M.Sankar Nadar vs Deva Krishnan on 20 January, 2017

Author: M.Duraiswamy

Bench: M.Duraiswamy

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.01.2017

CORAM

THE HONOURABLE MR.JUSTICE M.DURAISWAMY

S.A.(MD)No.511 of 2011
and
M.P.(MD)No.1 of 2011
and
M.P.(MD)No.1 of 2013
and
M.P.(MD)No.1 of 2014

1.M.Sankar Nadar
2.S.Sundar Raj .. Appellants/Respondents/Defendants

Vs.

Deva Krishnan .. Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.9 of 2010, dated 29.06.2010 on the file of the Subordinate Court, Uthamapalayam in reversing the judgment and decree dated 15.12.2009 passed in O.S.No.6 of 2009, on the file of the Principal District Munsif Court, Uthamapalayam.

!For Appellants : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi
^For Respondent : Mr.S.Parthasarathy

:JUDGMENT

The above Second Appeal arises against the judgment and decree passed in A.S.No.9 of 2010, on the file of the Subordinate Court, Uthamapalayam reversing the judgment and decree passed in O.S.No.6 of 2009, on the file of the Principal District Munsif Court, Uthamapalayam.

2. The defendants are the appellants and the respondent is the plaintiff in the suit. The plaintiff filed the suit in O.S.No.6 of 2009 for specific performance and permanent injunction.

3. The brief case of the plaintiff is as follows:

(i) According to the plaintiff, the suit property belongs to the first defendant by virtue of a registered sale deed dated 18.03.1980. The second defendant is the son of the first defendant. The plaintiff entered into a sale agreement dated 05.07.1995 with the defendants for the purchase of the suit property for a total sale consideration of Rs.10,000/- and on the date of sale agreement itself, the entire sale consideration was paid to the defendants. The defendants handed over the possession of the suit property to the plaintiff on the date of sale agreement and since then, the plaintiff has been in possession and enjoyment of the suit property. The defendants also handed over the original sale deed dated 18.03.1980 executed in favour of the first defendant to the plaintiff. In the sale agreement, the defendants agreed to execute sale deed in favour of the plaintiff or in favour of his nominee. On 05.06.2007, the plaintiff orally requested the defendants to execute the sale deed in his favour. However the defendants promised to execute the sale deed in six months' time, since they were employed in Tirupur. Subsequently also, the defendants avoided execution of the sale deed in favour of the plaintiff.

(ii) On 04.01.2009, the plaintiff came to know that the defendants were trying to alienate the suit property to some third parties, since the market value of the property had been increased. The plaintiff was always ready and willing to perform his part of the contract. On 05.01.2009, the plaintiff sent a notice to the defendants for executing the sale deed. On 06.01.2009, the defendants tried to interfere with the plaintiff's possession. In these circumstances, the plaintiff filed the suit.

4. The brief case of the defendants is as follows:

(i) The defendants while denying the averments stated in the plaint, specifically stated the second defendant borrowed a sum of Rs.10,000/- in the year 1991 from the plaintiff and as a security for the said loan, the defendants executed a promissory note in favour of the plaintiff. The defendants also paid interest at the rate of Rs.3/- per Rs.100/- per month. Since the defendants incurred loss in their business, they could not pay the interest to the plaintiff. Since the defendants could not pay the interest to the plaintiff regularly, they handed over the original documents pertaining to the suit property to the plaintiff as security. The defendants had also given the signed blank stamp papers to the plaintiff. The plaintiff informed the defendants that he is obtaining the blank stamp papers only as a security for due payment of the monthly interest. The plaintiff also informed the defendants that in respect of paying the interest, he will have the possession of the suit property and to that effect, he would write a document in the blank stamp paper obtained from the defendants.

(ii) In July 1995, the defendants tried to dispose of the property for discharging the loan availed from the plaintiff. Immediately, the plaintiff prevented the defendants from disposing of the property by using the blank stamp papers and getting the document written on it as though, the defendants agreed to sell the property to him. The defendants are willing to repay the loan amount together with interest from the date of signing the blank stamp paper. The defendants did not receive the notice dated 05.01.2009 alleged to have been sent by the plaintiff. The alleged sale agreement dated 05.07.1995 is not true and genuine and the same is not meant for selling the property to the plaintiff. The transaction between the defendants and the plaintiff is only a loan transaction. In these circumstances, the defendants prayed for dismissal of the suit.

5. Before the trial Court, on the side of the plaintiff, four witnesses were examined and six documents viz., Exs.A.1 to A.6 were marked and on the side of the defendants, the defendant was examined as D.W.1 and seven documents viz., Exs.D.1 to D.7 were marked. The trial Court, taking into consideration the oral and documentary evidences, let in by the parties, dismissed the suit for specific performance, however directed the plaintiff to receive a sum of Rs.10,000/- from the defendants and hand over the possession of the property and also sale deed dated 18.03.1980 to the defendants. The trial Court granted decree for injunction till the defendants pay the sum of Rs.10,000/- to the plaintiff.

6. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal in A.S.No.9 of 2010 and the lower Appellate Court set aside the judgment and decree of the trial Court and decreed the suit for specific performance. Aggrieved over the judgment and decree of the lower Appellate Court, the defendants have filed the above Second Appeal.

7. Heard Mr.V.Meenakshi Sundaram, learned Counsel appearing for the appellants and Mr.S.Parthasarathy, learned Counsel appearing for the respondent.

8. At the time of admission of the Second Appeal, the following Substantial Questions of Law arose for consideration:

?a) Whether the findings of the lower Appellate Court that the suit for specific performance filed in the year of 2009 based upon a sale agreement dated 05.07.1995 is maintainable, when there are no reasons or grounds established by the plaintiff to prove his readiness and willingness all through the time span of fourteen years and there is no explanation for the laches of fourteen years and thus warrants interference under Section 100 of C.P.C?

b) Whether the finding of the first Appellate Court in fixing the limitation from the date of issuance of legal notice i.e., from 05.01.2009 is against the Article 54 of the Limitation Act?

c) Even though the sale consideration is paid in full at the time of execution of agreement for sale, plaintiff should prove that he had been ready and willing to perform the contract from the date of agreement till the date of filing of the suit, without considering this fact the finding of the first Appellate Court that readiness and willingness need not to be proved in cases where sale consideration is paid in full is unjustifiable. Hence warrants interference?

d) Whether the Judgment and Decree of the lower Appellate Court is correct and justified in decreeing the suit in favour of plaintiff when no reason is stated for the delay of 13 years in filing the suit. Even if time is not the essence of contract, it has to be performed in reasonable time.

Hence warrants interference??

9. On 03.01.2017, the learned Counsel appearing for the appellants raised the following additional substantial questions of law, after serving a copy of the additional substantial questions of law on the learned Counsel appearing for the respondent:

?(a) Whether Ex.A.1 (05.07.1995) sale agreement was executed only as security and the transaction in Ex.A.1 was meant to be a loan transaction and not intended to be considered as agreement of sale?

(b) Whether the First Appellate Court was right in exercising the discretion vested with them under Section 20 of the Specific Relief Act??

10. On 03.01.2017, the matter was adjourned to 05.01.2017 enabling both the learned Counsel to make their submissions with regard to all the substantial questions of law raised by the appellants including the additional substantial questions of law. Accordingly, the learned Counsel appearing on either side made their submissions on all the substantial questions of law.

11. The respondent/plaintiff filed a petition in M.P.(MD)No.1 of 2014 under Order 41 Rule 27 C.P.C. to mark additional documents. The respondent sought to mark the judgment and decree passed in O.S. No.26 of 2009, dated 15.12.2009, on the file of the District Munsif Court, Uthamapalayam and the judgment and decree passed in A.S.No.6 of 2010, dated 29.06.2010, on the file of the Subordinate Court, Uthamapalayam as additional documents.

12. O.S.No.26 of 2009 was filed by the appellants for permanent injunction restraining the respondent/plaintiff from preventing them from alienating the suit property in favour of the third parties. After contest, the trial Court granted a decree for injunction restraining the respondent herein form preventing the appellants from alienating the suit property after receiving the sum of Rs.10,000/- from them as decreed in O.S.No.26 of 2009.

13. Aggrieved over the judgment and decree passed in O.S.No.26 of 2009, the respondent herein filed an appeal in A.S.No.6 of 2010, on the file of the Subordinate Court, Uthamapalaym and the

lower Appellate Court reversed the judgment and decree of the trial Court and dismissed the appeal. Before the trial Court, the respondent/plaintiff marked the copies of the plaint and the written statement as Exs.A.5 and A.6.

14. The appellants/defendants have not filed any counter affidavit in M.P.(MD)No.1 of 2014. It is pertinent to note that the appellants cannot dispute the existence of the judgment and decree passed in O.S.No.26 of 2009 and A.S.No.6 of 2010. That apart, the respondent/plaintiff had also marked the pleadings in O.S.No.26 of 2009 as Exs.A.5 and A.6. Therefore, no prejudice would be caused to the appellants if the judgments and decrees of the Courts below are marked as additional documents in this Second Appeal.

15. The learned Counsel appearing for the appellants has no serious objection for allowing the petition.

16. In these circumstances, the petition filed under Order 41 Rule 27 C.P.C., in M.P.(MD)No.1 of 2014 is allowed and the judgment in O.S.No.26 of 2009, dated 15.12.2009 is marked as Ex.A.7, the decree in O.S.No.26 of 2009, dated 15.12.2009 is marked as Ex.A.8, the judgment in A.S.No.6 of 2010, dated 29.06.2010 is marked as Ex.A.9 and the decree in A.S.No.6 of 2010, dated 29.06 is marked as Ex.A.10.

17. Mr.V.Meenakshi Sundaram, learned Counsel appearing for the appellants submitted that the alleged suit agreement was not meant for selling the property to the plaintiff and it can be construed only as a security document for due discharge of the loan amount. The learned Counsel further submitted that the alleged suit agreement is dated 05.07.1995, whereas the suit was filed only on 07.01.2009 i.e., nearly after 14 years from the date of alleged execution of Ex.A.1 sale agreement. The learned Counsel also submitted that in the absence of any evidence let in by the plaintiff to establish that there is no latches in filing the suit, the lower Appellate Court ought not to have decreed the suit. The learned Counsel also submitted that the plaint filed by the plaintiff for specific performance of the agreement is not in conformity with Order 6 Rule 3 C.P.C., and Clause 3 Appendix A. Further the learned Counsel submitted that the plaintiff has not come to the Court with clean hands and therefore, the lower Appellate Court ought not to have granted a decree for specific performance.

18. In support of his contentions, the learned Counsel relied upon the following judgments:

> (i) In K.S.Vidyanadam and Others Vs. Vairavan reported in 1997(1) CTC 628, wherein the Honourable Supreme Court held as follows:
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> ?14. Sri Sivasubramanium then relied upon the decision in Dr. Jiwan Lai and Ors. v. Brij Mohan Mehra and Anr. [1973]2SCR230 to show that the delay of two years is not a ground to deny specific performance. But a perusal of the judgment shows that there were good reasons for the plaintiff to wait in that case because of the pendency of an appeal against the order of requisition of the suit property. We may reiterate that the true principle is the one stated by the Constitution Bench in ChandRani Even

where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.?

(ii) In Smt.Gangabai Vs. Smt.Chhabubai reported in AIR 1982 Supreme Court 20, wherein the Honourable Apex Court held as follows:

?11.The next contention on behalf of the appellant is that sub-s.(1) of s. 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parole evidence in support of the contention. Section 91 of the Evidence Act provides that when the terms of contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Sub-s. (1) of s. 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms And the first proviso to s. 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contradicting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-s. (1) of s. 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub- section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties. Tyagaraja Mudaliyar and another v. Vedathanni. The Trial Court was right in permitting the respondent to lead parole evidence in support of her plea that the sale deed dated January 7, 1953 was a sham document and never intended to be acted upon. It is not disputed that if the parole evidence is admissible, the finding of the court below in favour of the respondent must be accepted. The second contention on behalf of the appellant must

also fail.?

(iii) In Parakunnan Veetill Joseph's Son Mathew Vs. Nedumbara Kuruvila's Son and Others reported in 1987(Supp) Supreme Court Cases 340, wherein the Honourable Apex Court held as follows:

?12. What do these averments mean? They are suggestive of the fact that Ex. B43 and Ex. B44 were executed with a view to close the transaction with Chettiar. Those deeds in the name of Mathew would serve as a source of strength for closing the transaction with Chettiar. Those averments also impliedly suggest that Ex. B43 and Ex. B44 were not obtained to defraud Chettiar from his legitimate rights, if any, under Ex. A1. In this context, the case of Varghese put forward in his written statement appears to assume importance. He has stated that the lease deed and agreement [Ex. B43 and Ex. B44] were executed with the intention of purchasing the property as per the agreement with Chettiar. This is very significant and ought not to be overlooked. It evidently indicates that the lease deed Ex. B43 and the agreement for sale Ex. B44 were obtained from the owners of the estate after taking Chettiar into confidence. We have no doubt about the implied consent of Chettiar for executing those documents and the parties settling his rights under Ex. A1. To put it in other words, Chettiar must have waived his rights to purchase the estate for himself. It is, in our view, plainly to be inferred. There is no escape from this logical assumption, particularly in the absence of evidence of Varghese and Kuruvila. Both of them have kept themselves away from the Court.

14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff The High Court has failed to consider the motive with which Varghese instituted the suit. It was instituted because Kuruvila could not get the estate and Mathew was not prepared to part with it. The sheet anchor of the suit by Varghese is the agreement for sale Ex A1. Since Chettiar had waived his rights thereunder, Varghese as an assignee could not get a better right to enforce that agreement. He is, therefore, not entitled to a decree for specific performance.?

(iv) In Parvinder Singh Vs. Renu Gautam and Others reported in (2004) 4 Supreme Court Cases 794, wherein the Honourable Apex Court held as follows:

?9. A person having secured a lease of premises for the purpose of his business may be in need of capital or finance or someone to assist him in his business and to achieve such like purpose he may enter into partnership with strangers. Quite often partnership is entered into between the members of any family as a part of tax

planning. There is no stranger brought on the premises. So long as the premises remain in occupation of the tenant or in his control, a mere entering into partnership may not provide a ground for eviction by running into conflict with prohibition against subletting or parting with possession. This is a general statement of law which ought to be read in the light of the lease agreement and the law governing the tenancy. There are cases wherein the tenant sublets the premises or parts with possession in defiance of the terms of lease or the rent control legislation and in order to save himself from the peril of eviction brings into existence, a deed of partnership between him and his sub-lessee to act as a cloak on the reality of the transaction. The existence of deed of partnership between the tenant and the alleged sub-tenant would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross examination, making out a case of sub-letting or parting with possession or interest in tenancy premises by tenant in favour of a third person. The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the document is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. Tyagaraja Vs. Vedathanni, AIR 1936 PC 70 is an authority for the proposition that oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different. A lease of immovable property is transfer of a right to enjoy such property. Parting with possession or control over the tenancy premises by tenant in favour of a third person would amount to the tenant having 'transferred his rights under the lease' within the meaning of Section 14(2)(ii)(a) of the Act.?

(v) In Gobinad Ram Vs. Gian Chand reported in (2000)7 Supreme Court Cases 548, wherein the Honourable Supreme Court held as follows:

?It is the settled position of Saw that grant of a decree Tor specific performance of contract is not automatic and is one of discretion of the Court and the Court has to consider whether it will be fair, just and equitable. Court is guided by principle of justice, equity and good consensus. As stated in P. V. Joseph's Son Mathew (supra) the court should meticulously consider all facts and circumstances of the case and motive behind the litigation should also be considered.?

(vi) In Padmakumari and Others Vs. Dasayyan and Others reported in (2015)8 Supreme Court Cases 695, wherein the Honourable Supreme Court held as follows:

?21. The second important legal contention raised by defendant Nos. 12 to 15 is that the pleadings of the plaintiff is not in conformity with Order 6 Rule 3 CPC, clause 3 of Form No. 47 in Appendix 'A', extracted hereinabove. By a careful reading of paragraph 6 of the plaint makes it very clear that the averment as provided under

clause 3 is not in stricto sensu complied with by the plaintiff. The same is evidenced from the averments made at paragraph 6 of the plaint which reads thus:

"6. The plaintiff is ready and willing to perform his part of the contract by paying the balance of sale consideration of Rs. 63,000/- and take the sale deed in accordance with the provisions of the agreement deed dated

19.04.1992."

22. Upon a careful reading of the abovesaid paragraph we have to hold that the plaintiff has not complied with the legal requirement which is mandatory as provided under Section 16 (c) of theSpecific Relief Act. Section 16(c) fell for consideration and has been interpreted by this Court in a number of cases, referred to supra, upon which reliance has rightly been placed and the said decisions are applicable to the fact situation in support of defendant Nos. 12 to 15 and, therefore, we have to hold that the concurrent finding of fact recorded by the High Court on Issue No. 1 is erroneous in law and is liable to be set aside.?

(vii) In Tyagaraja Mudaliyar and another VS. Vedathanni reported in AIR 1936 Privy Council 70, wherein the Privy Council held as follows:

?The Indian legislature has thought well to give statutory effect decision in Pym V. Campbell in proviso 3 to Section 92 :-"

The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract. . . may be proved "; and in Mottayappan v. Palani Goundan (1913) I.L.R. 38 Mad. 226, Benson and Sundara Ayyar JJ. have expressed the opinion that oral evidence to show that a document was never intended to operate according to its terms, 'but was brought into existence, as in the present case, solely for the purpose of creating evidence about some other matter is admissible under proviso 1 to Section 92, " any fact may be proved which would invalidate any document". This may well be so, but in their Lordships' opinion, even if there were no provisos to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract. It was, also, contended that the case came within Section 92, because of the provision recognising the widow's title to the jewels in her possession. The High Court have found that this provision was not intended to operate as an agreement, but was introduced to give verisimilitude to the document, it being usual to make such a provision in agreements for a widow's maintenance. Further, it was held by this Board in the passage already cited from the judgment in Pertab Chunder Ghose v. Mohendra Purkait (1889) L.R. 16 I.A. 233 that if the defendants were told that any stipulation in the agreement would not be enforced, they could not be held to have assented to it. Consequently the document was not the real agreement between the parties, and the plaintiff could not sue upon it. In their Lordships' opinion both the lower Courts were

right in finding on the oral evidence in this case that there was no contract, and they will humbly advise His Majesty that the appeal be dismissed with costs.?

(viii) In Shanthi Kawarbai and Others Vs.Sushila reported in 2009(4)CTC 842, wherein the Division Bench of this Court held as follows:

?21.The very reading of paragraph 2 of the plaint would indicate that all these averments found therein regarding obtaining of exemption from the Urban Land Ceiling Authority and the income tax clearance certificate are contra to what are found in the agreement as stated above. As pointed out earlier, the party who seeks the relief must come with the clean hands. In the instant case, all these averments are contra. Now, at this juncture, it has to be pointed out that while there was an agreement between the parties and it is for the plaintiff purchaser who should obtain the above, she should have done so. Further, the learned Counsel for the respondent/plaintiff would submit that she was ready and willing all along and she has given all the papers for signature and they were actually handed over to the defendants so that they could get exemption cannot be accepted even for a moment. There is nothing to indicate in the entire materials that she has taken steps in that regard. That apart, even though it was insisted by the parties that there was tax arrears at the time when the agreement, Ex.P5, was entered into, and it was also agreed by the plaintiff that she should clear the arrears, she has not even paid a single pie or there is nothing available to indicate that she has paid the tax arrears.

22.Further, the learned Counsel for the respondent would submit that getting vacant possession from the Madras Race Club, who was a tenant at that time, would arise only after the completion of the sale. Even assuming to be so, as far as getting exemption from the Urban Land Ceiling Authorities and also payment of tax which was payable by the defendant owner at that time, the plaintiff has not taken any steps whatsoever. Now, this Court has to point out the readiness and willingness as contemplated under the provisions of the Specific Relief Act. When a suit is filed on the strength of an agreement for sale, what has got to be looked into is whether the plaintiff was ready and willing to perform his part of the contract consistent with the terms found in the agreement. But, in the instant case, the plaintiff has come with contra averments as found in the plaint which would be indicative of the frame of mind of the plaintiff to come with the relief when she should not have been really ready and willing in the past. The Court could further comment that the above averments found in paragraph 2 of the plaint were not only contra to the agreement, but also speak that the allegations are false.

Under the circumstances, it can be well stated that the plaintiff has come forward with unclean hands, which, in the considered opinion of this Court, would suffice to deny the relief of specific performance.

23.It is well settled proposition of law that readiness and willingness must be from the very commencement of the agreement till the completion of the contract. While the readiness must actually indicate the financial position of the purchaser to make payment of consideration, the willingness must speak of his frame of mind. In the instant case, a careful scrutiny of the materials would indicate that they are contrary to the contentions put forth by the respondent/plaintiff's side that she was ready and willing to perform the contract. The Apex Court has held in a decision reported in (1995) 5 SCC 115 (N.P.THIRUGNANAM V. DR.R.JAGAN MOHAN RAO AND OTHERS) as follows:

> "4. It is next contended that the plaintiff was always ready and willing to perform his part of the contract. To buttress it, counsel placed strong reliance on the evidence of PW 2, who had testified that he was willing and prepared to lend a sum of Rs.2,00,000 to the plaintiff on the foot of a promissory note. It is not necessary for the plaintiff that he should keep ready the money on hand. What is relevant and material is that he should have the necessary capacity to raise the funds and was ready and willing to perform his part of the contract which has been demonstrated by the evidence of PW 2. We do not accede to the contention. The trial Judge had pointed out that on an application filed by the defendants, a direction was given to the plaintiff by order dated 11-2-1991 to deposit the amount of Rs.2,00,000 or furnish bank guarantee giving time up to 11-3-1991. He neither deposited the amount nor has given bank guarantee. It was also found that the plaintiff was dabbling in real estate business. He had a house on hire purchase agreement with the T.N. Housing Board. He paid only Rs.7750 up to 1980. A sum of Rs.29,665 was further payable. He had an agreement wide one Annamma Philip for Rs.49,500 to sell the said house after purchase from the Board. Obviously, he had obtained advance and sold the house to his vendee on 7-2- 1980 after getting a sale deed executed in his favour. He entered into an agreement (Ex. P-1) on 9-4-1979 to purchase the suit house for Rs.2,30,000. He was not able to pay the loans and he adjusted Rs.20,000 which was paid towards arrears of rent and paid only Rs.1975 under Ex. P-30 for the sale consideration of his house. He was unable to pay the rent to the respondents and had deposited huge amount towards arrears of rent pursuant to the orders of the courts. PW 2, though professed to be willing to advance a sum of Rs.2,00,000, did not have cash and admitted that he had to obtain Rs.2,00,000 by hypothecating his property and at the same time was willing to lend on a pronote to the plaintiff a sum of Rs.2,00,000, which was hard to believe. These circumstances were taken into consideration by the trial Judge as well as the Division Bench in concluding that the plaintiff was not ready and willing to perform his part of the contract.
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> 5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963 (for short #the Act#). Under Section 20, the court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed

> or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

(ix) In P.Sampoornam and Others Vs. L.T.Somasundaram and Others reported in (2008)3 MLJ 796, wherein this Court held that the relief of specific performance is a discretionary relief and the Courts have to exercise the discretion on sound and justifiable reasons. Further this Court held that in a suit for specific performance, the discretionary relief could be granted only if the plaintiff makes out a case, that too a strong case for exercising the discretion by the Courts and even if a doubt arises whether it is probable or possible that an agreement of sale would have been executed at all, the discretionary relief shall not be granted.

(x) In Mrs.Pappammal @ T.Pappa Vs. Mr.P.Ramasamy reported in 2012-4- L.W. 435, wherein this Court held as follows:

> ?23. In this case also, out of the total sale consideration of Rs.40,000/-, Rs.30,000/- was paid and for the payment of balance sum of Rs.10,000/- five year period was prescribed and therefore, in my opinion, Ex.A.2 was not intended to be an agreement of sale and it must have been executed only as security or as a loan transaction.

24. As stated supra, the appellant had proved that she had dealing with the Vetri Murugan Finance, by marking Ex.B.2 series, and the brother-in- law of the respondent was also one of the Directors of Vetri Murugan Finance Company and he has also filed the suit for specific performance of agreement of sale and therefore, the appellant has proved that preponderance of probabilities would only lead to the conclusion that Ex.A.2 was not intended to be acted upon as agreement of sale and it was given only as security or as loan transaction.

25. The Courts below, without properly appreciating the consideration fixed, advance paid and the time fixed for payment of balance sale consideration, erred in holding that Ex.A.2 was intended to be acted upon as agreement of sale. According to me, the findings of the Courts below are perverse

and is liable to be set aside. Hence, the substantial question of law No.1, is answered in favour of the appellant.

35. In this case, as stated supra, the agreement of sale was not intended to be acted upon and it was only the loan transaction and that is evident from the recitals regarding the consideration, advance paid and the period prescribed for payment of balance sale consideration and the respondent also proved that he was not ready and willing to perform his part of the contract, evenafter refusal by the appellant to execute the sale deed and having regard to the escalation of price, it would be unfair to compel the appellant to execute the sale deed in favour of the respondent, after a elapse of 5 years from the date of agreement of sale. Hence, the substantial question of law No.3 is also answered in favour of the appellant.?

(xi) In M.Johnson Vs. E.Pushpavalli reported in 2016-3 LW 527, wherein this Court held as follows:

> ?8. In a suit for specific performance of an agreement of sale, the following are the necessary factors to be pleaded and proved by the plaintiff: (a) that there is a valid agreement entered into between the parties in respect of the suit property; (b) that the plaintiff is always ready and willing to perform his part of the contract, whereas the defendant is not doing so within the time prescribed for completion of the transaction; (c) that the suit is filed within the period of limitation; and (d) that there is no inordinate or unexplained delay in filing the suit from the date of expiry of the time prescribed under the agreement for the purpose of completion of contract, even though, the suit is filed within the period of limitation. The inordinate or 6 unexplained delay referred to above, though may not be relevant for the purpose of deciding the question of limitation in filing the suit, however, the same would be very much relevant for the purpose of deciding the issue as to whether the plaintiff is always ready and willing to perform his part of the contract from the date of the agreement till the date of filing the suit. 9. In this case, it is true that the suit was filed within the period of limitation. At the same time, the undisputed fact is that six months time was shown as the maximum time limit in the agreement for the parties to perform their respective obligation under the contract and thus, it is evident that time is the essence of the contract. It is not the case of the plaintiff that the defendant by his own conduct altered the terms of the contract to presume that the time was not the essence of contract. On the other hand, it is contended that the defendant was evasive. Even though an attempt is made by the plaintiff to contend that though a draft sale deed was sent in the month of September 2003 to the defendant, it is seen that such contention was not proved before the Courts below by adducing any evidence and thus, such contention of the plaintiff was not accepted by the courts below. Therefore, the only evidence available to show the readiness and willingness by the plaintiff is the suit notice dated 06.07.2004 which was admittedly sent after one year from the date of the agreement. Therefore, nothing is there on 7 record or evidence to show that the plaintiff was ready and willing to perform his part of the contract not only within the stipulated period and also thereafter. In fact, the notice sent by the plaintiff was immediately replied by the defendant under Ex.A5 on

16.07.2004, denying his liability. Therefore, the very filing of the suit on 15.12.2006 i.e., after 2 1/2 years from the date of receipt of the said reply notice would show that the plaintiff was not at all ready and willing to perform his part of the contract and on the other hand, he slept over the matter beyond the time limit fixed in the agreement. At this juncture, it is to be noted that the readiness and willingness on the part of the plaintiff in performing his part of the contract would consist of several actions at different point of time commencing from the date of the agreement. One of such action showing such readiness and willingness would be the filing of the suit itself within the shortest time immediately after the denial by the other side. In other words, the bonafide of readiness and willingness must be evident apparently from every action of the plaintiff after the agreement. At the same time, it should not be mistaken as if this Court holds that not filing the suit immediately after the denial even though limitation period has not expired, has to be construed as fatal to the case of the plaintiff. If there is a long time gab between such denial and filing of the suit and the same is properly explained with convincing reasons, the Court can always decide such issue based on the facts and circumstances of each case. It is well settled that 8 in a suit for specific performance, the bounden duty of the plaintiff is to prove that he is ready and willing to perform his part of the contract all throughout the proceedings commencing from the date of agreement till the date of the decree and such readiness and willingness must be specifically pleaded and established by adducing evidence and not by making mere pleading alone. In this case, even by way of pleading, the plaintiff has not stated as to why there was a delay of one year in issuing the suit notice and further delay of 2 1/2 years in filing the suit. Therefore, I find that the Courts below have rightly rejected the case of the plaintiff and dismissed the suit, more particularly, when the relief of specific performance is the discretionary one. At this juncture, it is relevant to note the decision of this Court reported in 2007 (1) CTC 243 (Ramalingam,G. vs. T.Vijayarangam) wherein at paragraph Nos.19 and 20, it has been observed as follows: 19. .... Even assuming that the plaintiff had enough means to complete the sale transaction that itself is not sufficient unless the plaintiff established that he was ready and willing to pay the balance sale consideration and complete the sale transaction right from the date of the execution till the date of decree. As laid down by the Apex Court, the plaintiff has not proved his 9 continuous readiness and willingness at all stages from the date of agreement till the date of hearing of the suit. 20. The learned counsel for the appellant is unable to point out any infirmity in the reasonings of the Courts below in arriving at the finding that the plaintiff has not proved his continuous readiness and willingness at all stages i.e., from the date of agreement till the date of hearing of the Suit as laid down in the case of Thimmaiah and Others v. Ningamma and another 2000(7) SCC 409 and M.Nagar Kesavan Nadar v. Narayanan Nadar Kunjan Nadar, 2000 (10) SCC 244. When the findings of the Courts below are based on evidence available on record and when the findings are not perverse, this Court while exercising power under Section 100 of the Code of Civil Procedure cannot interfere with the concurrent findings of the Courts below. As rightly pointed out by the learned counsel for the respondent no substantial question of law stands raised.

Accordingly, since no 10 substantial question of law has arisen for consideration in the above Second Appeal and the same is dismissed. But however considering the relationship of the parties there will be no order as to costs. Thus, considering all these facts and circumstances, I do not find any question of law, much less substantial one arises for consideration even to entertain this Appeal. Accordingly, the Second Appeal fails and the same is dismissed. No Costs.?

(xii) In S.Mallika Vs. R.Saravanan reported in 2016-4 L.W. 66, wherein this Court held as follows:

?4. The plaintiffs are aggrieved against the concurrent finding of the Courts below in dismissing their suit for specific performance. Based on the facts and circumstances of the present case and the findings rendered by the Courts below, unless there exists a substantial question of law, the plaintiffs are not entitled for the indulgence of this Court to entertain this Second Appeal for further hearing on such substantial question of law. In this case, it is claimed by the plaintiff that the entire sale consideration agreed between the parties is Rs.4,05,000/-, out of which, they paid Rs.4 lakhs as early as on the date of agreement, namely, 10.5.2002. No doubt, it is true that three years time limit is stipulated for the performance of the contract. Therefore, for paying the balance sum of Rs.5,000/- and getting the sale deed executed, one will not wait for three years and ask the vendor to execute the sale deed at the end of third year. It does not appear to be with any sense or sound reasoning that parties to the agreement, who, are really intending to effect the sale, 4 would give such a long time of three years for paying the balance sum of Rs.5,000/-, more particularly, owing to the fact of escalation of real estate market every year. Needless to mention that any time limit fixed is to show the upper time for execution and not to be construed as the real time for execution. Therefore, within the time limit, the plaintiffs should have come forward to get the sale deed executed at the earliest point of time, more particularly, when the balance amount payable, in this case, is only Rs.5,000/- . Absolutely, there is no justification or explanation given by the plaintiffs for waiting for such a long period of three years and issuing the notice only on 02.03.2005 demanding specific performance. Therefore, it is abundantly clear that the entire transaction between the parties appears to be a loan transaction and therefore, the trial Court has rightly directed the defendant to repay the sum of Rs.4 lakhs received and referred to under the agreement.

19. Countering the submissions made by the learned Counsel appearing for the appellants, Mr.S.Parthasarathy, learned Counsel appearing for the respondent submitted that the suit agreement executed by the defendants was meant only for selling the suit property to the plaintiff and the recitals found in the said agreement itself would establish that it is meant for selling the property to the plaintiff. The learned Counsel further submitted that the plaintiff has been contacting and requesting the defendants to execute the sale deed, since the date of execution of the sale agreement and since they took steps to sell the property to some third parties, he

issued a notice dated 05.01.2009 and filed the suit on 07.01.2009. The learned Counsel also submitted that in view of the close relationship between the parties, the plaintiff did not file the suit immediately. Further the learned Counsel submitted that since the plaintiff had specifically pleaded that he is always ready and willing to perform his part of contract, the plaint filed by him cannot be stated as not in conformity with Order 6 Rule 3 C.P.C., and Clause 3 of Form 47 in Appendix A. The plaintiff has come out with a genuine case and therefore, it cannot be alleged that he has not approached the Court with clean hands.

20. The learned Counsel also submitted that in view of the findings given by the lower Appellate Court in A.S.No.6 of 2010, the appellants/defendants are estopped from raising the contention that the suit agreement is not meant for selling the property and it was given only as security. In these circumstances, the learned Counsel for the respondent prayed for dismissal of the Second Appeal.

21. In support of his contentions, the learned Counsel appearing for the respondent relied upon the following judgments:

(i) In Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B.Jeejeebhoy reported in 1970(1) Supreme Court Cases 613, wherein the Honourable Apex Court held follows:

?5. But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties : the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent court is finally determined between the parties and cannot be re- opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata : the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the , transaction which is the foundation of the right and the relevant law applicable to the determination of the transactions which is the soured of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision of law can

not be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent Proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.?

(ii) In Lonankutty Vs. Thomman and another reported in (1976)3 Supreme Court Cases 528, the Honourable Supreme Court held as follows:

?21.In its remanding judgment dated July 8, 1964 by which the plea of res judicata was repelled, the High Court relied principally on the decision of this Court in Narhari v. Shanker. That decision is in our opinion distinguishable because in that case only one suit was filed giving rise to 2 appeals. A filed a suit against B and C which was decreed. B and C preferred separate appeals which were allowed by a common judgment, but the appellate court drew 2 separate decrees. A preferred an appeal against one of the decrees only and after the period of limitation was over, he preferred an appeal against the other decree on insufficient court-fee. The High Court held that A should have filed 2 separate appeals and since one of the appeals was time barred, the appeal filed within time was barred by res judicata. This Court held that "there is no question of the application of the principle of res judicata", because "When there is only one suit, the question of res judicata does not arise at all". This was put on the ground that "where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up." In our case, here were 2 suits and since the appellate decree in one of the suits had become final, the issues decided therein could not be re-opened in the Second Appeal filed against the decree passed in an appeal arising out of another suit. This precisely is the ground on which Narhari's case was distinguished by this Court in Sheodan Singh v. Smt. Daryao Kunwar. It was held therein that where the trial court has decided 2 suits having common issues on the merits and there are two appeals therefrom the decision in one appeal will operate as res judicata in the other appeal.?

(iii) In Sitaramacharya (dead) through LRs., Vs. Gururajacharya (dead) through LRs., reported in (1997)2 Supreme Court Cases 548, wherein the Honourable Apex Court held as follows:

?6. The appellate Court has not explained any of the circumstances much less compelling one under which he came to make such an admission. Under Section 18 of the Evidence Act the admission made by the party would be relevant evidence. Section 31 provides that "admissions are not conclusive proof of the matters admitted but they may operate as estoppel under the provisions hereinafter contained". In view of the admissions referred to earlier they appear to be unequivocal and the

finding recorded by the appellate Court is cryptic. On the other hand, the trial Court has gone into the evidence on issues in extension and considered the evidence and the appellate Court has not adverted to any of those valid and relevant consideration made by the trial Court. The High Court has dismissed the second appeal holding that they are findings of fact recorded by the appellate Court on appreciation of evidence. We think that the view taken by the High Court is not correct in law. The admissions in the written statement in the earlier proceedings, though not conclusive, in the absence of any reasonable and acceptable explanation, it is a telling evidence heavily loaded against the respondent.

(iv) In Veerayee Ammal Vs. Seeni Ammal reported in (2002)1 SCC 134, wherein the Honourable Apex Court held as follows:

?11. When, concededly, the time was not the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of this Hon'ble Court in Chand Rani (Smt.) (Dead) By Lrs. v. Kamal Rani (Smt.)(Dead) By Lrs. [1993 (1) SCC 519 held that in case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case.

13.The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to ideosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means as soon as circumstances permit. In Law Lexicon it is defined to mean "A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstance will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space thant 'directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."

(v) In Shrimant Shamrao Suryavanshi and another Vs. Pralhad Bhairoba Suryavanshi (D) by Lrs., reported in (2002)2 MLJ 115 (S.C.)., wherein the Honourable Supreme Court held as follows:

?7.A perusal of Section 53-A shows that it does not forbid a defendant transferee from taking a plea in his defence to protect his possession over the suit property obtained in part performance of a contract even though the period of limitation for bringing a suit for specific performance has expired. It also does not expressly provide that a defendant transferee is not entitled to protect his possession over the suit property taken in part performance of the contract if the period of limitation to bring a suit for specific performance has expired. In absence of such a provision, we have to interpret the provisions of Section 53-A in a scientific manner. It means to look into the legislative history and structure of the provisions of Section 53- A of the Act.

17. We are, therefore, of the opinion that if the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under Section 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract has barred by limitation.

18. The matter may be examined from another angle. The established rule of limitation is that law of limitation is not applicable to a plea taken in defence unless expressly a provision is made in the statute. The law of limitation applies to the suits and applications. The various articles of theLimitation Act show that they do not apply to a defence taken by a defendant in a suit. Thus, the law of limitation bars only an action in a court of law. In fact, what the Limitation Act does is, to take away the remedy of a plaintiff to enforce his rights by bringing an action in a court of law, but it does not place any restriction to a defendant to put forward any defence though such defence as a claim made by him may be barred by limitation and cannot be enforced in a court of law. On the said principle, a defendant in a suit can put forward any defence though such defence may not be enforceable in a court of law, being barred by limitation.?

(vi) In Rame Gowda (D) by Lrs., Vs. M.Varadappa Naidu (D) by Lrs., & Another reported in 2004-3 L.W. 143, wherein the Honourable Apex Court held as follows:

?10.It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to Munshi Ram and Ors. Vs. Delhi Administration (1968) 2 SCR 455, Puran Singh and Ors. Vs. The State of Punjab (1975) 4 SCC 518 and Ram Rattan and Ors. Vs. State of Uttar Pradesh (1977) 1 SCC 188. The authorities need not be multiplied. In Munshi Ram & Ors.'s case (supra), it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the

true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re- enter and re- instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh and Ors.'s case (supra), the Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession' :

i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.?

(vii) In Gunwantbhai Mukhand Shah and Others V. Anton Elis Farel and Others reported in (2006)2 MLJ 399 (SC), wherein the Honourable Apex Court held as follows:

?7. We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963. Then, the enquiry should have been, first, whether any time was fixed for performance in the

agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in R.K. Parvatharaj Gupta Vs. K.C. Jayadeva Reddy [2006 (2) SCALE 156]. In the case on hand, there is no dispute that no date for performance is fixed in the agreement and if so, the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. In a case of that nature normally, the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been filed on behalf of the plaintiffs that they do not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial court should have insisted on the parties leading evidence, on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial.?

(viii) In Gunwantbhai Mulchand Shah and Others Vs. Anton Elis Farel and Others reported in (2006)3 Supreme Court Cases 634, wherein the Honourable Apex Court held as follows:

?12. The question as to how long a plaintiff, even if he had performed the whole of his obligations under an agreement for sale, in which a time for performance is not fixed, could keep alive his right to specific performance and to come to court after 29 years seeking to enforce the agreement, may have also to be considered by the court especially in the context of the fact that the relief of specific performance is discretionary and is governed by the relevant provisions of the Specific Relief Act. But again, these questions cannot be decided as preliminary issues and they are not questions on the basis of which the suit could be dismissed as barred by limitation. The question of limitation has to be decided only on the basis of Article 54 of the Limitation Actand when the case is not covered by the first limb of that Article, normally, the question of limitation could be dealt with only after evidence is taken and not as a preliminary issue unless, of course, it is admitted in the plaint that the plaintiffs had notice that performance was refused by the defendants and it is seen that the plaintiffs approached the court beyond three years of the date of notice. Such is not the case here.

13. Section 27 of the Limitation Act provides for extinguishment of right to property only at the determination of the period limited by the Limitation Act for instituting a suit for possession.Section 3 of the Limitation Act provides that subject to Sections 4 to 24 of the Act every suit instituted after the period prescribed therefor in the Limitation Act shall be dismissed. When the suit is for specific performance of an

> agreement for sale and we conduct a search in the Limitation Act in the context of Section 3 of the Act, we are obviously confronted only with Article 54 of the Schedule to the Limitation Act. We have already dealt with the scope of Article 54 and indicated that in this case it would be the second limb of the Article that would apply and consequentially the suit could not be held to be barred by limitation, having been filed three years after the agreement for sale or the date for performance fixed in the agreement for sale. We have also noticed that the plaintiffs have pleaded that they are in possession of the suit property and since it is not a suit for possession as such, the applicability of Section 27 of the Limitation Act also may not arise. It is, therefore, a case where in the context of Article 54 of the Limitation Act, the question had to be decided on the pleadings and evidence to be adduced by the parties on the aspect of the second limb of Article 54 of the Limitation Act.
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> 14. We have already indicated that the suit insofar as it relates to the prayer for a perpetual injunction restraining the defendants from interfering with the possession of the plaintiffs cannot be held to be barred by limitation. Whether the plaintiffs are able to prove that they are in possession of the suit property as on the date of suit and establish that they are entitled to the injunction prayed for, is a different matter. There is also the question whether the relief of injunction can be treated as being only a relief consequential to the relief of specific performance and the denial of one would automatically lead to the denial of the other, or whether it is an independent relief in itself and even if the plaintiffs are not entitled to a decree for specific performance they would still be entitled to a decree for injunction, a relief the grant of which is, of course, in the discretion of the court. It may be noticed that a suit for injunction would be governed by the residuary article, Article 113 of the Limitation Act and the cause of action for the said relief arises when the right to sue accrues.

That would depend upon the court deciding when the right accrued, on the pleadings and the evidence in the case. Therefore, the suit insofar as it relates to the prayer for a decree for perpetual injunction cannot be held to be barred by limitation at this preliminary stage.?

(ix) In Madina Begum and Another Vs. Shiv Murti Prasad Pandey and Others reported in 2016 SAR (Civil) 920, wherein the Honourable Apex Court held as follows:

> ?20. Quite independently and without reference to the aforesaid decision, another Bench of this Court in Rathnavathi and Another v. Kavita Ganashamdas[2] came to the same conclusion. It was held in paragraph 42 of the Report that a mere reading of Article 54 would show that if the date is fixed for the performance of an agreement, then non-compliance with the agreement on the date would give a cause of action to file a suit for specific performance within three years from the date so fixed. But when no such date is fixed, the limitation of three years would begin when the plaintiff has notice that the defendant has refused the performance of the agreement. It was further held, on the facts of the case that it did not fall in the first category of Article 54 since no date was fixed in the agreement for its performance.

21. The Clauses of the agreement for consideration in Rathnavathi were Clauses 2 and 3 and they read as follows:-

?2. The purchaser shall pay a sum of Rs. 50,000 (Rupees fifty thousand only) as advance to the seller at the time of signing this agreement, the receipt of which the seller hereby acknowledges and the balance sale consideration amount shall be paid within 60 days from the date of expiry of lease period.

3. The seller covenants with the purchaser that efforts will be made with the Bangalore Development Authority for the transfer of the schedule property in favour of the purchaser after paying penalty. In case it is not possible then the time stipulated herein for the balance payment and completion of the sale transaction will be agreed mutually between the parties.?

22. As far as the present appeal is concerned, the agreement between Gulab Bai and Madina Begum did not specify a calendar date as the date fixed for the performance of the agreement. Consequently, the view expressed in Ahmadsahab Abdul Mulla and Rathnavathi on the first part of Article 54 clearly applies to the facts of the case. In taking a contrary view, ignoring the absence of a specified date for the performance of the agreement and reversing the Trial Court, the High Court has fallen in error.?

(x) In N.B.Namazi Vs. Central Chinmaya Mission Trust, by its Trustee, Mrs.Leela Nambiar reported in 1987(100) L.W. 582, wherein the Division Bench of this Court held as follows:

?19. On a consideration of all the above we hold that the delay in this case cannot be put against the plaintiff - respondent so as to deny it the right of specific performance merely on the ground that such a relief is discretionary.?

(xi) In K.Viswanathan and another Vs. R.Appavoo Chettiar and Others reported in 2010(3) CTC 799, wherein the Division Bench of this Court held as follows:

?17. Thus the parties to the proceedings, the reliefs sought for and the issues that arose for consideration, were inextricably intertwined. This is why, the trial Court grouped the issues arising in all the suits into 4 or 5 categories and rendered common findings. In such circumstances, the failure of K.Viswanathan to file appeals against the decrees passed against him in all other suits, would certainly operate as res judicata, in so far as his present appeal against the Scheme decree framed in O.S.No.368 of 1991 is concerned. Hence his appeal A.S.No.524 of 1996 is liable to be dismissed.

18. Karuppanna Chettiar who is the second appellant in A.S.No.524 of 1996, was the second defendant in O.S.No.368 of 1991. He was not a party to O.S.Nos.271 of 1992 and 218 of 1993. But he was the fourth defendant in O.S.No.270 of 1992 filed by the first appellant K.Viswanathan himself. He was also the second defendant in

O.S.No.217 of 1993. Therefore, what applies to K.Viswanathan, applies equally to Karuppanna Chettiar, the second appellant in A.S.No.524 of 1996. Hence, A.S.No.524 of 1996 is liable to be dismissed.?

(xii) In P.Sakunthala and others Vs. N.A.Rajendran reported in 2016(6) CTC 490, wherein the Division Bench of this Court held as follows:

?20. The first and foremost relief sought in the plaint is to cancel the sale deed dated 20.02.2006 (Ex.A34) executed in favour of defendants 2 and 3 by the first defendant. Since Ex.A.34 has come into existence on 20.02.2006, the Court can easily come to a conclusion that there is a refusal from the first defendant only on 20.02.2006. As per Article 54 of the Limitation Act, 1963, it is made clear that a suit for Specific Performance can be instituted within three years from the date of refusal on the part of defendant. Since this suit has been instituted in the year 2008, the same has been filed well within the period of limitation.

(xiii) In Sharfunisa Bi Vs. Ameena Bi Ammal reported in 1988(1) LW 517, wherein this Court has held as follows:

?7. Point No.1: Ex.A.1 is the registered deed of mortgage executed by the defendant in favour of the plaintiff for Rs.14,500/- in respect of the suit property, belonging to the defendant. It is a simple mortgage and the amount of Rs.14,500/- advanced thereunder is repayable in a period of one year with interest thereon at 12% per annum. The plaintiff has filed the suit for recovery of this amount of Rs.14,500/- with interest thereon at 12% per annum from the date of mortgage. The contention of the defendant is that at the time of the execution of the suit mortgage bond it was agreed that the plaintiff should be in possession of the suit house in lieu of interest and in pursuance thereof, the plaintiff was in possession of the suit property from 31.05.1971 itself upto 31.05.1975 and she is not, therefore, entitled to claim interest for this period of four years. The short point for consideration is whether this contention falls within the mischief of Section 92 of Indian Evidence Act. Section 92 of Indian Evidence Act runs as follows:-

?When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.?

Ex.A.1 is a simple mortgage under which a sum of Rs.14,500/- is advanced on the security of the secured property. It is not a mortgage with possession. The agreement now pleaded by the defendant that at the time of the execution of Ex.A.1 deed of mortgage it was agreed that the plaintiff must take possession of the suit property

and be in occupation thereof in lieu of interest, has the effect of converting a simple mortgage into a mortgage with possession. It tantamounts to varying the terms of Ex.A.1 and comes directly within the operation of Section 92 of Evidence Act. The point has been covered by a direct decision of their Lordships of Judicial Committee of Privy Council in Mian Feroz Shah V. Sohbat Khan reported in 1933 Privy Council 173. In the case before the Judicial Committee, the mortgage was one with possession and evidence was sought to be let in to show that the mortgage was intended to be a simple mortgage. Rejecting the contention the Judicial Committee observed, ?Evidence to show that the mortgage was in reality a simple mortgage according to the intention of the parties was inadmissible under Section 92 of Evidence Act, and no presumption could be drawn from the previous transactions.?

I therefore hold that it is not open to the defendant to plead that there was a contemporaneous agreement under which the plaintiff is to take possession of the suit property and be in occupation thereof in lieu of interest when Ex.A.1 mortgage deed specifically refers to a simple mortgage. This point is found against the defendant?.

(xiv) In Rajeswari and Others Vs. K.M.Kumarasamy and Others reported in (2007)4 MLJ 442, wherein this Court has held as follows:

?14. After analysing the decision cited by the learned Counsel for the respondent/plaintiff, the following points are unearthed out of it.

1)In a case of defence of money dealing by the vendor, it is for the vendor to prove the transaction as one of money dealing by some modes.

2)Failure to prove the discharge of money dealing, an adverse inference has to be drawn against the vendor.

3)Not sending any reply to the notice of the agreement holder an adverse inference has to be drawn against the vendor.

4)Even if there is any discrepancy in the date of purchase of the stamp paper, i.e. prior to date of the sale transaction, it will not affect the agreement of sale transaction.

5)The defence theory is hit by Section 92 of the Indian Evidence Act, unless there are circumstances which would prove that equity will suffer by enforcing the agreement for sale.?

(xv) In Dr.Vijayakumar Rau Vs. Dr.B.Manohar Rama Rau and Another reported in (2008)8 MLJ 1052, wherein this Court held that the Court can pass judgment on admission at any stage either on its own motion or on the basis of an application in

that regard such admission may be in the form of pleadings, evidence, letters, other correspondence, etc. It can also be oral. However, a judgment on admission shall not be passed, unless such admission is clear, unambiguous and unconditional?.

(xvi) In Chokkammal and 3 others Vs. K.Balraj reported in (2009)3 MLJ 1168, wherein this Court held as follows:

?8. The crucial point for consideration in a suit for specific performance is readiness and willingness to pay the consideration. It is seen from Ex.A1 that Rs.20,000/- had been paid on 13.9.1992 and the balance of Rs.24,000/- alone was payable within a period of three months. The balance also is admitted to have been paid to the defendants. This admission by the defendants come in the shape of recital in EX.A3. The defendants' contention is that they received only Rs.20,000/- on 3.12.1992 and Rs.24,000/- had not been paid. I have already found that EX.A3 is genuine document and learned counsel for the respondent pointed out that the defendants cannot lead parole evidence to substitute the consideration found under the document. If the consideration as recited in the document Ex.A3 refers to Rs.44,000/-, the defendants are barred by Section 92 of the Evidence Act to contend that the consideration was Rs.1 lakh and that the payment of only Rs.20,000/- was made on the date when their signatures were obtained on 3.12.1992. Having regard to the fact that the entire sale consideration had been paid even on the date of institution of suit, I find that the plaintiff has proved his readiness and willingness also.

9. The other question that remains to be seen is whether the plaintiff has conducted himself in such a fashion which is at variance with truth and therefore the plaintiff has dis-entitled himself to the discretionary relief of specific performance. The entry into possession of property is said to be unlawful and therefore the relief could not be granted. Although, there is no recital under EX.A1 for delivery of possession of property, it is an admitted fact that the property has been taken possession by he plaintiff. The plaintiff would state that it was given voluntarily, while the defendants would contend that it was forcibly occupied. The date of actual taking of possession itself is not relevant for, after all if the document Ex.A3 is true, It hears a recital in the document that the property has been delivered possession to the plaintiff. We have already seen that the entire sale consideration has also been paid. A vendor who had received the entire sale consideration is obliged to handover possession of the property to the purchaser and give warranty for occupation free of disturbances. It is not possible to attribute any grave misconduct on the part of the plaintiff, especially in a case where the entire sale consideration has been paid, to deny to him the relief of specific performance. On the other hand, it would be inequitable to deny such a relief in view of Section 10 of Specific Relief Act, which states that in respect of immovable property, the breach on the part of the vendor cannot be compensated only by money and specific performance of the agreement alone is the adequate remedy.

(xvii) In Kader Pathu and Others Vs. Ayisha Gani (died) and Others reported in 2016(6)CTC 848, wherein this Court held as follows:

> ?21. A consideration of the said Article will make it clear that in respect of the agreements which prescribe a time for performance, limitation shall start running from the date of expiry of the time stipulated therein and that in case no such time is prescribed, limitation shall start running from the date on which the plaintiff gets notice of refusal to perform by the opposite party. Before the filing of the suit, the plaintiffs caused a pre- suit notice calling upon the first defendant to get the balance amount of consideration and execute the sale deed in accordance with the suit agreement for sale. The office copy of the pre-suit notice has been marked as Ex.A6. It was received by the first defendant and the postal acknowledgment card has been marked as Ex.A8. The first defendant issued a reply notice and the same has been marked as Ex.A7. Office copy of the same has been marked as Ex.B1. The reply notice is dated 20.01.2005 and Ex.B2-Acknowledgment card shows that it was received by the counsel for the plaintiffs on 24.01.2005. The suit came to be filed on 24.01.2005 itself. However, in the cause of action column nothing has been mentioned regarding the reply notice containing refusal to perform. Of course, it is obvious that after sending the notice calling upon first defendant to execute the sale deed in accordance with the suit sale agreement for sale, the suit came to be filed within 12 days and it so happened the reply notice sent by the first defendant was also received by the counsel for the plaintiffs on the date of filing of the suit.?
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> (xviii) In Mithu Khan Vs. Ms.pipariyawali and Others reported in AIR 1986 Madhya Pradesh 39, wherein the Madhya Pradesh High Court held as follows:
>
> ?9. Last material submission of the appellant is that, in a case of specific performance of contract, the plaintiff is required to plead and prove that he is ready and willing to perform his part of the contract and absence of such averment shows unwillingness on his part. This submission is not tenable. The plaintiff, after he paid the full amount to respondent and obtained from him the receipt of the last payment, completes his part of the contract has to be adjudged in the broad perspective. The Court in suitable cases should look into the totality of the circumstances and the allegations made in the plaint and from them come to the conclusion whether necessary allegations have been made by the plaintiff in that regard or not. No particular language or phraseology is needed to be employed by the plaintiff. A literal compliance of the language appearing in the provision is not imperative, nor is this the requirement of law.(See in case of Ramesh Chandra V.Chunnilal, AIR 1971 SC 1238).
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> 22. On a careful consideration of the materials available on record and the submissions made by the learned Counsel appearing on either side and also the judgments relied upon by the learned Counsel appearing on either side, it could be seen that the issue that has to be decided in this Second Appeal is whether Ex.A.1 ? sale agreement dated 05.07.1995 is meant for selling the property to the plaintiff or it

is given only as a security for the loan availed by the defendants from the plaintiff. The plaintiff contended that the defendants executed Ex.A.1-sale agreement in his favour for selling the suit property for a total sale consideration of Rs.10,000/-. According to the plaintiff, he paid the entire sale consideration on the date of execution of the sale agreement itself.

23. The first defendant is the father of the second defendant. The defendants contended that the second defendant availed a loan of Rs.10,000/-

from the plaintiff on a monthly interest of Rs.3/- per Rs.100/- per month (i.e.,36% p.a) and the plaintiff obtained their signature in blank stamp papers as security for due repayment of the loan amount and utilise those signed blank stamp papers for preparing the sale agreement. In the suit agreement, it has been recited that the defendants should execute the sale deed, as and when the plaintiff wishes either in his name or in the name of his nominee. Further it has been stated in the plaint that since the defendants were employed in Tirupur, they requested time for executing the sale deed in favour of the plaintiff.

24. On a perusal of the suit sale agreement, it is clear that the parties have not stated any reason for not executing the sale deed immediately. When the plaintiff had paid the entire sale consideration on the date of execution of the sale agreement itself, the reason for not getting the sale in his favour has not been stated either in the suit agreement or in the plaint. The normal conduct of a party, who had paid the entire sale consideration, would be to get the sale deed executed in his favour without any delay.

25. On a perusal of the suit agreement, it is also clear that there was no impediment for the defendants to execute the sale deed in favour of the plaintiff. Inspite of paying the entire sale consideration on 05.07.1995 itself, the plaintiff chose to file the suit only on 07.01.2009 ie., nearly 14 years from the date of execution of Ex.A.1 sale agreement. Strangely, the only correspondence between the plaintiff and the defendants is Ex.A.3 notice dated 05.01.2009 sent by the plaintiff to the defendants which was also returned unserved. It is also pertinent to note that the plaintiff received the returned cover only on 27.01.2009. Even without waiting to know about the fate of the notice sent to the defendants, the plaintiff rushed to the Court on 07.01.2009 and filed the suit. The plaintiff having waited for nearly 14 years, the sudden rush in filing the suit, has not been explained by the plaintiff. Though in the plaint it has been stated that the plaintiff came to know on 04.01.2009 that the defendants are taking steps to dispose of the property to some third parties and therefore, he sent notice on 05.01.2009 and filed the suit on 07.01.2009, he has not adduced any evidence to establish the said averments.

26. In the written statement, the defendants have stated that the transaction between the plaintiff and the defendants is only a loan transaction and Ex.A.1 agreement cannot be construed as a sale agreement meant for selling the property to the plaintiff. It is also pertinent to note that the first defendant alone is the absolute owner of the suit property. It is also the case of the plaintiff that on the date of sale agreement, the defendants handed over the original sale deed marked as Ex.A.2 dated 18.03.1980 to him. On a perusal of Ex.A.2 sale deed, it is clear that the first defendant alone is

the absolute owner of the suit property. That being the case, the reason for asking the second defendant to sign the sale agreement has not been explained by the plaintiff. The defendants contended that the second defendant borrowed a sum of Rs.10,000/- from the plaintiff and as security, the plaintiff obtained their signature in blank stamp papers, which were used by the plaintiff for filing the present suit for specific performance. When the second defendant has no title or right over the suit property, the reason for including him in the sale agreement also creates a doubt over the transaction. That apart, except stating that the plaintiff was orally requesting the defendants to execute the sale deed between 1995 and 2009, he has not produced a single paper to prove that he has been taking steps to get the sale deed executed in his favour.

27. P.W.2 and P.W.3 are the attestors of Ex.A.1 agreement. P.W.4 is the scribe of Ex.A.1. Except the attestors and the scribe, the plaintiff has not examined any other independent witness to prove the averments stated in the plaint. One cannot remain silent for nearly 14 years for filing the suit for specific performance, that too after paying the entire sale consideration. The contention raised by the plaintiff, that because of the close relationship between the parties, he did not file the suit immediately, cannot be accepted for the reason that ultimately after a lapse of nearly 14 years, he has come to the Court and filed the suit for specific performance.

28. All these things put together and also following the ratio laid down by this Court in the judgment in Mrs.Pappammal @ T.Pappa Vs. Mr.P.Ramasamy reported in 2012(4) LW 435, I am of the view that Ex.A.1 was not intended to be an agreement of sale and it must have been executed only as security or as loan transaction.

29. As far as Sections 91 and 92 of the Indian Evidence Act are concerned, since it is found that Ex.A.1 agreement was not intended to be an sale agreement and it must have been executed only as a security or as loan transaction, the bar under Sections 91 and 92 of the Indian Evidence Act has no application.

30. So far as the averments stated in the plaint are concerned, it cannot be stated that it is not in conformity with Order 6 Rule 3 C.P.C., and Clause 3 of Form 47 in Appendix A. In the plaint, in paragraph No.9, the plaintiff has specifically pleaded that he was always ready and willing to perform his part of contract. The said averment is sufficient to maintain a suit for specific performance only in the absence of such a pleading in the plaint, the defendants can take a stand that it is not in conformity with the provisions of the Civil Procedure Code. Therefore, the contention raised by the appellants in this aspect is rejected.

31. The lower Appellate Court, while reversing the judgment and decree of the trial Court held that there is no latches in filing the suit for specific performance for the reason that the plaintiff had issued Ex.A.3 Notice on 05.01.2009 and the cause of action for filing the suit would start from issuance of Ex.A.3 Notice. The said finding cannot stand for the reason that the suit agreement was executed as early as on 05.07.1995 and after keeping quiet for nearly 14 years, the plaintiff had approached the Court by filing a suit for specific performance. The plaintiff should have explained the reasons for not filing the suit immediately by necessary pleadings and evidence. In the case on hand, the plaintiff has not given any acceptable reason for the delay of 14 years in filing the suit. It is

settled position that a suit for specific performance in the absence of any period prescribed in the agreement, should be filed within a reasonable time. At no stretch of imagination, the period of 14 years, can be stated as a reasonable period. Therefore, on the ground of latches also, the suit is liable to be dismissed.

32. So far as Section 16(c) of the Specific Relief Act is concerned, the readiness and willingness of the party should be pleaded and proved before the Court of law. Readiness and willingness is not a single act. Readiness relates to the financial position of the purchaser and the willingness relates to his frame of mind. The lower Appellate Court erroneously took the readiness and willingness as a single act and has given an erroneous finding.

33. In the case on hand, even assuming that Ex.A.1 agreement is meant for sale of the property, when the plaintiff had paid the entire sale consideration on the date of alleged sale agreement itself, the question of readiness will not arise. However, when the plaintiff had filed the suit after a lapse of nearly 14 years, absolutely there cannot be any willingness on his side to perform his part of contract. Therefore, the mandatory provisions of Section 16(c) of the Specific Relief Act has not been completely fulfilled by the plaintiff. On this ground also, the suit should have been dismissed by the lower Appellate Court.

34. As far as limitation for filing the suit is concerned, Article 54 of the Limitation Act prescribes 3 years' time for filing a suit for specific performance. If no time was fixed in the agreement for the performance of the contract, the suit should be filed within 3 years and if no such date is fixed, 3 years period will start from the date of refusal by the defendant. In the case on hand, no date has been fixed and there was no refusal by the defendants. Inspite of the same, the plaintiff took 14 years for filing the present suit. The plaintiff cannot take his own time for filing a suit for specific performance which would put the defendants to prejudice and hardship.

35. The contention raised by the learned Counsel appearing for the respondent that the findings given in A.S.No.6 of 2010 would operate as estoppel against the defendants is concerned, the said appeal arises against the judgment and decree passed in O.S.No.26 of 2009 which was filed by the appellants for injunction restraining the respondent herein from preventing them from alienating the suit property. Both the suits were not tried jointly and they were disposed of separately, however on the same day. Similarly the lower Appellate Court also disposed of the appeals in A.S.Nos.9 of 2010 and 6 of 2010 by separate judgments, however on the same day. Admittedly, the appellants have not filed any appeal as against the judgment and decree passed in A.S.No.6 of 2010. The trial Court decreed the suit in O.S.No.26 of 2009, however the judgment and decree of the trial Court was reversed by the lower Appellate Court in A.S.No.6 of 2010.

36. In a suit for bare injunction, the question of readiness and willingness will not arise. However, in a suit for specific performance, the suit can be decreed only if the plaintiff is able to prove that he was ready and willing to perform his part of contract. In the suit filed by the respondent in O.S.No.6 of 2009 for specific performance, the truth and genuineness of the alleged sale agreement was considered and decided. In the suit for bare injunction filed by the appellants herein in O.S.No.26 of 2009, no such finding was given either by the trial Court or by the lower Appellate Court with regard

to the correctness of the alleged sale agreement. Therefore, merely because the said suit was dismissed, that will not operate either as res judicata or as estoppel. Hence, the contention raised by the learned Counsel for the respondent in that regard is rejected.

37. The other contention raised by the learned Counsel for the respondent/plaintiff that the respondent is entitled for a decree for permanent injunction, is concerned, even according to the plaintiff, he was put in possession of the property by the defendants pursuant to the alleged sale agreement dated 05.07.1995. Since he contended that he was put in possession pursuant to the alleged agreement of sale, he has no independent right to be in possession of the property for the reason that Section 53(A) of the Transfer of Property Act, he can protect his possession, however, the protection under Section 53(A) of the Transfer of Property Act, can be used only as a shield and not as a sword by a party. In other words, the provisions of Section 53(A) can be used only as defence by the defendants and it cannot be used by the plaintiff. In the case on hand, the respondent/plaintiff filed a suit for specific performance and therefore, he cannot protect his possession under Section 53(A) of the Act. In the case of the appellants/defendants filing a suit for recovery of possession, in that case, the respondent/plaintiff can defend the suit by taking protection under Section 53(A) of the Act. Therefore, the protection under Section 53(A) of the Act is not applicable to the respondent/plaintiff.

38. In a suit for specific performance, the discretionary relief could be granted only if the plaintiff makes out a case, that too a strong case for exercising the discretion by the Courts. It is a settled position that the Court should meticulously consider all facts and circumstances of the case and the Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. Since I am of the opinion that the plaintiff has not come to the Court with true facts, he is not entitled for discretionary relief. The lower Appellate Court, without considering all these aspects, erroneously reversed the judgment and decree of the trial Court and decreed the suit.

39. In these circumstances, the questions of law are decided in favour of the appellants/defendants. The judgment and decree of the lower Appellate Court are set aside. The suit in O.S.No.6 of 2009 stands dismissed. The Second Appeal is allowed. There shall be no order as to costs. Consequently, M.P.(MD)No.1 of 2014 is allowed and the connected Miscellaneous Petitions are closed.

To

1. The Subordinate Court, Uthamapalayam.

2. The Principal District Munsif Court, Uthamapalayam. .