

# Velsamy vs Jothi Vayola Rani : 1St on 5 June, 2018

**Author: S.S.Sundar**

**Bench: S.S.Sundar**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 05.06.2018

Reserved on: 08.03.2018

Delivered on: 05.06.2018

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Second Appeal (MD) No.112 of 2012

Velsamy : Appellant / 1st Respondent in  
A.S.No.19 /2010 / 1st Respondent in  
A.S.No.20/2010 / Plaintiff in O.S.

-Vs-

1.Jothi Vayola Rani : 1st Respondent / Appellant in  
A.S.No.19 /2010 / 2nd Respondent in  
A.S.No.20/2010 / 2nd Defendant in O.S.

2.Lingam Nadar : 2nd Respondent / 2nd Respondent in  
A.S.No.19 /2010 / Appellant in  
A.S.No.20/2010 / 1st Defendant in O.S.

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, praying to allow the appeal by setting aside the judgment and decree passed in A.S.No.19 of 2010 and A.S.No.20 of 2010 on the file of the Principal District Court, Thoothukudi, dated 29.09.2011 reversing the judgment and decree in O.S.No.350 of 2003 on the file of the Sub Court, Thoothukudi, dated 12.03.2010.

!For Appellant : Mr.S.Meenakshi Sundaram,  
Senior Counsel  
for Mr.R.Manimaran

^For Respondent 1 : Mr.N.Dilip Kumar  
For Respondent 2 : Mr.G.Prabhu Rajadurai

: JUDGMENT

The plaintiff in the suit in O.S.No.350 of 2003 on the file of Sub Court, Tuticorin, is the appellant in this Second Appeal.

2.The appellant filed a suit in O.S.No.350 of 2003 for specific performance of an agreement of sale dated 09.05.2002 executed by the first defendant in favour of the plaintiff, by directing the first defendant to execute the sale deed in respect of the suit property and to hand over possession.

3.The case of the appellant in the plaint is as follows:

3.1.The suit property was purchased by the first defendant under a registered sale deed dated 18.08.1999. The first defendant approached the plaintiff to sell the property as the first defendant intended to sell the suit property and to settle in Delhi.

3.2.The first defendant orally agreed to sell the property for a sum of Rs.4,50,000/- and received a sum of Rs.50,000/- on 07.01.2002, Rs.1,00,000/- on 01.03.2002, a sum of Rs.50,000/- on 20.03.2002 and another sum of Rs.50,000/- on 10.04.2002 and finally a sum of Rs.1,00,000/- on 09.05.2002. On 09.05.2002, the plaintiff and the first defendant entered into an agreement of sale in writing.

3.3.As per the agreement dated 09.05.2002, the balance of sale consideration, namely, a sum of Rs.1,00,000/- should be paid on or before 31.12.2002. There was a subsisting mortgage and hence, the first defendant agreed to redeem the mortgage and to sell the property.

3.4.Though the plaintiff was ready and willing to pay the balance of Rs.1,00,000/- and was demanding the first defendant to execute the sale deed upon receipt of the balance amount, the first defendant was delaying the execution of the sale under one pretext or other. Further, he was not available in Pudukottai as he went to Delhi.

3.5.In order to cheat the plaintiff, even before the expiry of the time for performance (31.12.2002), the first defendant colluded with the second defendant and sold a portion of the suit property to the second defendant on 25.09.2002. Knowing this, the plaintiff issued the suit notice on 02.12.2002. The first defendant refused to receive the notice and the second defendant sent a reply on 06.01.2003. Thereafter, the plaintiff caused a paper publication on 04.01.2003. The second defendant in response to the paper publication made another publication refuting the allegations.

3.6.The plaintiff is always ready and willing to pay the balance of Rs.1,00,000/- and to get the sale deed executed. After knowing that the first defendant is likely to sell the suit property to a third party, the plaintiff once again issued a notice on 22.07.2003. Again the first defendant refused to receive the same and ignored the notice. In breach of the agreement of sale, the first defendant without issuing any reply to the plaintiff's notice, executed another sale deed in favour of the second defendant on 29.10.2003. The subsequent sale is fraudulent and sham and nominal.

It will not bind the plaintiff. The second defendant has purchased the property knowing fully well the sale agreement in favour of the plaintiff. Hence, the plaintiff is entitled to a decree for specific performance.

4.It is pertinent to mention that though the plaintiff has impleaded the subsequent purchaser namely the second defendant, the relief of specific performance is only against the first defendant.

5.The suit was contested by both the defendants. The first defendant denied the execution of the sale agreement and the receipt of amount as alleged by the plaintiff in the plaint. The first defendant admitted the sale deeds executed by him on 05.09.2002 and 29.10.2003 in favour of the second defendant. The signature of the first defendant in the sale agreement was specifically denied. The second defendant also filed a detailed written statement denying the agreement and the receipt of money in tune with what the second defendant had stated in her reply notice. It was further stated by the second defendant that the payment of amount advanced as alleged by the plaintiff is not supported by any receipt. The second defendant described the sale agreement as a rank forgery and pointed out the contradiction between the notice issued on behalf of the plaintiff and the plaint with regard to payment of advance. The second defendant claimed that she is a bona fide purchaser for value and that therefore, the plaintiff is not entitled to any relief as against the second defendant. Further, it is also the specific case of the second defendant that the second defendant is carrying on business in textiles in the name of Jenifer Textiles in the shop that was put up by the first defendant. The second defendant further pleaded that the sale agreement was not shown in the encumbrance and the second defendant has purchased the property after seeing the encumbrance certificate and hence, she had no knowledge about the sale agreement.

6.The plaintiff examined himself as P.W.1 and examined three others as P.W.2 and P.W.4. P.W.2 and P.W.3 were examined to prove the sale agreement. P.W.4 is an Advocate claims to be a Fingerprint Expert by experience. Though P.W.4 is not attached to any scientific laboratory or Government Department, she has stated in her evidence that she has 35 years of experience. The plaintiff marked Ex.A1 to A17. The first defendant examined himself as D.W.1 and the second defendant was examined as D.W.2.

Defendants marked Ex.B1 to B19. Ex.C1 to Ex.C4 are the report of P.W.4 and the photographs taken by the expert for comparison of signatures.

7.The trial Court after framing necessary issues found that the sale agreement Ex.A1 is proved mainly relying upon the evidence of P.W.4. The contention that the opinion of P.W.4 cannot be believed as she is not qualified to give expert opinion was negated on the ground that objection was not raised at the relevant point of time. The trial Court also found that plaintiff was ready and willing to perform his part of the contract merely by referring to the statement of P.W.2 that he went

to Delhi and asked him to execute the sale deed and the fact that the suit notice was sent to the first defendant. On the issue whether the second defendant is a bona fide purchaser for value or not, the trial Court held that the second defendant is not a bona fide purchaser as the knowledge of second defendant at the time of second sale in October, 2003, is admitted. The Court also relied upon the judgment of this Court reported in 2008 MLJ 766 and held that the second defendant cannot canvas any other issue relating to the transaction emerged between the parties to the agreement of sale. The trial Court also held that the subsequent purchaser cannot raise any other defence which are available to vendor. Even though the first defendant has produced several documents and let in documentary and oral evidence to prove that the plaintiff is a moneylender and that he is in the habit of advancing loan by taking sale agreements, the trial Court rejected the contentions of the first defendant and the documents on the simple ground that no amount of evidence is admissible without pleading. As a matter of fact, even for the contradictions that was pointed out by the defendants between the evidence of plaintiff as P.W.1 and the documents Ex.A1, A6, A8 with regard to payment of advance and other facts, the arguments of the learned counsel appearing for the defendants before the trial Court were negated on the ground that there is no plea in the written statement. After holding that the second defendant cannot canvas the case of first defendant, the trial Court observed that the second defendant, as subsequent purchaser, has failed to make proper enquiry relying upon certain judgments of the Hon'ble Supreme Court and this Court in cases where the subsequent purchaser has failed to make any enquiry as to the nature of possession and title of a person who is in possession. Ultimately, the suit was decreed as prayed for by the trial Court. Aggrieved by the judgment and decree of the trial Court, the first defendant, the second respondent in this appeal, preferred an appeal in A.S.No.20 of 2010 before the Principal District Court, Tuticorin. The second defendant in the suit filed another appeal in A.S.No.19 of 2010 on the file of the Sub Court, Tuticorin.

8.Both the appeals were heard together and disposed of by a common judgment by the learned Principal District Judge, Tuticorin. The lower appellate Court after elaborately considering all the factual and legal issues came to the conclusion that the sale agreement under Ex.A1 is not proved in the manner required in law. The lower appellate Court also entertained a doubt as to the genuineness of the transaction under Ex.A1 after considering the document filed by the first defendant to show the antecedents of the plaintiff as a moneylender. The final conclusion of the appellate Court is that the plaintiff has not proved the genuineness of the transaction under Ex.A1 and the execution of sale agreement dated 09.05.2002. Having due regard to the discrepancies and the contradictions between the stand taken in the notice, news paper publication and the plaint, the lower appellate Court also held that the plaintiff has not proved the execution of the agreement as well as the passing of consideration. Since the payments of money on various dates are not supported by any receipt or document, the lower appellate Court disbelieved the case of the plaintiff who is also a moneylender. Since the plaintiff ultimately failed to explain several inconsistencies and the unnatural aspects in the whole transactions, particularly, the contradictory stand taken before and after the filing of the suit, the appellate Court held that no relief can be given in favour of the plaintiff.

9.Sum and substance, the appellate Court found that the entire case of the plaintiff is unbelievable and that therefore, the equitable relief of specific performance cannot be granted in favour of the

plaintiff. Since the trial Court has not considered the important aspects of the case in a proper perspective, the appellate Court set aside the judgment of the trial Court and allowed the appeal. As a result, the suit was dismissed. Aggrieved by the judgment and decree of the Principal District Court, Tuticorin, as against the judgment and decree in A.S.19 of 2010 and A.S.No.20 of 2010, this Second Appeal has been preferred by the plaintiff.

10. At the time of admitting the second appeal, the following substantial questions of law were framed:

- (i) Whether the 1st appellate Court is correct in law in coming to the conclusion that the appellant is in the habit of getting sale agreement in lieu of loan transaction, when it is not the case as pleaded by the 1st respondent herein?
- (ii) Whether the subsequent purchaser can take any defence apart from that he is bona fide purchaser as against the proposed vendor in a suit for specific performance?

11. Though the questions of law framed by this Court even if answered in favour of the appellant, it is to be seen that the plaintiff / appellant may not get the relief of specific performance and hence, this Court permitted the appellant to raise other points as well. With regard to the first question of law that was framed by this Court, this Court can agree with the legal proposition that no amount of evidence will be looked into without any pleading. In this case, the plaintiff has come forward with a suit for specific performance on the basis of an agreement of sale under Ex.A1, dated 09.05.2002. The execution of agreement of sale is specifically denied by the defendants. In such circumstances, it is open to the first defendant to prove the conduct of plaintiff as a moneylender and only in the context of the present case, when the genuineness of the agreement is an issue, the first defendant produced several documents to show that the plaintiff is in the habit of advancing loan against sale agreements. The habit of getting the sale deed and the attitude of plaintiff in getting either registered sale agreement or receipt even while advancing small amount to other persons are certainly relevant. Having regard to the situation in the present case, where the genuineness of the sale agreement is an important issue, this Court do not see any irregularity in the judgment of the appellate Court where several documents were considered to arrive at a finding with regard to the transaction entered into by the plaintiff with others as a moneylender. Hence, the first question of law is answered in favour of the respondents.

12. As far as the question whether the subsequent purchaser can take any defence apart from the claim as a bona fide purchaser as against the proposed vendor in a suit for specific performance, the controversy is now settled. In *Ram Awadh (Dead) by L.Rs and others v. Achchaibar Dubey* and another reported in 2000 (2) SCC 428, the Hon'ble Supreme Court has held that the subsequent purchaser can also raise a contention that the plaintiff was not ready and willing to perform his part of the contract in a suit for specific performance. This judgment of the Hon'ble Supreme Court was also followed by the Hon'ble Supreme Court in the case of *Azhar Sultana v. B.Rajamani and others* reported in 2009-3-L.W. 911. With regard to the genuineness of the agreement Ex.A1, the plaintiff / appellant has not even raised a substantial question of law challenging the specific findings of the

lower appellate Court on this issue. The appellate Court having regard to the over all circumstances of the case, has specifically found that the plaintiff failed to prove the transaction under Ex.A1 as a bona fide sale transaction and that he is not entitled to the relief of specific performance based on Ex.A1 which is not proved in accordance with law. The other two questions of law raised by the appellant are as follows:

- (i) Whether the first appellate Court is correct in coming to the conclusion that the appellant has not come with clean hands when there is no specific pleadings and evidence and when there is no specific point for determination to that effect.
- (ii) Whether the first appellate Court is correct in not discussing about the conclusion arrived at by the first appellate Court on the basis of the pleadings and oral evidence let in by respective parties.

13.As regards the questions of law framed above, it is pertinent to note that the appellate Court of course is required to frame points for determination as required under Order 41, Rule 31 of C.P.C. Even in the case where the points for determination are not framed, this Court and the Hon'ble Supreme Court had occasions to hold that whether the appellate Court applied its mind and discussed all the factual and legal issues advanced before the Court elaborately this Court will not set aside the judgment merely because there was a failure on the part of the appellate Court to frame appropriate points for determination. In this case, the lower appellate Court has framed the points for consideration in the following manner.

?14.The points for consideration in both the appeals are as follows:-

- (1) Whether the plaintiff entered into any sale agreement in respect of the plaint schedule property and in lieu of that he paid certain amount aggregating to Rs.3,50,000/- on different dates or not?
- (2) Whether the sale agreement dated 09.05.2002 was actually executed by the first defendant agreeing to sell the schedule property for the total sale consideration of Rs.4,50,000/- in favour of the plaintiff or not?
- (3) Whether the plaintiff is entitled to the decree of specific performance or not?
- (4) Whether the judgment and decree of the trial Court is legally sustainable or not?
- (5) To what other relief??

14.In a suit for specific performance, the Court has a discretion as the equitable relief cannot be granted as a matter of routine in every case where the agreement is proved. The Court can refuse to exercise its discretion to grant equitable relief even in a case where the agreement is proved, after considering the overall circumstances particularly with reference to:

(a) the conduct of the plaintiff before and after the sale agreement.

(b) delay and laches on the part of the plaintiff in filing the suit for specific performance.

(c) hardship that is likely to be caused to the defendants in view of the delay in filing suit or thereafter.

15. There are several other factors on the basis of which relief for specific performance can be negated. In such circumstances, the lower appellate Court need not frame an issue whether the appellant has come to Court with clean hands or not as the Court can give a finding as to the conduct of the plaintiff while answering the issue whether the plaintiff is entitled to the equitable relief of specific performance. Hence, this Court is unable to see any substance in the first question of law framed in the memorandum of grounds as extracted above.

16. The next question of law raised in the grounds is somewhat misleading. This Court presumes that the appellant wants to submit that the findings of the lower appellate Court are not supported by appropriate pleading and evidence. Unfortunately, no argument was advanced by the learned Senior Counsel appearing for the appellant with reference to any specific instances where the appellate Court has rendered a finding based on no evidence or not supported by specific plea or a finding which is inconsistent with the plea raised by the parties. However, in the course of arguments, this Court is able to gather that the focus is on the genuineness of the sale agreement Ex.A1. The lower appellate Court has categorically held that the plaintiff failed to prove the transaction under Ex.A1 as a bona fide sale agreement. The first defendant in his written statement has simply denied the sale agreement and put the plaintiff to strict proof. It is not his specific case that he signed the agreement but it was in relation to a loan transaction. The learned Senior Counsel appearing for the appellant submitted that the trial Court has found that the agreement is genuine and that the plaintiff has proved the signature of the first defendant in Ex.A1 sale agreement. The evidence of P.W.4 a Fingerprint Expert is also relied upon by the trial Court to hold that the plaintiff has proved the execution of Ex.A1 sale agreement by the first defendant. It was pointed out then by the learned Senior Counsel appearing for the appellant that the appellate Court has not traversed or considered the findings of the trial Court on the genuineness of the sale agreement Ex.A1.

17. In this case, the main issue that was considered by the lower appellate Court is about the genuineness of the transaction under Ex.A1 and the execution of the sale agreement Ex.A1 by the first defendant. The trial Court simply believed the evidence of P.W.4 the Fingerprint Expert. However, the appellate Court considered the issue with reference to various facts and circumstances apart from several documents and materials produced by the first defendant to prove his case. The fact that the plaintiff is a moneylender is not seriously disputed. The first defendant has produced several documents to show that the plaintiff used to get sale agreement as a security for loan transactions. The first defendant himself has executed some of the documents in favour of the plaintiff. The plaintiff as a moneylender is in the habit of getting stamped receipts or registered agreements while advancing loan even for a small value. However, the plaintiff states that he had advanced a sum of Rs.3,50,000/- on various dates to the first defendant pursuant to the oral

agreement. This oral agreement is not supported by any independent evidence. If the plaintiff is a moneylender and he advanced to the tune of Rs.3,50,000/- to the first defendant on various dates, there must have been some evidence or some documents to vouch the payment or receipts. In the absence of any document to prove the payment of a sum of Rs.3,50,000/-, it is natural for the appellate Court to raise a doubt as to the genuineness of the transaction under Ex.A1, particularly, when the recitals in Ex.A1 is contrary to the plea that is now raised by the plaintiff not only in the plaint but also in the notice and paper publication effected by the plaintiff.

18.The lower appellate Court has not of course discussed about the genuineness of the sale agreement with reference to the expert opinion. In this case, the documents Ex.C1 to C4 and the evidence of P.W.4 have to be considered. Surprisingly, it is seen that P.W.4 is a practicing Advocate in Bangalore and she says that she is an expert because of her experience as a Fingerprint Expert for more number of years. P.W.4 admits that she is not specially qualified to give opinion. But she states that she follows a method suggested by a foreign author to give her opinion. P.W.4 is not a technical expert in the sense that her experience and quality of knowledge cannot be assessed as in the case of persons who is working in a forensic laboratory or Government department or a private agency of high reputation. P.W.4 justify her opinion based on a book she used to refer. P.W.4 states that no special qualification is required to give opinion. When it is not shown that P.W.4 possessed special skill or knowledge, it is not safe to rely upon her opinion. Further, P.W.4 has not accounted for the dissimilarities. Having regard to the evidence of P.W.4 and the document Ex.C1 to C4, particularly, the report, this Court is not impressed to believe the evidence of P.W.4. The appellate Court has considered several aspects and circumstances, particularly, with regard to the conduct of the plaintiff as moneylender. In such circumstances, this Court has no hesitation to confirm the findings of the appellate Court that the plaintiff has not proved the sale agreement Ex.A1 as a bona fide sale agreement.

19.The learned Senior Counsel appearing for the appellant though argued that the second defendant has not proved that she is a bona fide purchaser for value, it can be seen that the appellant has not raised any grounds challenging the findings of the lower appellate Court. The only ground that is raised is that the second defendant as a bona fide purchaser for a value cannot raise any defence as to the genuineness of the sale agreement or as to the readiness and willingness of the plaintiff. Be that as it may, the admitted facts in this case would disclose that second defendant had no knowledge about the sale agreement at the time when she purchased the portion of the suit property under Ex.B3, dated 25.09.2002. It was only thereafter there was exchange of notices and ultimately, the second defendant purchased the other portion of the suit property under Ex.B4, dated 29.10.2003. The second defendant is a bona fide purchaser for value when she purchased the portion of the property under Ex.B3. However, the second defendant purchased the remaining portion under Ex.B4 dated 29.10.2003 with the knowledge of the claim of plaintiff under Ex.A1 sale agreement. Since this Court has confirmed the findings with regard to the genuineness of Ex.A1, the question whether the second defendant is a bona fide purchaser for value or not may not be relevant. However, for the sake of convenience, this Court can safely hold that the sale agreement cannot be enforced as against the second defendant insofar as the property purchased by her under Ex.B3, dated 25.09.2002.



20. Apart from advancing substantial arguments on all the points raised by the learned Senior Counsel appearing for the appellant, the learned counsel appearing for the respondents also pointed out that the plaintiff is not entitled to the equitable relief of specific performance on account of the long delay and laches on his part in approaching the Court for the relief of specific performance. Secondly, the learned counsel pointed out that on account of the delay in filing the suit, the second defendant had established business in the property purchased by her under Ex.B3 and that she had commenced the construction of residential house in the remaining property conveyed under Ex.B4. On the question of delay, the learned counsel appearing for the respondents pointed out that the suit was filed on 10.11.2003. It is pertinent to mention that the defendants refuted the contract even in the notice that was issued in December, 2002. As a matter of fact, even on 06.01.2003, in the reply notice that was sent by the second defendant under Ex.A5 the sale that was made in favour of the second defendant in respect of the portion of the suit property was referred to. Therefore, the plaintiff knew about the sale deed executed by the first defendant in favour of the second defendant even on 06.01.2003. However, the suit was filed after a lapse of more than 10 months thereafter without any explanation as to why the plaintiff should wait for. This unexplained delay, according to the learned counsel appearing for the respondents, would disentitle the plaintiff from getting the relief of specific performance. Further, the learned counsel appearing for the respondents submitted that this time lag on the part of the plaintiff in filing the suit and the constructions put up by the second defendant for her residence is a factor which would come in the way of exercising discretion to grant the equitable relief of specific performance in favour of the plaintiff. The learned counsel relied upon a judgment of the Division Bench of this Court in the case of B.Nemi Chand Jain and another v. G.Ravindran and others reported in 2010 (2) CTC 751. Paragraphs 196 to 200 in the said judgment are relevant and hence, extracted below:

?196. As we have pointed out, the plaintiffs appear to have come to know about the sales in favour of defendants 4 and 5, even in December 2007. Otherwise, they could not have come into possession of the xerox copies of the Sale Deeds (filed as Exx.A-29 to A-34) executed in favour of defendants 4 and 5. The certified copies of those Sale Deeds were filed by the plaintiffs as Exx.A-35 to A-40, at the time of re-examination of PW-1, after he was confronted in cross examination as to how he got into possession of the xerox copies. The certified copies filed as Exx.A-35 to A-40 were applied for and obtained by the plaintiffs on 16.4.2008. But even on 23.1.2008, they were served with caveats and the plaintiffs waited for 90 days to file the suit and obtain an order of injunction on 28.4.2008. This time lag on the part of the plaintiffs in filing the suit, probabalises the case of the defendants 4 and 5 that there was a demand for money from the plaintiffs. Such a demand had emboldened the defendants 4 and 5 to proceed with the constructions and also process their applications before various authorities, for obtaining approval for establishing a Medical College. The efforts of defendants 4 and 5 have ultimately borne fruit, in the form of necessary approvals, though in July 2009. If the plaintiffs had been steadfast in their stand for specific performance right from the beginning and approached the Court even in December 2007 or at least in January 2008 when caveats were served, the defendants 4 and 5 could have been denied the benefit of equity now pleaded by them. By their act of omission, to initiate action at the earliest point of time and by

their act of commission in giving out an impression that they may ultimately settle down for a monetary claim, the plaintiffs have allowed the defendants 4 and 5 to change their position and alter the character of the property. Consequently, the grant of specific performance would involve hardship on defendants 4 and 5 due to the acts of the plaintiff subsequent to the contract. Therefore, the case falls under the exception carved out in Explanation 2 to Section 20(2).

197. Adverting to the report of the Advocate Commissioner, filed before the trial Court, we have pointed out that by the time the suit was filed, the defendants 4 and 5 had already put up huge constructions. Though these constructions appear to have been put up illegally, without the sanction of the appropriate authority, the illegality has now been set right and even the Government of India have granted approval for the establishment of the Medical College. Though this is a subsequent event, the Court is bound to take note of the same.

198. In *Gulabbai vs. Nalin Narsi Vohra* {1991 (3) SCC 483}, the Supreme Court referred to its various earlier decisions and held in para 25 that it is beyond the pale of any doubt that in appropriate cases, events subsequent to the filing of the suit can be taken notice of and can be duly considered provided the same are relevant. Again in *Om Prakash Gupta vs. Ranbir B. Goyal* {2002 (2) SCC 256}, the Supreme Court in para 11 held as follows:-

"11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;

(ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and

(iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise."

199. Therefore, we cannot turn a blind eye to the subsequent event, of the grant of approval by Government of India to defendants 4 and 5 for establishing a Medical College in the suit property. But for this subsequent event and but for the wrong signals that the plaintiffs had sent from December 2007 upto the date of institution of the suit on 28.4.2008, we would have granted a decree for specific performance in favour of the plaintiffs, in view of our finding that (i) Ex.A-1 was an Agreement of Sale (ii) that the plaintiffs were always ready and willing to perform their part of the obligations and (iii) that the defendants 4 and 5 were not bona fide purchasers for value without notice. The grant of specific performance as on date, would involve severe hardship on defendants 4 and 5. Pointing out that the doctrine of comparative hardship and severe hardship are recognised in

India, the Supreme Court cited "Chitty on Contracts" in paragraph-30 of its decision in K.Narendra vs. Riviera Apartments (P) Ltd {1999 (5) SCC 77} as follows:-

"30. Chitty on Contracts (27th Edn., 1994, Vol. 1., at p. 1296) states:

"Severe hardship may be a ground for refusing specific performance even though it results from circumstances which arise after the conclusion of the contract, which affect the person of the defendant rather than the subject- matter of the contract, and for which the plaintiff is in no way responsible."

The above decision was relied upon in V.Muthusami vs. Angammal {2002 (3) SCC 316}.

200. Even in a case where very small improvements were made, the Supreme Court rejected the prayer for specific performance, in Janardhanam Prasad vs. Ramdas {2007 (3) MLJ 721}. It was held in paragraph-18 of its said decision as follows:-

"18. Furthermore, the applicant is in possession of the said land. He had dug a well. He had made improvement on the suit land. Digging of well as also making improvements was within the notice of the respondent. The witnesses examined on his behalf had categorically admitted the same. In that view of the matter too, in our opinion, it was a fit case where the discretionary jurisdiction of the Court under Section 20 of the Specific Relief Act should not have been exercised and, instead, monetary compensation could be granted (See M.Meenakshi and Others vs. Metadin Agarwal (Dead) by LRs. And Others {2006 (7) SCC 470})"

21. In this case, it is admitted that the second defendant has constructed a house at heavy cost in the suit property. The events subsequent to the sale agreement before and after the suit are therefore relevant and this Court in view of the irreparable injury that is likely to be caused to the second defendant is not inclined to interfere with the findings of lower appellate Court.

22. Regarding the issue whether the plaintiff can be denied the relief of specific performance on the ground of delay, the learned counsel appearing for the respondents, relied upon the following judgment of a Division Bench of this Court in the case of G.Chelliah Nadar and others v. Periasami Nadar and others reported in 1993-2-MLJ, 272 wherein it has been held as follows:

?12. In Ramaswamy v. Venkatachalam (1976)1 M.L.J. 243, Ismail J., has refused specific performance on the ground that the plaintiff had filed the suit making false allegations. He held that the falsity of the case directly impinged on the essential ingredients and elements necessary for claiming the relief. The falsity of the case put forward by the plaintiff disentitled him from obtaining the discretionary reliefs specific performance of agreement. In Vyapuri v. Vijayan, 1978 T.L.N.J. 62, the Court found that a sum of Rs. 11,000 was not paid as advance as contended by the plaintiff and that what was paid was only a sum of Rs. 1,000. The Division Bench comprising of Isamil and Nainar Sundaram, JJ. pointed out that the remedy of specific

performance is an equitable remedy and is in the discretion of the Court, which discretion has to be exercised according to recognised principles of law and not arbitrarily. The plaintiff who comes to the Court with a false case in material ingredients necessary for the grant of relief of specific performance will not be entitled to the equitable relief at all. It is obvious that in the present case the appellant has based his relief on Ex.A-1 after making interpolation so as to make it appear that he has a right in it. And on the ratio laid down in the decisions referred to above even this is sufficient to refuse the relief to the appellant. In addition we have already seen that there is unexplained delay on the part of the appellant in seeking the remedy. In the circumstances, the learned trial Judge has rightly refused specific performance.?

23.The learned counsel appearing for the respondents relied upon another judgment of a Division Bench of this Court in the case of Govindappa Naidu v. C.Sidda Chetty and others reported in 2003-3-L.W. 479 wherein it has been held as follows:

?22. The plaintiff issued the notice on 10.11.1979 for which a reply was sent on 14.11.1979 by Chennappa Chetty stating that the time for performance has expired and the plaintiff is not entitled to claim the relief of specific performance. Even thereafter, the plaintiff kept quiet. Chennappa Chetty died on 28.01.1980 and the suit was filed on 18.06.1980. We are of the view that nothing prevented the plaintiff from instituting the suit immediately after the receipt of reply notice dated 14.11.1979 Ex.A.3 sent by Chennappa Chetty or soon after the death of Chennappa Chetty.

23. It is well established that the plaintiff need not produce the actual cash before the Court to show that he was ready and willing to perform his part of the contract. However, the plaintiff should establish his capacity to pay money and he was ever ready and willing to perform his part of the contract. We find on evidence that the plaintiff has not established that he has the requisite financial capacity to pay the sale consideration either within the time stipulated in the agreement or within a reasonable time thereafter. The plaintiff approached the Court only after the sale deed was executed in favour of the seventh defendant by the second defendant on 26.05.1980 and till then he was keeping quiet and there is absolutely no evidence to show that he was ready and willing to perform his part of the contract.?

24.The learned counsel appearing for the respondents also relied upon a judgment of the Hon'ble Supreme Court in the case of Saradamani Kandappan v. S.Rajalakshmi and others reported in 2011 (4) CTC 640 and my judgment in the case of Balakrishnan and others v. P.Veni and others reported in 2017 (5) CTC 249 wherein unexplained delay has been quoted as a reason for denying specific performance to the plaintiff who has approached the Court with unexplained delay even though the suit is well within the time.

25.This Court after going through the records and the findings of the lower appellate Court is fully convinced that the findings of the appellate Court are well founded and supported by pleadings and

evidence both oral and documentary. The substantial questions of law are answered against the appellant. Hence, this Court has no hesitation to dismiss this second appeal.

26. One more aspect in this case is about the enforceability of the decree even if it is granted in favour of the plaintiff. The plaintiff has not prayed for specific performance as against the subsequent purchaser namely the second defendant. Though the second defendant is a subsequent purchaser, the suit was filed only after the entire property was sold in favour of the second defendant under Exs.B3 and B4. The plaintiff also knew that the suit property has been sold in favour of the second defendant under Exs.B3 and B4. The plaintiff's averments would prove this. In such circumstances, the suit prayer for a decree for specific performance as against the first defendant alone is not appropriate. Practically the suit prayer cannot be enforced against the second defendant.

27. For all the above reasons, this Second Appeal is dismissed. The judgement and decree in A.S.No.20 of 2010 on the file of the Principal District Court, Tuticorin, dated 29.09.2011 reversing the judgment and decree in O.S.No.350 of 2003 on the file of the Sub Court, Tuticorin, dated 12.03.2010 are confirmed. There is no order as to costs.

To

1. The Principal District Court, Tuticorin.

2. The Sub Court, Tuticorin.

3. The Section Officer, Vernacular Records, Madurai Bench of Madras High Court, Madurai.

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