Mrs.A.Kanthamani(Defendant) vs Mrs.Nasreen Ahmed(Plaintiff) on 27 October, 2006

Author: A.C.Arumugaperumal Adityan

Bench: A.C.Arumugaperumal Adityan

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.127 of 2000

Mrs.A.Kanthamani(Defendant) .. Appellant

vs.

Mrs.Nasreen Ahmed(Plaintiff) ..Respondent

Prayer: This Appeal has been filed against the decree and Judgment dated 30.10.1

For Appellant : Mr. S.Nageswaran
For Respondent : Mr. R.Karunakaran

JUDGMENT

This Appeal has been preferred against the Decree and Judgment in O.S.No.135 of 1996 on the file of the VIII Additional Judge, City Civil Court, Chennai. The Defendant, who has lost her defence before the trial Court, is the appellant herein.

2. The averments in the plaint in brief relevant for the purpose of this case are as follows:

> 2(i) The Defendant is the owner of the plaint schedule property. On 05.03.1989 she entered into an agreement with the plaint for sale in respect of a part of ground floor of the said property described in schedule 'B' to the plaint together with 1/3 undivided share in the property described in schedule 'A' for Rs.3,43,200/-. The

original of the agreement has been filed by the plaintiff. The plaintiff paid an advance of Rs.1,30,000/- on 5.3.1989 and a further advance of Rs.20,000 on 3.4.1989. The plaintiff also orally agreed to sell to the Defendant an additional area of 132.25 sq.ft in the ground floor and = of undivided share and the plaintiff paid Rs.46,000/- for the sale of the additional property. The plaintiff on 10.11.1989 sent a draft sale deed for 847.25 sq.ft and = undivided share. The Defendant went back on her promise to sell the additional area in the ground floor and treating the advance of Rs.46,000/- for this additional area as advance under the original written agreement and sent her draft sale deed for approval on 4.12.1989. The plaintiff has accepted this way of treating Rs.46,000/- as advance under the original agreement.

2(ii) Again on 15.12.1989 the Defendant sent another draft sale deed which is the same as the first draft except for deletion of clauses 18 and 27 and minor changes. Since these deleted clauses referred to clauses 17 and 24 of the agreement of sale the plaintiff approved the first draft which contained these clauses. But the Defendant wrote on 27.12.1989 insisting on the approval of her second draft on or before 31.12.1989.

2(iii) The plaintiff on 28.12.1989 sent the second draft sale deed approving it. By her counsel's letter dated 30.12.1989 she gave sufficient time to the Defendant to get the income tax clearance certificate for registering the sale deed. By letter dated 3.1.1990 the Defendant cancelled the agreement and refused to sell the property to the plaintiff.

2(iv) The plaintiff was ever ready and willing to buy the property. She paid advance as demanded and borrowed Rs.1,00,000/- from the Life Insurance Corporation of India to pay the Defendant. She was at all times and now also ready to pay the balance of Rs.1,47,200/- towards the purchase money of the said property to the Defendant. She was ready to get the approved draft engrossed on non-judicial stamp papers.

2(v) The Defendant has not executed any instrument of transfer. The Defendant presumably had second thoughts and took all possible steps to avoid the sale. The defendant's husband even met the official of the Life Insurance Corporation personally and tried in dubious ways to prevent the sanction of the loan to the Plaintiff. Time was not of the essence of the contract. There was a tenant in the portion to be sold to the plaintiff. Vacant possession was to be given at the time of sale. The Defendant did not know when the tenant would vacate but hoped the tenant would vacate by 31.12.1989 and promised possession by that day. If possession could not be granted by that day the Defendant undertook to pay interest at 18% on the advance given. According to her she obtained possession on 03.12.1989 only. The refusal of the Defendant to sell is not legal and valid. Hence the plaintiff has filed the suit for specific performance of the contract.

3. The Defendant in his written statement would contend as follows:-

3(i) In 'B' schedule property to the plaint the extent is wrongly mentioned as 735 sq.ft whereas as per the agreement the extent agreed to be sold is only 715 sq.ft. The plaintiff has paid an advance of Rs.1,30,000/- on 5.3.1989, but he has paid only Rs.10,000/- on 3.4.1989 and another Rs.10,000/- was paid only on 4.5.1989. The Defendant has not orally agreed to sell an additional area of 132.25 sq.ft in the ground floor ad one half undivided share. Absolutely there is no oral agreement of sale as alleged by the plaintiff. This Defendant has not received Rs.46,000/- towards the sale of additional property. A sum of rs.46,000/- was paid by the plaintiff only towards the advance for the sale of the suit property and not for the bed room. The amounts were paid on three occasions as follows:

i). Rs.15,000/- on 3.7.1989

ii) Rs.15,000/- on 6.7.1989

iii)Rs.16,000/- on 16.8.1989.

Even receipt issued by the Defendant reads as follows:-

"Received on 3.7.1989, rupees fifteen thousand only from Mrs.Nashreen Ahmed towards payment for ground floor Flat Portion at 193, Loyds Road, Gopalapuram, Madras-86"

The receipt given by the Defendant on the second occasion reads as follows:-

"Received on 6.7.1989 rupees fifteen thousand only from Mrs.Nashreen Ahmed towards payment for ground floor Flat Portion at No.193, Lloyds Road, Madras-86".

On the third occasion only the date and amount were not noted, eventhough a separate receipt was given to the Plaintiff. As stated in Clause 17 of the agreement, the portion in the ground floor retained by the Defendant is the bedroom. The receipt refer to the Flat Portion and not the bedroom. But still the plaintiff concocted a false case of oral agreement in respect of the bedroom and tried to snatch the bedroom portion and extra land share also and that too for the very same price quoted in the agreement of sale for the Flat portion. Further the plaintiff claimed exclusive right to use the portion marked "A' in the plan eventhough she was given only limited right to park her vehicles in the said place.

3(ii) The Defendant denies the averments in the plaint to the effect that she went back on her promise to sell the additional area in the ground floor and treating the advance of Rs.46,000/- to the additional area as advance under the original written agreement and sent her draft sale deed for approval, and that the plaintiff accepted this way of treating Rs.46,000/- as advance under the original agreement. The plaintiff sent a draft sale deed for 847.25 sq.ft and half of the undivided share in the land. On seeing the draft sale deed, the Defendant was shocked though the totally false averments in the draft sale deed. Solely with a view to grab defendant's property for the very same

sale price of Rs.3,43,200/- which was agreed as the price for only 715 sq.ft of plinth area and 1/3 undivided share, under the agreement of sale dated 5.3.1989. If the sum of Rs.46,000/- was given separately as advance for the additional area viz. The bedroom and additional share of land, then the sale price could never be Rs.3,43,200/-. A reading of the draft agreement of sale sent by the Plaintiff to the Defendant would prove beyond doubt that the plaintiff is acting malafide and dishonestly with a view to grab at the defendant's property by deceitful means. Hence the plaintiff who has not come forward with clean hands to seek the equitable remedy of specific performance is not entitled for the said remedy in the circumstacnes of this case.

3(iii) The Defendant states that notwithstanding the above attempted fraud, the plaintiff had also falsely filed up one of the blank printed forms signed by the Defendant to be given to the LIC as if the Defendant had agreed to sell 860 sq.ft. When this Defendant protested, she corrected it to 715 sq.ft. By this act, the plaintiff had not only tried to create false records against the Defendant, but also tried to mislead the LIC and to get loan. The sequence of events and the correspondence between her and the plaintiff have not been clearly stated. A perusal of the correspondence would clearly prove that the plaintiff had not approved the drafts sent by the Defendant and had been dragging her feet for more than two weeks. Only at the last minute the plaintiff sent a letter to the Defendant which reached her on 30.12.1989 that she is approving the draft of the Defendant. By that time, the time fixed for the completion of the transaction viz. 31.12.1989, has almost come to an end. In this respect the Defendant submits that it has been agreed that time is the essence of the contract. In fact clause 3 of the agreement specifically states as follows:-

> "The sale shall be completed not later than 31st December, 1989, and on delivery of vacant possession"

The Defendant was keeping the vacant possession of the suit property ready for sale. The plaintiff was never ready and willing to buy the suit property as per the agreement of sale. Instead she laid malicious claim over an extent, which she is not entitled to and it cannot be said that the plaintiff was ever ready to purchase the property as per the agreement of sale. The Defendant was very reasonable and it is the act of the plaintiff which forced the defendant to cancel the agreement. It is false to allege that the defendant's husband met the officials of the LIC and tried to prevent the sanction of loan to the plaintiff.

3(iv) It is false to state that time was not the essence of the contract. As stated above it is specifically agreed between the parties that time is the essence of the contract. In fact only on that basis, long time was fixed (nearly 10 months) for the performance of the contract. Having dragged on the matter till the end, the plaintiff is not entitled to say that time is not the essence of the contract. The Defendant had kept the suit property vacant from 3.12.1989 itself and the plaintiff was also informed by the Defendant about this fact, by her letter dated 15.12.1989. Hence, handing over vacant possession was not an issue at all as is sought to be made out by the plaintiff. The plaintiff is also entitled to get any compensation and for specific performance in law, justice and equity. The plaintiff fraudulently laid claim over an extent of 847.25 sq.ft and = share in the land for the very same sale price, totally contrary to the terms of the agreement of sale. She has misrepresented to the LIC as if the Defendant has agreed to sell 847.25 sq.ft. Hence, the plaintiff who has not come

forward with clean hands is not entitled to the equitable remedy of specific performance. By claiming a large extent of property, she is not entitled to the relief under the agreement. The plaintiff has violated one of the essential terms of the contract. She has also acted at variance with or in subversion of the relation intended to be established by the contract. Hence under Section 16(b) of the Specific Relief Act, the plaintiff is not entitled for specific performance of the contract.

3(v) The plaintiff at the first instance was not ready and willing to purchase the suit property as per the agreement of sale. The agreement relates to a portion in the ground floor and an undivided 1/3 share in the land. The Defendant and her family are residing in the first floor. The defendant's husband is using the ground floor bedroom portion for his office purpose. The plaintiff has acted dishonestly and tried to cheat the Defendant by trying to knock off the bedroom also with an extra share in the land without paying any amount. After this and after the transaction fell through, the relationship between the plaintiff and defendant became strained and not cordial. Hence, if the plaintiff is given the relief of specific performance, and if the plaintiff occupies the ground floor with undivided interest in the 1/3rd share in the land, it will lead to perennial problem for the Defendant. As such the performance of the contract would involve heavy hardship on the Defendant which she did not forsee, whereas its non-performance would involve no such hardship on the plaintiff. In the light of Section 20(b) of the Specific Relief Act, the discretion of this Court may not be exercised in favour of the plaintiff. The suit is vexatious and not maintainable in law and there is no cause of action. Hence the suit is liable to be dismissed.

4. On the above pleading the trial Court has framed five issues and one additional issue and after careful scrutiny of the documentary and oral evidence let in by both the parties, has come to a conclusion that the plaintiff is entitled to a decree for specific performance of contract on the basis of Ex.A.2-sale agreement dated 5.3.1989 in respect of the plaint schedule property, giving two months time to execute the sale deed and further giving one month time for the plaintiff to deposit the balance of sale consideration of Rs.1,47,200/-. Aggrieved by the findings of the learned trial Judge, the Defendant has preferred this appeal.

5. Now the point for determination in this appeal is whether the plaintiff was always ready and willing to perform his part of the contract in terms of Ex.A.2-sale agreement dated 5.3.1989 in respect of the plaint schedule property or whether there is a personal bar for the plaintiff under Section 16(c) of the Specific Relief Act, 1963, to ask for the relief of specific performance since she has deviated from the terms of the contract?

6. The point:-

> 6(i) The learned counsel appearing for the appellant would attack the Judgment of the learned trial Judge on the following grounds:
>
> As against the terms and conditions of Ex.A.2-sale deed the plaintiff has asked for additional extent of 847.25 sq.ft and claimed one half share in the suit property as against the original agreement for sale in respect of 715 sq.ft and 1/3 undivided share in the land. The learned counsel further contend that as per Section 16(b) of the

Specific Relief Act, since the plaintiff has deviated and violated the essential terms of the contract and also acted willfully at variance with the terms of the contract, she is not entitled to the relief asked for in the plaint.

6(ii) Ex.A.2 is the sale agreement in respect of the plaint schedule property dated 5.3.1989 entered into between the plaintiff and the Defendant in respect of 1/3 undivided share in the land described in 'B' Schedule to Ex.A.2 along with a part of ground floor at an area of 715 sq.ft. The sale consideration under Ex.A.2 is Rs.3,43,200/- and on the date of Ex.A.2 itself an advance of Rs.1,30,000/- was paid by way of cheque drawn in Bank of Baroda bearing No.017979 dated 5.3.1989. Both the parties have agreed to complete the sale not latter than 31.12.1989 and on delivery of vacant possession. The plaintiff in the plaint has averred in paragraph 5 and 6 that there was an oral agreement between the parties to sell an additional area of 132.25 sq.ft in the ground floor and one half undivided share and that on the said basis Rs.46,000/- was paid towards advance. At paragraph 6 of the amended plaint the plaintiff has further stated that a draft sale deed for 847/25 sq.ft (715 sq.ft + 132.25 sq.ft) and one half undivided share was sent to the Defendant on 10.11.1989, but the Defendant went back on her promise to sell the additional area in the ground floor and treating the advance of Rs.46,000/- paid by the plaintiff in respect of the additional area, towards payment for the original written agreement by the Defendant and that the plaintiff has accepted this way of treating Rs.46,000/- as advance under the original agreement. Except this averments in the amended plaint in paragraph 5 & 6 the plaintiff has not claimed any inch of land over and above the agreed area and undivided 1/3 share in the suit property as per the original sale agreement under Ex.A.2-. Even in the relief column at paragraph 17 and also in the plaint schedule the plaintiff has specifically stated that the relief asked for is only in respect of 715 sq.ft and 1/3 undivided share in the plaint schedule property in terms of Ex.A.2-sale agreement.

6(iii) The learned counsel appearing for the appellant relying on 1976(1) MLJ 243 (Ramaswamy Gounder Vs. K.M.Venkatachalam and others), contend that the false allegation in the plaint will not entitle the plaintiff to ask for the relief of specific performance of the contract. The short facts in the above said dictum is that:

"The tenth Defendant in O.S.No.93 of 1968 on the file of the Court of the Subordinate Judge of Salem is the appellant herein. Admittedly respondents two to ten herein entered into an agreement for the sale of certain immovable property for Rs.15,500 under Ex.A.1 dated 14th October, 1967 in favour of two individuals. The first respondent herein obtained an assignment of that agreement from those two individuals under Ex.A.2 dated 25th October, 1967. It is on the strength of this assignment that the first respondent instituted the present suit for specific performance of the agreement under Ex.A.1. The appellant herein, who was the tenth Defendant in the suit, was the purchaser of 2/3 of the suit property under Ex.B.9 dated 27th February, 1968 from Defendants 1 and 3. According to the first

respondent, the appellant herein was a subsequent transferee with knowledge of the existence of the agreement, Ex.A.1, and therefore the sale in his favour would not be binding on him (first respondent). The first respondent stated in his plaint that an advance of Rs.1,500/- was paid on the date of Ex.A.1, that the balance of consideration to be paid was Rs.14,000/- and that under Ex.A.1 five months' time was available for executing and registering the sale deed. According to the first respondent, after the assignemnt dated 25th October, 1967, he had been pressing Defendants 1 to 9 at various times to receive the balance of sale price of Rs.14,00 and to execute the sale deed at his cost, tendered the balance of the sale price of Rs.14,000 to Defendants 1 to 9 on 14th February, 1968 and requested them to execute the sale deed in his name at his cost in respect of the suit properties after receiving the balance of the sale price, but they evaded to execute the sale deed and delayed the matter. His further case was that even prior to 14th February, 1968, he tendered the balance of the sale price on many occasions and requested them to execute the sale deed after receiving the balance of the sale price and that they delayed and evaded to execute the sale deed. His further case in the plaint was that on 16th February, 1968 he and his assignors had issued a notice to Defendants 1,2,3,5 and 6 calling upon them to come to Petanaickanpalayam Sub Registrar's office on 24th February, 1968 with defendants 4 and 7 to 9 and then to execute and register a proper sale deed in favour of the first respondent, after receiving the balance of the sale price of Rs.14,000 at his cot. The Defendants 1 to 3, 5 and 6 had received the said notice. The first respondent went to Pethanickenpalayam Sub-Registrar's Officer on 24th February, 1968 within whose jurisdiction the suit properties were situated for the purpose of registration with necessary stamp papers and with the balance of the purchase money of Rs.14,000/- for payment of Defendants 1 to 9. The first respondent had gone to the sub-Registrar's Office on 24th February, 1968, with one Rama Gounder, his son Perianna Gounder and one Annaswami and Chinna Pillai, Defendant 1, 3 and 6 came to the Sub-REgistrar's office on the said date and they evaded to execute the sale deed in favour of the first respondent. The subsequent request made by the appellant Written Statement also turned down. But the respondents demanded an extra amount of Rs.500/-. Hence the first respondent issued suit notice to Defendants 1 to 3, 5 and 6. In the reply notice, the Defendants made false allegations fixing the very date of 24th February, 1968, fixed by the first respondent at an unreasonable place for the execution of the sale deed with a view to cover up their default and to evade the execution of the sale deed in favour of the first respondent. The sixth Defendant in his reply notice has stated that he was present on 24th February 1968 at the Sub-Registrar's Officer for execution of the sale deed. The appellant's contention was rejected for the following reasons by the trial judge of this Court:

A) In the reply notice the defendants stated that they would be waiting at the office of the counsel on 24th February, 1968 and asking the first respondent also to come there. In the plaint the first respondent stated that such a notice had been received, but in his evidence he has stated that by 24.2.1968 such a notice was not received and

he did not verify his counsel whether such a reply has been received or not. This is a false deposition of the appellant before the trial Court.

(B) According to the appellant he had asked the Defendants to come to the Sub-Registrar Office on 24.2.1968, but they evaded to execute the sale deed in favour of the first respondent/appellant. As against this, the case of the first respondent was that after the receipt of the notice under Ex.A.6 they sent reply under Ex.A.9, dated 22.2.1968 through counsel stating that it would be proper to have a draft settled before executing the sale deed, that therefore the first respondent should go to the office of the counsel who sent the notice on behalf of the Defendants, on 24.2.1968, where the Defendants would be waiting from 9 am till 12 noon and that, if the first respondetn wanted, they were prepared to go over to the office of his counsel. According to them, having waited in the office of their counsel and the first respondent not having turned up, they went to the Sub-Registrar's officer at pethanickenpalayam and waited there till 5 p.m. But the first respondent did not turn up at the Sub-Registrar's office. Evidence was produced by both the parties to show that they were present at the Sub-Registrar's office. Exhibit A.8 is a registration copy of a mortgage deed for Rs.7,000/- executed by the first respondent in favour of one Perianna Gounder on 24th February, 1969 and registered on that day, showing that the first respondent went to the Sub-Registrar's office at Pethanaickenpalayam, on 24.2.1968. On the other hand, Ex.B.6 dated 24.2.1968 is the registration copy of a mortgage deed for Rs.300 executed by one Periasami Naicker in favour of Ramaswami, showing that D.W.1 was an attesting witness in that case before the Sub-Registrar. Therefore, the evidence clearly established that both the parties were present at the Sub-Registrar's office, though in the pleadings the first respondent stated that the other Defendant evaded executing the sale deed. In the course of his evidence as P.W.3, the first respondent completely went back on his pleadings in the plaint. He categorically stated in his evidence that Defendants 1, 3 and 6 did not come to the Sub-Registrar's office, but evaded executing the sale deed, he went to the extent of stating that he did not make any such statement in the plaint and thereafter he went back on his statement and stated that he did not read the plaint. This is the second falsehood putforth by the appellant.

C) In Ex.A.6 as well as the averments contained in the plaint, wherein the first respondent sated that on 14.2.1969 and even prior to it he had tendered the entire balance of Rs.14,000/- to the Defendants and called upon them to execute the sale deed, but they were evading to execute the sale deed. On the other hand it is clear from his own evidence though the Ex.A.8 was a mortgage executed by him on 24.2.1968 for Rs.7,000/- for the purpose of getting that amount for paying to the defendants for obtaining the sale deed. In one portion of his evidence in chief-examination he stated that he executed the mortgage, Ex.A.8 for getting money for the purchase of the suit property. In his subsequent evidence, however, he went back on this statement and stated that he had borrowed a sum of Rs.7,000/- from Rama Gounder, that for the balance he had his own money, that he had thus the sum

of Rs.14,000/- ready with him and that the mortgage under Ex.A.8 was for the purpose of repaying the handloan obtained from Rama Gounder.

Only on the above allegations of falsehood, the learned Judge of this Court has held in the said appeal as follows:-

"The falsity of the case put forward by the first respond herein clearly disentitles him from obtaining the discretionary relief of specific performance of the agreement.

Under Section 16(b) and section 22 of the Specific Relief Act, the said dictum will not be applicable to the present facts of the case because except the pleading in paragraph 5 and 6 to the amended plaint in respect of the oral agreement the plaintiff has not asked for any relief on the basis of the oral agreement in the plaint nor scheduled more area in the plaint schedule deviating from the terms of the agreement entered into between the parties under Ex.A.2.

6(iv) The learned counsel appearing for the appellant relying on 1979(1) MLJ 270 (A.M.Gandhisan Vs. Ayyasami), contended that the plaintiff in the plaint has stated that as per the oral agreement in respect of an additional plinth area of 132.25 sq.ft, an advance of Rs.46,000/- was paid to the Defendant, but subsequently he would say that the Defendant agree to adjust the above said advance of Rs.46,000/- towards balance of sale consideration for the original written agreement under Ex.A.2. According to the learned counsel for the appellant, this plea of the plaintiff is unfair. The facts of the above said dictum is that:

"The Defendant is the owner of the plaint schedule property, which is an extent of 9 acres 51 cents of dry land with a house therein. On 9.11.1972, the Defendant executed an agreement for sale in favour of the plaintiff undertaking to sell the property to him for a sum of Rs.14,000/- On the date of Ex.A.1 he received from the plaintiff an advance of Rs.1,000/-. The stipulation in the agreement was that the Defendant should execute the sale deed within three months from the date of Ex.A.1 on receipt of Rs.13,000/- if he committed a breach of the agreement, he should pay the plaintiff Rs.3,000/- as damages. Similarly, if the plaintiff failed to take the sale deed on payment of Rs.13,000/- he had to pay the Defendant Rs.3,000/- by way of damages. The Defendant did not comply with the terms of the agreement. Therefore the plaintiff issued Ex.A.2 notice to the defendant on 23.1.1973 calling upon him to execute the sale deed in terms of Ex.A.1. Since the Defendant did not send any reply, the plaintiff filed the suit for specific performance of the agreement for sale evidenced by Ex.A.1. The plaintiff averred in the plaint that Ex.A.1 agreement for sale was executed by the Defendant pursuant to a panchayat and in the presence of the panchayatdars. The plaint further mentions that prior to the execution of A1, the agreement for sale, the Defendant had purchased the suit property under Ex.B.4 dated 1.8.1972. According to the plaintiff though in the document the sale consideration is mentioned as Rs.20,000/- the Defendant really paid only

Rs.10,000/-. This averment has been evidently made to show that actually the plaintiff agreed to purchase the property from the Defendant for Rs.4,000/- more than what the latter paid to purchase the property under Ex.B.4. The Defendant paid Rs.10,000/-.

In the written statement the Defendant had stated that at the time when he executed Ex.A.1 he was not aware of the contents of the document and that he could neither read nor write Tamil. He was informed by the plaintiff and the panchayatdars that he would be paid a sum of Rs.22,000/- which is made up of Rs.20,000/- which he paid for taking Ex.B.4-sale deed and Rs.2,000/- which he spent on the purchase of stamp papers. In fact, according to the Defendant, it was on the basis of these representations that were made to him he signed Ex.A.1. He therefore contended that the plaintiff is not entitled to a decree for specific performance.

Instead of paying Rs.22,000/- under the sale agreement, the plaintiff has actually paid only Rs.10,000/- in the above said case. Only under such circumstances, it has been held by this Court in the said appeal as follows:-

"The plaintiff took an unfair advantage and used his position against the Defendant to compel him to sell the property to him under the agreement and so the relief of specific performance cannot be granted to the plaintiff."

But in the case on hand, even the advance amount of Rs.46,000/- said to have been paid by the plaintiff to the Defendant on the basis of the oral agreement was subsequently been agreed upon by the Defendant to be adjusted towards the balance of sale consideration under Ex.A.2-written agreement. This fact has been admitted. According to the plaintiff a sum of Rs.15,000/- was paid on 3.7.1989 and another sum of Rs.15,000/- was paid on 6.7.1989 and another sum of Rs.16,000/- was paid on 16.8.1989. So the total amount of advance paid as indicated above, according to the plaintiff was on the basis of oral sale agreement for additional plinth area and also for one half undivided share. The plaintiff in his plaint at paragraph 5 & 6 has categorically stated that the Defendant has not agreed to sell more area, but he agreed to adjust the above said amount(Rs.46,000/-) paid by him towards the balance of sale consideration due under Ex.A.2-sale agreement. This fact has been proved by Ex.B.4-document wherein the Defendant himself has given credit to the above said amount(Rs.46,000/-) paid towards advance under three instalments as stated above. Ex.B.4 is the draft sale deed sent by the Defendant on 4.12.1989. Even in Ex.B.4 draft sale deed sent by the Defendant also this position has been clarified i.e. Rs.46,000/- has been credited towards advance for the amount due under Ex.A.2-sale agreement. So the above dictum will not be applicable to the present facts of the case.

6(v) The another dictum relied on by the learned counsel for the appellant is reported in AIR 1996 SC 2814 (Lourdu Mari David and others vs. Louis Chinnaya Arogiaswamy and others). The learned counsel for the appellant relying on the above dictum would contend that the plaintiff is not entitled to any equitable relief because he has not come forward with clean hands to the Court on the ground that the contention of the plaintiff regarding oral agreement for an additional plinth area has been

rejected by the trial Court. While answering issue No.1 the learned trial Judge has given a clear finding that except Ex.A.2-sale agreement there is no proof for any specific plea for an oral agreement between the parties to convey over and above 132.25 sq.ft in the suit property and one half undivided share in it. But one important point to be noted is that even in the said finding the learned trial Judge has stated that there is an agreement for sale under Ex.A.2 between the parties in respect of 715 sq.ft and 1/3 undivided share in the land in the suit property. The important point to be noted in this case is that even though the plaintiff has averred in paragraph 5 and 6 to the plaint in respect of oral agreement for an additional area of 132.25 sq.ft and also for one half undivided share in the land in the suit property, he has not asked for any relief in respect of the additional area of 132.25 sq.ft or for undivided one half share in the plaint. The claim of the plaintiff in the plaint is only on the basis of Ex.A.2-sale agreement. Even in the schedule of properties to the plaint the plaintiff has confined himself only to the schedule of property mentioned in Ex.A.2-sale agreement and one on the basis of the oral agreement for any additional area. The facts of the above said dictum is that:

> " The plaintiff seeking specific performance of the agreement to purchase an immovable property, approached the court with incorrect fact and false facts. The petitioner in that suit had filed O.S.No.6/1977 on September 10, 1980, before the Second Additional Sub-Judge at Pondicherry for specific performance of the agreement of sale dated October 18, 1976 to convey the property in possession as tenants under the agreement. It is their case that a sum of Rs.31,000/- was sale consideration and a sum of Rs.4,000/- and odd was paid as part consideration. The balance consideration was Rs.26,500/-. He was always ready and willing to perform his part of the contract but the respondents were avoiding to execute the sale deed. Though the trial Court found that respondents 1 and 2 committed breach of the agreement of sale but denied to them specific performance of the agreement on the ground that respondent No.3 was a bona fide purchaser for value without notice of prior agreement with the petitioner. The petitioner filed the appeal in the High Court. Pending appeal, he died. Therefoe, his legal representatives have come on record. The learned single Judge by judgemnet and decree dated September 11, 1980 agreed with those findings and held that the 3rd respondent was a bona fide purchaser without notice of the agreement. In the impugned Judgment,the Division Bench rejected the claim on the additional ground that the plaintiff did not come to the Court with clean hands. Therefore, he is disentitled to the relief of the specific performance. Under Section 20 of the Specific Relief Act, 1963, the decree for specific performance is in the discretion of the Court but the discretion should not be refused arbitrarily. The discretion should be exercised on sound principles of law capable of correction by an appellant Court.
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> Since it has been proved in the above said appeal that the plaintiff has approached the Court with incorrect and false facts it has been held has follows:-
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> "It is settled law that the party who seeks to avail of the equitable jurisdiction of a Court and specific performance being equitable relief, must come to the Court with

clean hands. In other words the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief. The division Bench has pointed out in the judgement three grounds which disentitle the plaintiff to the equitable relief as he came with a positive case of incorrect and false facts as set out in paragraph 4 to 6 thus:

On a perusal of the records we are entirely in agreement with the view expressed by the learned Judge. It is quite clear that the plaintiff has not come to Court with clean hands. There are three circumstances which are pointed out by the learned Judge and we find that they are sufficient to warrant refusal of the claim for specific performance. First is that the plaintiff claimed that he was already in possession of Door No.2/53 as a lessee and he was given possession of Door No.1/53 on the date of the agreement itself, viz., 18.10.1976 by Defendants 1 and 2. But, in the course of evidence he did not say anything about taking possession pursuant to the sale agreement. On the contrary, he deposed falsely that he did not mention in the plaint about getting possession of Door No.1/53 on 18.10.1976. it is mentioned in the evidence that Door No.1/53 was not given to theplaintiff at any time in December, 1976. The tenant who was occupying the said portion has vacated the same and gave possession to Defendants 1 and 2 who in turn handed over the same to third Defendant. Thus, the case of the plaintiff regarding possession of Door No.1/53 is false. Learned counsel contends that there was no mention in the plaint as to the date on which he took possession of Door No.1/53. This contention is not correct. In paragraph 5 of the plaint it is mentioned specifically that in pursuance of the agreement, the plaintiff who was in possession of item No.2 was given possession of item No.I on that date and that he was in possession of both the items since then under the agreement dated 18.10.1976. This plea is clearly false. D.W.3 who was occupying Door No.1/53 has given evidence that the portion was vacated on 12.12.1976 by his father by taking a sum of Rs.2500/- from the prior owner. The plaintiff has himself stated as P.W.1 that the tenant delivered possession to the owner of the property on 15.12.1976. That belied his case that he had taken possession even on the date of agreement viz. 18.10.1976. But, in another place P.W.1 has stated that the tenant of Door No.1/53 vacated the portion on 5.12.1976. Thus, his evidence is not only false, but also discrepant.

The second circumstance is that the plaintiff has made an express allegation in paragraph 7 and 9 of the plaint that he informed the third Defendant in the first week of December 1976 about the agreement when the third Defendant inspected the house for the purpose of purchasing the same. This plea is also false. P.W.1 has not chose to make a whisper about this in his deposition. On the other hand, it is contended that there is no denial of the said allegation in the written statement but it is not correct. In the written statement, the third Defendant has clearly stated that at no time he had any talk with the plaintiff and he was never informed about the agreement with the plaintiff.

> The third circumstance is that the plaintiff claimed that he had paid a sum of Rs.400/- in addition to the sum of Rs.4,000/- paid as advance to the second Defendant at the latter's request for vacating Door No.1/53. In the deposition he had stated that he had mentioned the same, in his plaint, but it is not so. It is also a false plea as found correctly by the learned Judge. The above three circumstances are sufficient to uphold the refusal of specific performance. It has been held by this Court repeatedly that a person who has come to Court with a false plea is not entitled to the equitable relief of specific performance."

So in the case on hand it cannot be said that a mere averment regarding oral agreement in the plaint will not derive us to a conclusion that the plaintiff has not come to the Court with clean hand because he has not asked for any relief in the plaint on the basis of the above said oral agreement. So the contention of the learned counsel for the appellant that the plaintiff shall be branded as a liar cannot hold any water.

6(vi) Yet another flimsy ground adverted by the learned counsel appearing for the appellant is that the plaintiff has failed to enter into the box to depose her case. On this point the learned counsel relied on AIR 1983 MADRAS 169 (H.G.Krishna Reddy & Co. Vs. M.M.Thimmiah). The fact in brief in the said dictum is that:

> "On 26th Jan.1974, the second respondent executed a receipt Ex.P.1 for Rs.3,000/- in favour of the first respondent. The receipt recited that a sum of Rs.3,000/- was being received towards the agreed price of Rs.1,22,500/-, for the sale of the suit property by the second respondent in favour of the first respondent. It further stated that the salewas to be completed within 45 days from the date of the advocate for the first respondent passing the title deed. Among others, there was a further clause to the effect that the second respondent should execute a regular contract for sale on a stamp paper within 15 days from the date of the receipt and that if the transaction was not or could not be completed within the said 45 days or the extended time for any reason, the second respondent should return the amount of advance with interest thereon at 12 per cent per annum from that date. Thereafter, in Feb.1974. The first respondent sent Ex.P.4 draft agreement of sale to the second respondent for his approval and signature.
>
> The second respondent returned the draft agreement of sale to the first respondent suggesting certain amendments. Subsequently, some correspondence ensued between the parties. Ultimately, on 22nd Feb.1974, the counsel for the second respondent wrote to the counsel for the first respondent stating that the second respondent did not propose to keep the contract for sale alive and that he could not execute any agreement for sale. He also returned the sum of Rs.13,000/- which had been paid by the first respondent towards the advance of sale consideration. It is common ground that on 28th Mar.1974, the first respondent received the cheque for Rs.13,000/-, from the second respondent without prejudice to his right under the contract for sale. It may also be mentioned that on 15th June, 1974, the second

respondent sold the suit property to the appellant for a sum of Rs.1,10,000/-. It is, in these circumstances, the first respondent filed the suit for the specific performance of the agreement for sale entered into by the second respondent with him in respect of the suit property.

The second respondent in his defence contended that there was no concluded contract for sale of the suit property between the first respondent and him. He further contended that Ex.P.1 receipt did not by itself constitute a concluded contract, but contemplated a written agreement for sale being entered into between the parties. The counsel for the first respondent did not approve the title of the second respondent and wanted further particulars from the respondent to enable him to pass the title as good. Though the second respondent received a draft agreement for sale and a cheque for a sum of Rs.10,000/- he returned the draft agreement with suggestion for effecting certain amendments. But the first respondent did not agree to the amendments suggested by the second respondent. It is the further case of the second respondent that he informed the first respondent that he could not give a good title within a reasonable time and stated that if the first respondent would wait for some time and also give a further sum of Rs.60,000/- for the payment of his debts, he would complete the sale transaction or else he would treat the contract as cancelled. Since the first respondent did not agree to the terms of the second respondent. Pursuant to the cancellation of the contract for sale, the first respondent also received back the sum of Rs.13,000/-. Thereafter, the second respondent sold the property to the appellant for a sum of Rs.1,10,000/-.

.....

one of the points that arises for consideration is whether the appellant is a bona fide purchaser for value without notice of the contract for sale. D.W.1 a partner of the appellant firm had given evidence regarding the payment of consideration. The first respondent has not gone into the box. There is clear evidence to show that the appellant purchased the property for value. As regards notice D.W.1 has given evidence that he was not aware of the contract for sale, that before purchasing the property he inspected the property, when one Jaraman a gumastha and Athimoolam the watchman were present and no business was being carried on there. The first respondent has not gone into the box to rebut the evidence given by D.W.1.

Only under such circumstances, it has been held in the above appeal that the non-examination of the first respondent is fatal to the case of the plaintiff. It has been held by the Division Bench of this Court as follows:-

" In the circumstances, it was the duty of the first respondent to have gone into the box and given evidence that notwithstanding the acceptance of Rs.13,000/- he was willing and ready to perform his part of the contract. To give a further opportunity to the first respondent at this stage to let in evidence over again before the trial Judge

> would be to permit him to fill up the lacuna in the evidence at the expense of the appellant."

In this case even though the plaintiff has not examined as a witness, her husband was examined as P.W.1. Yet another circumstance to be noted in this case is that the plaintiff is a Muslim lady. P.W.1 has produced Ex.A.1-letter given by the plaintiff authorizing her husband P.W.1 to depose in this case. P.W.1 has spoken to the effect that the plaintiff was always ready and willing to perform her part of the contract. The learned counsel appearing for the appellant would contend that even in the cross-examination P.W.1 has admitted that his wife was in employment even before her marriage. But there was no evidence to show that even after the marriage the plaintiff was employed. All the facts relevant for the purpose of this case to prove the case of the plaintiff has been spoken to by P.W.1 on behalf of the plaintiff. Under such circumstance, it cannot be said that non-examination of the plaintiff being a Muslim lady is fatal to the case of the plaintiff.

6(vii) The next case relied on by the learned counsel for the appellant is AIR 1983 ALLAHABAD 343 (Rahat Jan Vs. Hafiz Mohammad Usman). In the above dictum the facts are as follows:

> "An agreement was executed under which the Defendants agreed to sell the Bhumidhari land owned by them to the plaintiff for a consideration of Rs.20,000/- out of which the plaintiff had paid a sum of Rs.2,600/- on the date of the execution of the agreement clause (a) of the agreement contained the mandatory condition according to which the plaintiff had to pay a sum of Rs.3,400/- to the Defendants within one month of the agreement. The payment of RS.3,400/- to the Defendants was not dependant upon the delivery of possession to the plaintiff. The plaintiff, however, did not pay Rs.3,400/- as he had all along been insisting that the money would be paid to the Defendants only after they had put him in possession over the property. In a suit for specific performance of the contract the plaintiff took a stand that under the terms of the agreement the Defendants had undertaken to put the plaintiff into possession within one month and the plaintiff would thereafter pay Rs.3,400/- to them, but the Defendants failed to comply with the terms of the agreement.
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> In the above pleadings the plaintiff has failed to plead that he was ready and willing to perform his part of the contract. Only under such circumstances, it has been held in the above case that:
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> "The plaintiff's insistence for being put into possession before payment of Rs.3,400/- was not in accordance with the real term of the agreement. The agreement clearly stipulated payment of Rs.3,400/- within one month to the Defendants without there being any condition attached to it. In the circumstances, there was no escape from the conclusion that the plaintiff was not ready and willing to perform his part of the contract. The trial Court, therefore, was right in refusing to grant relief to him."

The above said dictum will also be not applicable to the present facts of the case because in the plaint at paragraph 11 the plaintiff has specifically pleaded that she was ever ready and willing to buy the property. The act of the plaintiff that she was always ready and willing to perform her part of the contract is seen from Ex.A.13, 14, 15 and 16. Ex.A.14 is the telegram sent by the plaintiff to the Defendant on 28.12.1989. The time stipulated under Ex.A.2 to execute the sale deed is before 31.12.1989. In Ex.A14, the plaintiff has stated that the second draft sale deed was approved by the Defendant and it has been signed by the plaintiff and sent by speed post on 28.12.1989 itself and she has further stated that towards the balance of sale consideration LIC has sent a cheque in the name of the Defendant and on registration the same will be given to her and she has been asked to register the sale deed and also instructed the Defendant not to sell the suit property to any one else. Under Ex.A.13-letter dated 28.12.1989 the plaintiff has informed about Ex.A.14-telegram and that the loan applied by her from the LIC to pay the balance of sale consideration was santioned by LIC(Rs.1,00,000/-) and has asked the Defendant to get income-tax clearance certificate immediately and even in Ex.A.13, the plaintiff in crystal clear terms has stated that she is always ready and willing to perform her part of the contract and further she has asked the Defendant to come to the Sub-Registrar's Office and to execute the sale deed after receiving the balance of sale consideration. She has also enclosed alongwith Ex.A.13-letter, written by the LIC regarding the sanction of Rs.1,00,000/- in the name of the vendor (Defendant) and also copy of the draft sale deed duly signed by the plaintiff and also the additional paragraph to be included in the the draft sale deed. Ex.A.15 is the copy of the letter written by the plaintiff to the Defendant dated 30.12.1989. Even on that date she has stated that since 31.12.1989 and 1.1.1990 are being public holidays, she is agreeable to change the clause 26 of the agreement to sale from 31.12.1989 to 10.1.1990 and agree to extend time till 10.1.1990 to execute and register the sale deed. Ex.A.16 is the reply notice sent by the Defendant to the plaintiff for her suit notice under Ex.A.15. She has admitted the payment of sale consideration towards Rs.1,96,000/- by the plaintiff to the Defendant under Ex.A.2-sale agreement. The reply notice was sent only on 3.1.1990. In the reply notice the Defendant has admitted that she had received the approved draft sale deed sent by the plaintiff on 30.12.1989 itself, but she would say that she is unable to get the income-tax clearance certificate before 31.12.1989 because it was a public holiday. Under such circumstances the inference to be made is that the time was not the essence of the contract, that too in respect of an immovable property. The Defendant has asked the plaintiff to get back the advance amount by the month of February 1990. The act of the Defendant itself will clearly go to show that she was never ready to perform her part of the contract whereas even on 28.12.1989 the plaintiff was ready and willing to perform her part of the contract is seen from Ex.A.13 to 15 documents. On the other hand, even on 30.12.1989 it is seen from Ex.A.16-reply of the Defendant that the Defendant was not ready to perform her part of the contract. So the dictum in AIR 1983 ALLAHABAD 343 (Rahat Jan Vs. Hafiz Mohammad Usman) will not be applicable to the present facts of the case.

6(vii) The other ruling relied on by the learned counsel for the appellant is 1997(2) LW 820 (Vasantha and three others Vs. M.Senguttuvan). In that appeal two suits were filed before the trial Court. One for specific performance of the agreement of sale and the other one by the Defendant, owner of the property, for recovery of possession of the property. The specific performance suit was decreed and suit for recovery of possession was dismissed by the trial Court. The lower appellate Court came to the conclusion that the appellant was never ready and willing to take the sale deed at

his expense and he did not have sufficient funds and even though time may not be the essence of the contract appellant was never diligent to take sale deed within a reasonable time that he entered the property not with the consent of the owner, and the construction put up by him was also unauthorised. His suit for specific performance was dismissed, and the respondent's suit for recovery of possession was allowed. Hence the two second appeals were preferred by the plaintiff, who had lost the case before the trial Court. It has been held in that case that:

> " Both the trial Court and the lower appellate Court found that the appellant was not ready to take the sale deed and he was not having sufficient funds. The respondent has satisfied the trial Court that he along with the appellant had been in the office of the Urban Land Tax Authorities, and form them, information was given to the appellant that their sanction was not required for executing a sale deed. It has been further proved by the respondent that he has shown that the property was unencumbered for 14 years, and the appellant was also satisfied about the un-encumbered nature of the property. The evidence was accepted by the trial Court and the findings on those aspects were also not disturbed by the lower Appellate Court. It is a concurrent finding. It has, therefore, to be taken that the respondent has discharged his obligation under the contract."

In the case on hand the plaintiff has paid Rs.1,30,000/- towards advance by way of cheque bearing No.017979 drawn in Bank of Baroda dated 4.3.1989. she has also paid Rs.20,000/- on 3.4.1989 (Rs.10,000/- on 3.4.2989 and another Rs.10,000/- on 4.4.1989) and a sum of Rs.15,000/- on 3.7.1989 and a sum of RS.15,000/- on 6.7.1989 and another sum of Rs.16,000/- on 16.08.1989. The above said payments amounting to Rs.1,96,000/- was paid towards advance for the total sale price of Rs.3,43,200/- as per Ex.A.2-sale agreement. This fact has been admited by the Defendant also. The remaining amount to be paid is only Rs.1,47,200/- out of the above said amount. The plaintiff has applied for LIC loan and it is seen from the letter dated 20.12.1989 from LIC to the plaintiff that the loan amount of Rs.1,00,000/- has been sanctioned and cheque is ready in favour of the Defendant. With regard to the balance of Rs.47,200/- the plaintiff has prepared to give a cheque drawn on Bank of Baroda. The learned counsel appearing for the appellant would contend that as per the terms of Ex.A.2-sale agreement, the plaintiff has to pay the balance of sale consideration only by cash and not by way of cheque and since the plaintiff has said that Rs.47,200/- is to be paid only by way of cheque the inference to be drawn is that the plaintiff was not having sufficient funds to get the sale executed. This contention of the learned counsel for the appellant cannot be sustainable because even the advance of Rs.1,30,000- under Ex.A.2 was paid only by way of Cheque No.017979 drawn from Bank of Baroda dated 5.3.1989. Under such circumstance, the contention of the learned counsel for the appellant that the plaintiff has no sufficient funds to get the sale executed cannot hold any water.

6(viii) The next dictum relied on by the learned counsel appearing for the appellant is 2002(4) LW 125 (Marimuthu Ammal Vs. K.S.Arunachala Iyer & others). In that case a suit for specific performance was dismissed by the trial Court on the ground that there was no oral or documentary evidence to prove that there was a sale agreement between the parties. The learned counsel appearing for the appellant relying on the above said dictum would contend that since there was no

proof for oral agreement in this case the suit filed by the plaintiff to be dismissed. No prudent man will accept the above said contention of the learned counsel for the appellant because the plaintiff in her plaint even though has pleaded about the oral agreement in respect of an additional plinth area of 132.25 sq.ft and also for one half of the undivided share in the land, she has not asked for any relief in the plaint. The property scheduled to the plaint is in consonance with Ex.A.2-sale agreement. The relief asked for in the plaint is also based only on Ex.A.2-sale agreement. Under such circumstance, the above said dictum will not be applicable to the present facts of the case.

6(ix) For the same analogy the learned counsel relied on another decision reported in 1995(3) Current Civil Cases 363 (Khagendra Lall Dutta & Another Vs. Jacob Sole Jacob) wherein also it has been held by the Honourable Apex Court that in the absence of a specific plea no amount of evidence can be looked into by Court. Since there is no relief asked for on the basis of the oral agreement by the plaintiff in the plaint, the suit filed by the plaintiff cannot be rejected on the ground that there was no evidence let in to prove the oral agreement, since there is no relief asked for by the plaintiff under the oral agreement.

6(x) The learned counsel for the appellant relied on 2003(2) LW 447 (Embar Naidu Vs. Rathnam Chettair & another) to the effect that the plaintiff has to prove that she has sufficient funds to perform her part of the contract. The facts of the above said dictum is that:

> "The first Defendant who is the appellant, is the owner of the property. According to the plaintiff, on 23.2.1975, the appellant in the appeal has agreed to sell the suit property to one Gopal Chettiar, who is the second respondent herein, the second Defendant in the suit, free from all encumbrances for a consideration of Rs.53,000/- and he also received a sum of Rs.2,000/- towards advance on that day. If was agreed that the balance of sale consideration should be paid by Gopal Cheittiar within a period of six months. As per the plaint averments, Gopal Chettiar was always ready and willing to pay the balance of sale price and get the sale deed executed and he approached the appellant for the same personally and through his friends, but the appellant refused to execute sale deed. It is stated that Gopal Chettiar also telegraphically contacted the appellant to get the sale deed executed and ultimately he issued a notice on 17.8.1975 for the said purpose, but the appellant did not send a reply. It is stated that on 22.2.1978, Gopal Chettiar assigned all his rights under the sale agreement dated 23.2.1975 in favour of the plaintiff, first respondent herein for a valuable consideration and hence, the plaintiff is entitled to enforce the sale agreement. It is stated that the plaintiff was ready and willing to pay the balance of sale consideration and get the sale deed executed. It is also stated that Gopal Chettiar informed the appellant about the assignment in favour of the plaintiff and since the appellant refused to execute a sale deed, the plaintiff filed the suit for specific performance of the agreement dated 23.2.1975.
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> The second respondent, Gopal Chettiar remained absent and he was set ex parte in the suit. The appellant who figured as the first Defendant in the suit, in his written statement, has questioned the right of the first respondent herein to maintain the

suit. According to the written statement, the plaintiff is a tenant and he wanted to retain the property under the guise of the said agreement. The appellant has denied the case of the plaintiff that time was not the essence of contract, and according to him, at no point of time, Gopal Chettiar was ready with funds and Gopal Chettiar has come forward with a false case in his notice dated 17.08.1975 as if the appellant had refused to receive a sum of Rs.10,000/-. According to him, the assignment in favour of the plaintiff is false and invalid and the plaintiff was not ready and willing to perform his part of the contract.

The trail Court held that the plaintiff got the assignment from Gopal Chiettiar and the assignment was not valid and the plaintiff could not enforce the agreement and there was no cause of action for the suit. The trial Court dismissed the suit.

In appeal the learned Single Judge of this Court has allowed the appeal holding that there is no documentary evidence to show that the plaintiff was not having the money and in view of the trial Court it could not be sustained. Hence the letters Patent Appeal was preferred.

In the Letters patent appeal, the Division Bench has held that Gopal Chettiar in his evidence has not explained as to why he kept quiet after the issue of Ex.A.-1 notice, nor he has stated the reason for his total inaction when he was of the view that the appellant had refused to perform his part of the contract. There is an unexplained delay on the part of Gopal Chettiar and the trial Court was therefore correct in its finding that if Gopal Chettiar was ready to pay the balance of sale consideration and for registration he would have taken steps against the appellant and completed the transaction and despite that, he waited for three years. It is a case where the trial Court found that there was an unexplaied delay on the part of Gopal Chettiar and the plaintiff as an assignor in getting a decree for specific performance.

The Letters Patent appeal was allowed setting aside the Judgment of the learned Single Judge, thereby confirmed the judgment of the trial Court.

In the case on hand there is absolutely no evidence to show that the plaintiff had no sufficient funds to get the sale executed. Under such circumstances, the above said ratio decidendi will not be applicable to the present facts of the case.

6(xi) The learned counsel for the appellant relied on 2004(4) LW 807 (Ranganatha Gounder Vs. Sahadeva Gounder & others) and contended that under Section 16(c) of the Specific Relief Act it is obligatory on the part of the plaintiff both to plead in the Plaint and prove in the Court that he had all along been ready and willing to perform the essential terms of the contract and that the plaintiff has not pleaded in the Plaint that he was not ready and willing to perform his part of the contract. The above said dictum reads as follows:

" Though as general proposition of law that time is not the essence of the contract in the case of a sale of immovable property, yet the parties herein intended to make time as the essence of the contract under the clause referred to in the sale agreement Ex.B.1. When such being the case, the appellant must have produced the evidence indicating that he approached the vendors for execution within reasonable time, though not in three months. The appellant miserably failed to prove the same.

In terms of Section 16(c) of the Specific Relied Act, it is obligatory on the part of the plaintiff both to plead in the Plaint and prove in the Court that he had all along been ready and willing to perform the essential terms of the contract which were required to be performed by him. In other words, in a suit of specific performance, it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, but also he must go further and plead that he has been and is still ready and willing to perform his part of the contract and he has applied to the other party specifically to perform the agreement pleaded by him but the other party, namely, the vendor has not done so.

It is well settled that a person cannot claim the relief of specific performance unless he proves his readiness and willingness to perform his part of the contract. Readiness and willingness to perform includes ability to perform. It is incumbent upon the buyer to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the property and that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money. Unless this is established, Section 16(c) of the Specific Relief Act would create a bar to the grant of this discretionary relief.

There cannot be a dispute with regard to the above proposition of law. In this case the plaintiff at para 11 to the Plaint has specifically pleaded that she is always ready and willing to buy the property. She has further stated in the Plaint and also proved through the documentary evidence to show that she has also applied of a loan of Rs.1,00,000/- from LIC of India and the same was also sanctioned through Ex.A.13-letter dated 28.12.1989 written by the Managing Director of LIC of India to the plaintiff and she has further stated in para 11 to the Plaint that she was at all times ready to pay the balance of Rs.1,47,200/-. But there is no evidence on the side of the defendant to show that that she is ready to perform her part of the contract even on 30.12.1989 i.e. one day before the red letter dated agreed upon between the parties under Ex.A.1 for the completion of the sale. On the other hand it is seen from Ex.A.16 that the defendant is not able to get Income-Tax Clearance Certificate before 31.12.1989. Under such circumstances, it cannot be said that the plaintiff has not specifically pleaded in the Plaint that she was ready and willing to perform her part of the contract, in view of the specific plea at para 11 to that effect by the plaintiff in the Plaint.

6(xii) For the same proposition of law the learned counsel for the appellant relied on AIR 1996 SC 116 (N.P.Thirugnanam Vs. R.Jagan Mohan Rao). In the above case, the appeal was dismissed on the ground that there was lack of evidence to show that the plaintiff, to file the suit for specific performance, was ready and willing to perform his part of the contract. But as indicated above in this case there is sufficient evidence both oral and documentary let in by the plaintiff through P.W.1 to show that the plaintiff was always ready and willing to perform her part of the contract, which enable here to get the benefit under Section 16(c) of the Specific Relief Act.

6(xiii) For the same proposition of law the learned counsel for the appellant also relied on a Judgment reported in 2006(2) MLJ 651 (Yesudass (died) and others Vs. Henry Victor and others), which is also not applicable to the present facts of the case since the plaintiff has proved beyond any reasonable doubt that she was always ready and willing to perform her part of the contract.

6(xiv) The learned counsel for the appellant relied on 1986(2) MLJ 470 (Kalianna Gounder (died) S/o.Komaraswami Gunder and others Vs. Kalianna Gounder, S/o.Appavu Goudner) and contended that time is the essence of the contact. The relevant dictum in the above said case is as follows:

"In Gomathinayagam Pillai Vs. Palaniswami Nadar, (1967)1 SCR 227 : AIR 1967 SC 868, the Supreme Court pointed out that if it is intended by the parties that time is of the essence of the contract, such intention if expressed in writing, must be in language, which is clear and unmistakable, but that it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. It was also further pointed out that intention to make time of the essence of contract may be evidenced by either express stipulation or by circumstances sufficiently strong to displace the ordinary presumption that in a contract of sale of land, stipulation as to the time, is not of the essence of the contract. In the case decided by the Supreme Court there was no express stipulation nor were there circumstances strong enough to indicate that it was the intention of the parties that time was of the essence. On the contrary in this case the terms of the agreement, Ex.A.1 not only make it clear that the intention was to make time of the essence by express stipulation in clear language, but it had also been so understood by the parties by pleading and evidence, so that even on the footing time was not originally of the essence, the parties had agreed to execute the conveyance within the time fixed, in default of compliance of which, other consequences were to follow. On the terms of the Ex.A.1, there is no doubt that the parties had stipulated that time was of the essence of the contract and had also incorporated a clause to that effect and had understood the transaction as a time bound one."

So under such circumstances, it was held in the above said dictum that the plaintiff cannot be entitled to a decree for specific performance of contract as he had failed to prove that he was all

along been ready and willing to perform his part of the contract before the stipulated time. In the case on hand the stipulated period of time for executing the sale deed under Ex.A.2 is 31.12.1989. It is seen from Ex.A.13 to 15 that the plaintiff was ready and willing to perform her part of the contract even on 28.12.1989. But it is seen from Ex.A.16-reply notice of the defendant that she cannot get Income-tax Clearance Certificate before 31.12.1989. The general principle of law is that time is not essence of contract in respect of immovable properties. Under such circumstances the above said dictum will not be applicable to the case on hand.

6(xv) The another ratio decidendi relied on by the learned counsel for the appellant is AIR 1997 SC 1751 (K.S.Vidyanadam Vs. Vairavan) which is also on the same point, wherein it has been held by the Honourable Supreme Court of India as follows:

> "The regor 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 modified, particularly in the case of urban immovable properties. It is high time, the Court do so. In the instant case may be, the parties knew of the circumstance regarding rising prices but they have also specified six months as the period within which the transaction should be completed. The said time limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time isnot made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time limits for taking steps by one or the other party, it must have some significance and that the said time limits cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).
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> In the case on hand the time stipulated under Ex.A.2 was 31.12.1989. The plaintiff has proved that before the stipulated time she was ready and willing to perform his part of the contract. On the other hand, the defendant alone had failed to prove that she was ready and willing to perform her part of the contract. The reply notice-Ex.A.16 itself will clearly go to show that before 31.12.1989 she could not get income-tax clearance certificate. If she would get the income-tax clearance certificate before that date she would have insisted the plaintiff to get the sale deed executed in terms of Ex.A.2 at least on 30.12.1989. It is evident from Ex.A.16-reply notice of the defendant itself that she was not ready with income-tax clearance certificate to execute the sale deed in the terms of Ex.A.2-sale agreement.
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> 6(xvi) The learned counsel for the appellant also relied on AIR 1991 Allahabad 343 (Satya Prakash Goel Vs. Ram Krishan Mission) and contend that the discretionary power of Court under Section 20 of the Specific Relief Act can be exercised only on the basis of jurisdictional principles and not arbitrarily by granting a decree for

specific performance. In the above said dictum the facts are as follows:

" According to the appellant/plaintiff the respondent No.1 had decided to sell the property in dispute by its resolutionNo.8 dated 27.2.1975 and authorised respondent No.2 to sell the property in dispute and entered into an agreement for the said purpose. The respondent No.2 had met and informed the appellant in the second week of June, 1976 that he was intending to sell the property in suit. The plaintiff had, therefore, made his offer to purchase the property for Rs.67,100/-. The respondent No.2 had accepted the offer of sale of the property on as it is basis with all litigation involved in the said property. It was alleged in the Plaint that in this way there was concluded contract between the parties in respect of the property in dispute. The plaintiff-appellant had gone to R.K.Sinha, Advocate of respondent No.2 to get the draft of agreement executed between the contracting parties finalised. But Sri Singha had not finalised it. Thereafter plaintiff-appellant had written letter to respondent No.2 to get the sale deed executed but no reply was given to this letter. Respondents 1 and 2 had sent notice on 20.9.1976 through their Advocate Sri R.K.Sinha denying the contract for sale between the parties. Respondents 1 and 2 sent another notice through their advocate Sri R.K.Sinha to the appellant on 3.11.1976 threatening for disposing their property in suit to defendant-respondents 4 to 6. The appellant has alleged that he was always willing to perform his part of contract.

Respondents 1 and 2 filed separate written statements. They denied that any contract was finalised between the parties. It was however admitted that plaintiff-appellant had made offer of Rs.67,100/- to purchase the property. It was denied that appellant had gone with the draft agreement to Sri R.K. Sinha, Advocate. The respondent had contended on the other hand that when the appellant had approached Sri R.K.Sinha, Advocate he had specifically informed appellant that the agreement shall provide no warranty of title nor shall provide any warranty according to law. The plaintiff had not agreed to these terms. It was urged that as plaintiff-appellant had not agreed to purchase the property without any warranty of title and warranty as provided by law no contract had finalised between the parties. Respondents 1 and 2 admitted that the appellant was certainly informed that the respondents 1 and 2 are intending to sell the property to respondents 4 to 6. It was also alleged in paragraph 22 of the written statement that as plaintiff-appellant had negotiated on behalf of some undisclosed person had no personal interest in the agreement. He had, therefore, no right to maintain the suit for specific performance of contract.

It has been held in the above said case that no concluded contract between the parties. Actually the appellant was not a contracting party acting on behalf of third person. Hence unless the third person had agreed to the terms and condition as stated in Ext.1 there could be no contract at all. The lower Court has rightly decided this point and ultimately the appeal was dismissed.

The above said dictum will not be applicable to the case on hand because in the case on hand Ex.A.2-sale agreement is between the plaintiff and the defendant and the plaintiff has proved that she was always ready and willing to perform her part of the contract. The fact that the plaintiff has not entered into the box will not in any way affect the case of the plaintiff because plaintiff being a Mislim woman her case was putforth by her husband P.W.1. Apart from his oral testimony the case of the plaintiff has been proved by documentary evidence particularly under Ex.A.14 to A.16. Under such circumstances, it cannot be said that the plaintiff is not entitled to the provision contemplated under Section 20 of the Specific Relief Act.

6(xvii) For the same proposition of law the learned counsel for the appellant relied on AIR 1998 SC 2216 (Ganesh Shet Vs. C.S.G.K.Setty). The facts of the above said case are as follows:

"The plaintiff has filed O.S.No.50/1985 before the trial Court for specific performance of contract, after losing the case he has preferred an appeal. There are three defendants, who are brothers and joint owners of the house at Shimoga. The first defendant who was a Professor was working at Delhi. The second defendant was at Madras and the third defendant was at Bangalore. The defendants 2 and 3 gave powers-of-attorney to the first defendant. There were consultations between plaintiff and the first defendant which started in1983 by way telephone calls and letters and after the negotiations reached a final stage the 1st defendant wanted the plaintiff to come to Delhi " for finalising" the proposals. The plaintiff took along with him, one Mr.R;K.Kalyankar (P.W.2) to help him in the negotiations. They took two Bank drafts for Rs.50,000/- and Rs.10,000/- respectively and reached Delhi in January 1984. On 25.1.1984, at the residence of the 1st defendant, a draft agreement of sale was approved by the 1st defendant with small changes made in his own handwriting and the 1st defendant told the plaintiff that he has approved the draft and the contract was concluded. The agreed consideration was Rs.5 lakhs and the purchaser agreed to bear the stamps and registration charges. It ws also agreed that the sale deed was to be executed on or before 30.6.1984 or within a reasonable time and that thereafter the plaintiff would be put in possession. The 1st defendant did not accept the Bank drafts but said he would accept the entire consideration in one lump sum at the time of registration. The plaintiff returned to Shimoga and the further correspondence only confirmed that the defendants would execute the sale deed. The plaintiff received a telegram addressed to P.W.2 that the terms of the agreement were acceptable.

Ultimately they met at Bangalore and it was agreed that plaintiff was to be ready with the entire sale consideration by about 3rd week of June, 1984. The plaintiff raised finances by selling some of his properties. The plaintiff was ready and willing to perform the contract. The 1st defendant came to Shimoga on or about 17.6.1984 but surprisingly he did not meet the plaintiff. On the other hand defendants gave a paper advertisement on 26.6.1984 for sale of the house. Plaintiff then got a registered notice

dated 2.7.1984 issued and defendants 2 and 3 gave a reply dated 31.7.1984. The suit was laid for specific performance of the agreement of sale said to be dated 25.1.1984 entered into at Delhi and for possession and also for permanent injunction restraining alienation by defendants.

It was contended on behalf of the defendants that there was correspondence between parties, the negotiations did not reach any final stage and that there was no concluded contract. There were only proposals and counter proposals. Sale consideration was not Rs.5 lakhs. The 1st defendant had an obligation to consult his brothers. They were not willing for a consideration of Rs.5 lakhs. The 1st defendant did not state, as contended, in any telegram dated 4.4.1984 nor any letter dated 11.4.1984, PW.2 sent another draft agreement(Ex.D11) along with his letter dated 29.3.1984(Ex.P.8) and the 1st defendant made corrections therein, especially regarding consideration, correcting the figure Rs.5 lakhs as Rs.6.50 lakhs apart from other corrections. The 1st defendant did not ask the plaintiff to be ready by June, 1984 for registration as alleged by plaintiff. The agreement produced along with Plaint was only proposal. Plaintiff was, in the meantime, negotiating for another property at Davangere. Plaintiff was not ready and willing.

The trial Court after considering the evidence granted a decree for specific performance. On appeal the High Court reversed the decree of the trial Court and dismissed the suit. Hence the above said Letters patent appeal, wherein it has been held as follows:

"Applying the legal principles referred under Point 3 to the above facts it will be noticed even assuming that a contract dated 28.4.1984 at Bangalore is proved, which in our view, is not proved that this case does not fit into the exceptions stated by Fry on Specific performance inasmuch as this is not a case where there has been part performance by delivery of possession. Nor can it be said that the variation between pleading and proof is immeterial or insignificant. Plaintiff has also refused to amend the Plaint to seek relief on the basis of an agreement dated 28.4.1984, keeping the Plaint as it is.

Nor can this case be brought with the principles applicable to general relief because the Plaint specifically says that there is a concluded contract on 25.1.1984 at Delhi which is belied by the oral and documentary evidence. However liberally the Plaint is construed, all that it says that the 1st defendant came to Bangalore and asked the plaintiff to be ready. It does not speak of any fresh agreement entered into at Bangalore on 28.4.1984. Nor are we able to spell out any such agreement concluded on 28.4.1984. The grant of any general relief on the basis of an agreement of sale dated 28.4.1984 - even if proved - will be doing violence to the language in the Plaint to the effect that the parties concluded an agreement on 25.1.1984. The Letters patent appeal was dismissed."

The only one defence of the learned counsel for the appellant is that the plaintiff has pleaded oral agreement deviating from the terms and conditions entered into between the parties under Ex.A.2-sale agreement. As far as Ex.A.2 is concerned, the defendant cannot go beyond it. Ex.A.2 is binding on both the parties. The plaintiff has filed the Plaint only inconsonance with the terms of Ex.A.2-sale agreement. Under such circumstances, the above said dictum will not be applicable to the present facts of the case.

6(xix) The last decision relied on by the learned counsel for the appellant is AIR 2006 PATNA 145 (Amar Singh Vs. Baliram Singh). The substantial question of law formulated in the above said case were :

> "a) Whether plaintiff is entitled for decree for specific performance of contract when he instituted the suit after long delay in view of the provision of Section 20 of the Specific Relief Act and such delay and inaction amounts to waiver and abandonment of contract?
>
> b) Whether the plaintiff is entitled to sue for specific performance of contract when he did not pursue the remedy under the Indian Registration Act?
>
> c) Whether the finding of the appellate Court reversing the finding of trial Court on payment of part of the consideration money suffers from the vice of non-consideration of oral evidence considered by the trial Court and as such, the finding of first appellate Court is perverse?

In the above dictum it has been held as follows:

> "From perusal of the decisions referred above, it appears that it has been held by the Honourable Judges of the Supreme Court that merely on the ground of delay,the relief for specific performance of contract cannot be refused but if the conduct of the plaintiff is such which is directly responsible in inducing the defendant to change his position to his prejudice then in that situation the relief for specific performance of contract which is a discretionary relief cannot be granted. So, in my view, the conduct of the plaintiff will be important in this case to decide -whether the relief for specific performance of contract for sale can be granted to him or not. It is the admitted case of the plaintiff that the sale deed in question was executed by original defendant Atma Ram Singh on 18.4.1973 (although the defendant Atma Ram Singh has denied this execution). It is also admitted fact that on that date the sale deed could not be presented before the Registrar for registration and the original defendant Atma Ram Singh handed over the said sale deed to the plaintiff and promised to register the sale deed on the next date but then the plaintiff never became ready for registering the same. Thus, it is clear that on 18.4.1973 itself the possession of the sale deed was transferred to the plaintiff but the plaintiff did not take any attempt to get it compulsorily registered within a period of four months, as provided under Section 23 of the Registration Act and even after expirty of the said period the plaintiff never

tried to apply before the registering authorities for condoning the delay under the provisio of Section 25 of the Act. He also did not try to get any summons or notice served upon the original defendant Atma Ram Singh asking him to register the documents.

Under such circumstances, the appeal was allowed setting aside the relief granted for specific performance of the contract in favour of the plaintiff in that suit.

Since the plaintiff in that suit has failed to perform his part of the contract in terms of the contract of sale, it was held that he was not entitled to the provision contemplated under Section 16(c) of the Specific Releif Act. That is not the case here. The defendant even after the receipt of the telegram dated 28.12.1989 has not informed the plaintiff that the defendant is ready and willing to perform her part of the contract by asking the plaintiff to come to the Sub-Registrar s Office at least on 30.12.1989 for present the sale deed for registration. On the other hand the conduct of the plaintiff through out is that she was always ready and willing to perform her part of the contract. Under such circumstances, the above said dictum will not be applicable to the present facts of the case.

6(xx) The plethora of radio recidendi relied on by the learned counsel for the appellant as indicated above are in no way helpful to the case of the appellant. The learned trial Judge on the basis of the oral and documentary evidence has come to a correct conclusion that the plaintiff is entitled to a decree for specific performance of contract on the basis of Ex.A.2-sale agreement, which does not warrant any interference from this Court since the judgment of the lower Court do not suffer from any infirmity or illegality. The point is answered accordingly.

7) In fine, the appeal is dismissed with costs, confirming the decree and judgment passed in O.S.No.6420 of 1996 on the file of the VIII Additional Judge, City Civil Court, Chennai. Time for executing the sale deed is one month.

To, The VIII Additional Judge, City Civil Court, Chennai