment of sale consideration will also depend upon such satisfaction regarding title and nil encumbrance. As noticed above there is an unconditional promise to pay the balance consideration in three instalments and the said promise by the purchaser is not dependent upon performance of any obligation by vendors. The contract specifically states that having paid the balance price, if the purchaser is not satisfied about the title and on being intimated about the same if the vendors fail to satisfy the purchaser about their title, all amounts paid towards the price should be refunded to purchaser. This clearly demonstrates that the payment of balance of sale price in terms of the contract was not postponed nor made conditional upon the purchaser being satisfied about the title, but that payment of the balance price should be made to the vendors as agreed unconditionally. In fact if the intention of the parties was that only after the vendors satisfying the purchaser about their title, balance consideration had to be paid, clause (12) would be redundant as the situation contemplated therein would not arise. Further, if that was the intention, the purchaser would not have paid Rs.1,00,000 as further advance on 28.1.1981 and Rs.25,000 on 2.4.1981.

It is therefore clear that the contract does not expressly (or even impliedly) specify the order of performance of reciprocal promises, as alleged by the appellant.

37. The terms of the contract makes it clear that payment of sale price did not depend on execution of the sale deed. The sale deed was not required to be executed within any specific period. The purchaser had to fulfil her obligation in regard to payment of price as provided in clause 4 and thereafter vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser, either in her name or in the names of her nominees. The sale deed had to be executed only after payment of complete sale consideration within the time stipulated. In these circumstances, section 52 of the Contract Act does not help the appellant but actually supports the vendors-respondents.

Re: Question (iii)

38. Learned counsel for the appellant next submitted that the lands belonging to the first respondent were mortgaged to Bank of India, the lands belonging to the second defendant were mortgaged to one Gulecha, the lands belonging to third respondent were mortgaged to State Bank of Mysore and therefore none of the original title deeds were in the custody of vendors; that having regard to section 55 (1) of Transfer of Property Act, 1882 (`TP Act' for short) the vendors were bound to disclose to the purchaser, any material defect in their title to the property; that the failure of vendors to disclose the existence of the mortgages/encumbrances amounted to fraudulent conduct within the meaning of section 55 of TP Act. It was submitted that the vendors had deliberately failed to disclose the existence of the said encumbrances to the purchaser and thereby

committed a fraud which made the purchaser to enter into an agreement of sale and part with a potion of the sale consideration in advance; that when the purchaser got doubts and insisted on production of the original title deeds, the fourth respondent took time to get the original title deeds and agreed that the balance of sale price due may be paid after production of sale deeds. It was submitted that having regard to section 55 of the TP Act, failure to disclose the encumbrances amounted to fraud; and in view of such fraud by the respondents, the appellant was prevented from performing her part of the contract by paying the balance price before the agreed dates and therefore the appellant was entitled to extension of further time for performing her promise to pay the balance price, corresponding to the delay caused by such fraud, having regard to the provisions of section 34 of the TP Act.

39. Section 55 of TP Act lists the rights and liabilities of the buyer and the seller in the absence of a contract to the contrary. The relevant portion of section 55 reads thus:

> "55. Rights and liabilities of buyer and seller -- In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:
>
> (1) The seller is bound-
>
> (a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;
>
> (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
>
> (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto; x x x x x Section 34 of the TP Act relied upon by appellant, is extracted below:
>
> "34. Transfer conditional on performance of act, time being specified Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled."

40. Whenever a party wants to put forth a contention of fraud, it has to be specifically pleaded and proved. It is significant that the plaint does not allege any fraud by the defendants. Evidence shows that before the agreement was entered, the purchaser's husband and legal advisor had examined the xerox copies of the title deeds and satisfied themselves about the title of the vendors. The appellant in her evidence clearly admits that xerox copies of the title deeds were shown to her husband.

The agreement of sale provided that the sale would depend upon purchaser getting satisfied about the title of the vendors. The manner in which the agreement was drafted by the purchaser shows that the purchaser and/or her husband were made aware of the encumbrances.

Firstly there is no provision in the agreement that the lands were not subject to any encumbrances. Secondly, the provision for payment of sale price within a specified time does not link the payment to execution of a sale deed. Thirdly the contract provided that on execution of the agreement the purchaser will take possession as care taker of the suit schedule properties and that on complete payment of the sale price on 30.5.1981, she will be entitled to possession in part performance and that the execution of the sale deed will be whenever required by the purchaser, totally disconnected with either payment of price or delivery of possession. All these provisions demonstrate that the vendors were in urgent need of money, that the purchaser was made aware of the encumbrances, that on the purchaser paying the sale price, the vendors had to clear the encumbrances and thereafter convey the property, free from encumbrances. The contention that the vendors deliberately or intentionally suppressed any information regarding the pending encumbrances or the fact that the original documents were not available and thereby committed fraud is neither pleaded nor proved.

41. The appellant did not allege in the plaint, any fraud on the part of vendors, in regard to suppression of encumbrances over the property. The entire plaint tried to justify that the plaintiff did not commit breach of contract by not paying the balance instalments on 6.4.1981 and 30.5.1981, except for a stray sentence that the plaintiff will be entitled to proceed against the third defendants 1 to 3 for damages, for not performing their part of the contract and not disclosing several prior encumbrances over the property. In the written statement the defendants submitted that the encumbrance certificate upto the year 1980 had been given to appellant's husband, which showed the encumbrance in favour of State Bank of Mysore, that plaintiff and her husband both knew before entering into the agreement of sale that original documents were with the said bank and that therefore the allegation that the encumbrance was not disclosed was false. It was also disclosed in the written statement, that a document was surreptitiously detained by one Gulecha. It was stated that the defendants intended to utilise the last two instalments for securing back the original documents by discharging the loans. It is not disputed that the amount due to Gulecha was around Rs.40,000 and the amount due to State Bank of Mysore was around Rs.39,000 and any of the last two instalments would have been sufficient to discharge the said liabilities. The appellant having committed default in paying the last two instalments which would have enabled discharging the debts, can not find fault with the vendors by contending that they did not secure the original title deeds. If the mortgage/encumbrance was made known to appellant's husband and if it had been understood that the same would be cleared from the last of the instalments paid by the appellant, the absence of original title deeds could not be made a ground for not paying the last two

instalments. The claim of the appellant that the vendors should have cleared all the encumbrances before payment of the last two instalments is not borne out by any evidence. Even in law, the obligation of the vendors is to convey an encumbrance free, good and marketable title subject to contract to the contrary. The stage of execution of sale deed had not arrived as the appellants did not paid the amount due in terms of the contract.

42. The appellant contended that the debt due to the Bank of India had been fraudulently suppressed by the vendors. There is no reference to such a mortgage either in the plaint or the evidence of the plaintiff. No one has been examined from the bank nor any document produced to prove the existence of such mortgage. Appellant attempted to produce some documents relating to the said mortgage with an application under Order 41 Rule 27 CPC which was rejected by the High Court. Before us, the appellants relied upon the decision in Bank of India v. Vijay Transport [2000 (8) SCC 512] which related to the bank's suit against Vijay Transport of which the first respondent was stated to be a partner.

The said decision of this court discloses that proceedings were commenced in the year 1975 against the firm in which the first respondent was a partner, for recovery of Rs.18,14,817.91 in the Court of Sub-Judge, Eluru; that the partnership firm raised a counter claim of Rs.

34,48,799 against the Bank; and that on 6.7.1976 the Bank's suit was decreed only for Rs.1,00,418/55 whereas the counter claim of the first respondent was decreed for Rs.34,48,799 with costs. The bank filed an appeal before the High Court which was allowed on 20.9.1983 and the Bank's suit was decreed for Rs.18,49,209.70 with interest and the firm's counter claim was dismissed. But what is significant and relevant is the fact that as on the date of the agreement of sale (17.1.1981) the first defendant was not a debtor of Bank of India but on the other hand the bank itself was a debtor to the extent of more than Rs.33,00,000 with interest. Therefore the contention of the appellant that an encumbrance in favour of Bank of India was in existence and that was not disclosed and the said liability was not disclosed, is wholly untenable. From the evidence on record as rightly held by the courts below it is not possible to make out either any fraud or any suppression or failure to disclose facts on the part of the respondents.

43. We are therefore of the view that the failure of the appellant to pay the balance of Rs.75,000 on 6.4.1981 and failure to pay the last instalment of Rs.75,000 on or before 30.5.1981 clearly amounted to breach and time for such payment was the essence of the contract, the respondents were justified in determining the agreement of sale which they did by notice dated 2.8.1981 (Ex. P5). Therefore rejection of the prayer for specific performance is upheld.

44. We may next briefly deal with the correctness of the dismissal of the suit for injunction. The appellant was not put in possession of the suit properties in part-performance of the agreement of sale. Under clause 15 of the agreement of sale, she was only entrusted with the suit schedule properties as a caretaker until possession is given on receipt of the entire sale consideration. As neither the entire sale consideration was paid nor possession delivered, the plaintiff remained merely a caretaker and on cancellation of the agreement of sale by the respondents, the plaintiff became liable to leave the suit schedule properties as the possession continued to be with the

defendants. As appellant never had `possession' she was not entitled to seek a permanent injunction to protect her possession. We have held that the cancellation of agreement was justified and upheld the rejection of the suit for specific performance. In the circumstances, the dismissal of the suit for injunction by the learned Single Judge, affirmed by the Division Bench, is also not open to challenge.

45. We also find no reason to interfere with the dismissal of the suit for recovery of Rs.1,25,000 from the fourth respondent. The trial court held that the said amount was not paid as commission but was paid as consideration for the movables. The said suit was dismissed by the trial court. In the High Court the learned counsel for the appellant during arguments clearly stated that the appellant was not pressing for any decree against the fourth respondent in view of the finding that the amount paid was part of the consideration for movables. Therefore the dismissal of suit for Rs.1,25,000 is also upheld.

46. The division bench to do broad justice and work out the equities, took note of the offer of the defendants in their written statement to refund the amount paid as advance and directed the defendants to refund the sum of Rs.2,25,000 paid to defendants 1 to 3 under the agreement and Rs.1,25,000 paid to the fourth respondent, in all, Rs.3,50,000 with interest at 9% per annum for the period when the appellant was not acting as a care taker till date of payment. We find no reason to interfere with the direction to refund Rs.3,50,000 with interest. We however propose to make a modification in regard to the rate of interest and the period for which interest is payable. The High Court has awarded interest on the sum of Rs.3,50,000 at 9% per annum for the period in which the appellant had not acted as caretaker till the date of payment. As noticed above, the agreement of sale does not provide for forfeiture of the amounts paid as advance under any circumstances and on the other hand, specifically provides that if the plaintiff was not satisfied with the title of the defendants, the amounts received as advance would be refunded. In fact, the respondents, in their written statement, offered to refund the amount. Therefore, the High Court ought to have granted interest from the date of cancellation of the agreement (2.8.1981) to date of payment.

The High Court was not justified in restricting the interest to only for the period during which the appellant had not acted as caretaker. The liability to refund the advance has nothing to do with the appointment of the plaintiff as caretaker or the obligation of the plaintiff to return the property on cancellation of the agreement. Having regard to the facts and circumstances, we are of the view that the rate of interest shall be increased to 12% per annum instead of 9% per annum.

Re : Question No. (iv)

47. The appellant contended that none of the three vendors (defendants 1, 2 and 3) stepped into the witness box to give evidence and therefore an adverse inference should be drawn against them that the case put forth by them is incorrect. Reliance was also placed on the decisions of this court in Vidhyadhar v. Mankikrao & Anr. (1999) 3 SCC 573 and Balasaheb Dayandeo Naik (Dead) through LRs. and Ors. v. Appasaheb Dattatraya Pawar (2008) 4 SCC 464 in that behalf. There were four defendants in the suit. Defendants 1,2 and 3, who were the owners of the lands were respectively the wife, son and daughter of the fourth defendant. It is an admitted position that the entire transaction

was done on behalf of the defendants 1,2 and 3 by defendant No.4 who alone had complete knowledge of the entire transaction. Fourth defendant has given evidence on behalf of all the other defendants. When one of the defendants who is conversant with the facts has given evidence, it is not necessary for the other defendants to be examined as witnesses to duplicate the evidence.

The legal position as to who should give evidence in regard to the matters involving personal knowledge have been laid down by this court in Man Kaur (dead) by LRS. v. Hartar Singh Sangha (2010) 10 SCC 512. This court has held that where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent alone can give evidence in regard to the transaction. This court further observed:

> "Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

Therefore the evidence of the fourth defendant (examined as DW2) was sufficient to put forth the case of the defendants and there was no need to examine the other three defendants who did not have full or complete knowledge of the transactions. In the circumstances we find no merit in the contention that the suits ought to have been decreed, as defendants 1,2 and 3 did not step into the witness box.

Re : Contempt Petition (C) Nos.28-29/2009 :

48. The appellant has filed these contempt petitions praying that respondents 1 to 4 be punished for committing contempt of the order dated 11.11.2002 made in C.A. Nos.7254-7256/2002. The appellant filed the said appeals aggrieved by the common judgment dated 19.6.2002 passed by the Division Bench of the High Court, affirming the dismissal of the three suits of appellant for injunction, for specific performance and for refund of Rs.1,25,000/-. This Court on 11.11.2002 while granting leave in the special leave petitions, made an interim order that the respondent shall not encumber the property in any manner.

49. The appellant alleges that one Jeevanandam filed three suits against respondents 1 to 3 in the years 2007 and 2008 for injunctions and other reliefs, alleging that he had entered into three Memorandum of Understanding (MOU for short) dated 5.7.2002 with them, under which they had agreed to enter into agreements of sale in regard to the suit schedule properties; that he had paid advances to each of them on 5.7.2002, and that he had further paid to respondents 1 to 3 in the years 2004 and 2005, a sum of Rs.1,50,00,000. The appellants contend that the alleged act of

receiving Rs.1,50,00,000 in the years 2004 and 2005 by respondents 1 to 3 from Jeevanandam, amounted to creating an encumbrance over the suit property and thereby respondents 1 to 3 have committed contempt of the order dated 11.11.2002 of this Court. The appellant also wants this court to hold an enquiry and hold that the MOUs were actually entered subsequent to the interim order dated 11.11.2002, but deliberately anti-dated to get over the interim order and therefore the execution of the said MOUs also amounts to creating an encumbrance. It is not necessary for us to examine the question whether the MOUs were anti-dated as the said question is not relevant as will presently be seen, apart from the fact that no material has been produced by the appellant to establish the said allegation.

50. An `encumbrance' is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. [See National Textile Corporation vs. State of Maharashtra - AIR 1977 SC 1566 and State of H.P. vs. Tarsem Singh -

2001 (8) SCC 104]. Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance. The MOUs said to have been executed by respondents 1 to 3 provide that agreements of sale with mutually agreed terms and conditions will be entered between the parties after clearance of all pending or future litigations. Therefore the MOUs are not even agreements of sale. In these circumstances, it is not possible to hold that the respondents have created any encumbrances or violated the order dated 11.11.2002. Hence, these contempt petitions are liable to be rejected.

51. We make it clear that nothing stated in this order on the contempt petitions will be construed as an expression of any opinion on the merits of the dispute between Jeevanandam and respondents 1 to 3, and necessarily any pending litigation between them will have to be decided on the merits of the respective cases.

CIVIL APPEAL NOS. 7254-7256 OF 2002

52. These appeals are filed by the vendors - defendants 1 to 3 (who are respondents 1 to 3 in C.A. Nos.7254-7256/2002). They are aggrieved by the judgment and decree of the Division Bench in O.S.A. No.12/1992 (arising from the specific performance suit) and O.S.A.No. 148/1999 (arising out of the money suit) whereby the Division Bench directed defendants 1 to 3 to jointly repay Rs.3,50,000 with interest at 9% per annum during the period the plaintiff was not acting as a caretaker till the date of payment. Defendants 1 to 3 urge the following contentions :

> (a) In their written statement (filed in the specific performance suit), their offer was to repay the amount advanced was a conditional offer subject to the plaintiff not obstructing the defendants from interfering with the property or filing any frivolous, mischievous or vexatious suit and voluntarily handing over the possession of the property. They had not unconditionally agreed to repay the sum of Rs.3,50,000. As the plaintiff failed to hand over the possession and obstructed the defendants from selling the property, the offer to return the advance had stood withdrawn.

(b) During the pendency of the Original Side Appeals, the plaintiff was permitting to continue in possession as Receiver of the suit properties and she had reaped a huge benefit of more than Rs.37,00,000 due to continuing in possession for about 15 years. As the plaintiff was permitted to retain the said benefit, no further benefit ought to have been given by directing refund of the sum of Rs.3,50,000 with interest.

53. The fact that defendants 1 to 3 received Rs.2,25,000 out of the sale price of Rs.3,75,000 is not in dispute. Similarly, there is no dispute that the fourth defendant had received a sum of Rs.1,25,000 from the plaintiff and agreed to refund the said amount if the sale remained unconcluded or if the agreement of sale was cancelled. The division bench of the High Court found fit to award the said amount, after affirming the decision rejecting the prayer for specific performance, in view of the offer made by defendants 1 to 3 in their written statement to repay the amounts received towards the sale consideration. We have held that the time stipulated for payment of the balance price by the plaintiff was the essence of the contract and when the same was not paid, defendants 1 to 3 were justified in cancelling the sale agreement. But, we also found that there was no provision in the agreement for forfeiture of the amounts already paid, even in the event of breach by the purchaser. On the other hand it provides that if the vendors did not satisfy the purchaser in regard to their title, the amounts received would be refunded. The consistent case of the plaintiff was that the defendants 1 to 3 failed to satisfy her about their title.

54. Further, defendants 1 to 3 in their written statement filed in the specific performance suit had agreed to refund all amounts received by them from the plaintiff. It is true that the offer was conditional upon the plaintiff not creating any hindrance in the way of the defendants by filing false, frivolous and mischievous suits. Though we have affirmed the decision of the learned Single Judge and the Division Bench that the plaintiff is not entitled to the relief of specific performance, it cannot be said that the plaintiff had filed false, frivolous and mischievous suits. In view of the above, in terms of the agreement and in terms of its offer, the plaintiff was entitled to recover the amounts paid by her. A sum of Rs.2,25,000 was paid under the agreement of sale to defendants 1 to 3.

The finding of the learned Single Judge that the sum of Rs.1,25,000 paid by the plaintiff to the fourth defendant was also the consideration for the movables in addition to the consideration of Rs.3,75,000 under the agreement of sale, was not been challenged by the defendants. In the circumstances, the Division Bench was justified in granting a decree in favour of the plaintiff for Rs.3,50,000 with interest. These appeals are therefore liable to be dismissed.

Conclusion :

55. In view of the foregoing the appeals and contempt petitions are disposed of as follows:

(i) C.A. Nos.7254-7256/2002 are allowed in part only in regard to the rate of interest and period for which interest is payable, with respect to the decretal amount of Rs.3,50,000/-. We direct that respondents 1 to 3 shall refund the sum of Rs.3,50,000/- to appellant as directed by High Court, with interest at 12% per annum from 2.8.1981 to the date of payment. Subject to the aforesaid modification in regard

to the period for which interest is payable and rate of interest, the judgment of the Division Bench of the Madras High Court is upheld in its entirety.

(ii) Contempt Petition Nos.28-29/2009 are dismissed.

(iii) C.A. Nos.4641-4642/2003 are dismissed.

(iv) Parties are directed to bear their respective costs.

As a consequence, CS No. 170/1984 and CS No. 302/1989 stand dismissed. CS No. 95/1984 is decreed in part in favour of the appellant for Rs.3,50,000 with interest at 12% per annum from 2.8.1981 to date of payment.

.....J. (R V Raveendran) New Delhi; .....J. July 4, 2011 (K S Radhakrishnan)