Emani Krishna Rao vs Vijaya Chitra Films And Ors. on 25 June, 2002

Equivalent citations: 2002(6)ALD176, AIR 2003 (NOC) 142 (AP), 2003 A I H C 334, (2002) 6 ANDHLD 176, (2003) 1 ICC 353, (2003) 1 CIVLJ 591

JUDGMENT

P.S. Narayana, J.

1. This Appeal is filed by the appellant/1st plaintiff in OS No. 310/ 82 on the file of Principal Subordinate Judge, Visakhapatnam. The appellant/1st plaintiff along with other two plaintiffs Venkata Jagannadha Rao and Ramachandra Rao filed the suit for the relief of specific performance of an agreement of sale dated 12-8-1979 directing the defendants 1 to 15 in the suit to execute a sale deed in favour of the plaintiffs for Rs. 2,50,000/- in respect of plaint B Schedule property and for delivery of possession of the same or directing defendants 2 to 5 in the suit to execute sale deed in respect of 1065 sq.metres covered by the building portion which was permitted to be retained by them by 6th defendant in the suit under the provisions of Urban Land Ceiling Act on payment of proportionate consideration or in the alternative directing defendants 1 to 15 to pay a sum of Rs. 2,40,000/- as damages and also directing defendants 1 to 5 in the suit to refund a sum of Rs. 10,000/- with subsequent interest and for costs of the suit. The trial Court had recorded the evidence of PW1, the 2nd plaintiff in the suit who had not preferred the appeal and also DW1, the 4th defendant and DW2, the 12th defendant in the suit and had marked Exs-A1 to A18 and Exs.B1 to B11 and on appreciation of the oral and documentary evidence, the trial Court had decreed the suit in favour of the plaintiffs and defendants 1 and 3 to 5 for refund of Rs. 10,000/- with subsequent interest at 24% from the date of suit till realisation with proportionate costs and the rest of the reliefs claimed by the plaintiffs in the suit against defendants 6 to 16 had been negatived, but in the facts and circumstances without costs.

2. As already stated supra, the 1st plaintiff alone had preferred the present appeal. The 1st defendant in the suit i.e., 1st respondent in the appeal is the firm, represented by the 2nd respondent Ichapurapu Ramakrishna Rao who died and as against respondents 8 to 18 in the appeal i.e., subsequent purchasers and also Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam, the appeal was dismissed for default, vide Court order dated 3-3-1998.

3. For the purpose of convenience, the parties in the appeal are referred to as shown in the suit.

4. The plaintiffs had pleaded that defendants 3 to 5, shown as respondents 3 to 5 in the appeal are the undivided sons of the 2nd defendant and they are the members of joint family governed by Mitakshara School of Hindu Law and their father, 2nd defendant at the relevant time, was the manager of the said joint family. It was further pleaded that since they were hard-pressed for money

they had approached the plaintiffs and represented that they purchased the building with vacant land, garage and pump-shed comprised in T.S.No. 1031, described as plaint A schedule with the sale proceeds of their ancestral properties and all of them are entitled to claim share, therein in their own right and offered to sell 3180 sq.yards along with building, garage and pump-shed from out of the said premises and the same is described as plaint B Schedule. It was also pleaded that they made this representation as partners of the 1st defendant firm and believing their representations, the plaintiffs offered to purchase the said plaint B schedule property for consideration of Rs. 2,50,000/-. Pursuant thereto, defendants 2 to 5 in the suit as partners of the 1st defendant firm had executed on 12-8-1979, the agreement of sale relating to plaint B Schedule property for a sum of Rs. 2,50,000/- and received a sum of Rs. 10,000/- as advance in part payment of the price and agreed to execute registered sale deed in their favour or in favour of their nominees after obtaining permission from the 16th defendant in the suit within a period of three months and receive the balance of sale consideration at the time of registration of the sale deed. It was further pleaded that the plaintiffs secured the balance of sale consideration and expenses for execution of the sale deed and its registration and demanded defendants 2 to 15 to obtain permission from the 16th defendant and execute a registered sale deed, but however they were putting off the execution of the sale deed on some pretext or other and hence the plaintiffs had suspected their bona fides and issued the registered notice dated 10-5-1981 demanding them to obtain permission from the 16th defendant and execute the sale deed and they also published a notice in Eenadu dated 11-5-1981 to the said effect.

5. It was further pleaded that defendants 2 to 5 have received the notice on 10-5-1981 and they had sent a reply with false and untenable allegations and the plaintiffs had sent a rejoinder dated 14-6-1981 and after receiving the said rejoinder another notice dated 30-6-1981 was sent. Subsequent thereto, the plaintiffs learnt that the 16th defendant had treated the premises described in A Schedule as the exclusive property of the 2nd defendant and the same was in excess of the ceiling limits under the Urban Land (Ceiling and Regulation) Act, 1976 and was about to grant permission to him to sell the surplus land to the 6th defendant and hence the plaintiffs have sent a registered notice dated 6-1-1982 informing the same to the 16th defendant and in the said circumstances the plaintiffs had filed a Writ Petition No. 552/ 82 on the file of the High Court of Andhra Pradesh seeking the relief of injunction restraining the 16th defendant from granting permission to the 2nd defendant to convey the surplus to the 6th defendant and the contentions raised by the parties also had been pleaded in detail. However, the said writ petition was dismissed with an observation that the plaintiffs have to seek their remedy for specific performance of the agreement of sale dated 12-8-1979 before a competent civil Court. It was specifically pleaded that the agreement of sale is not hit by the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 and defendants 2 to 5 are capable of performing the said agreement in toto from its inception and even by the date of institution of the suit it was pleaded that they were in possession of 2086 sq.yards of land with building, garage and pump shed. It was also further pleaded that the 6th defendant was aware of the said agreement of sale and hence the 6th defendant is not a bona fide purchaser for value without notice of the said agreement of sale and the sale of plots by the 6th defendant to its members i.e., defendants 5, 7 to 15 is also not valid and binding on the plaintiffs as all of mem were aware of the plaintiffs' agreement dated 12-8-1979 in view of the notice published in Eenadu dated 11-5-1981. The other details also had been pleaded in the plaint so as to substantiate

their stand that the plaintiffs are entitled to the relief prayed for in the suits.

6. The 2nd defendant had filed a written statement and the same was adopted by defendants 1 and defendants 3 to 5. It was pleaded that it is true that defendants 2 to 5 agreed to sell B Schedule property to the plaintiffs for a sum of Rs. 2,50,000/- and the plaintiffs paid Rs. 10,000/- as advance and the same has to be executed within three months after obtaining permission of the 16th defendant and the balance of sale consideration will be received at the time of registration. Even at that stage, the 2nd defendant informed the plaintiffs that they have already given a declaration under the Urban Land (Ceiling and Regulation) Act, 1976 and the excess was determined and the draft statement under Section 6 was issued. But however, the plaintiffs represented that they have necessary influence and they would get the necessary exemption and believing the same and acting on their representation the 2nd defendant had entered into partnership with his sons who are defendants 3 to 5 on 1-12-1975 and so far as his contribution is concerned, he contributed land and building covered by D.No. 10-2-82 situated in Waltair Up-lands Block No. 45 T.S.No. 1031 of an extent of Acs. 1-33 cents together with the building thereon as his share of capital to the partnership firm and the partnership firm was formed for the purpose of producing cinema films etc., and inasmuch as a draft declaration under Section 6 of the Urban Land (Ceiling and Regulation) Act, 1976 was issued, the agreement of sale is void, inoperative and unenforceable and is hit by Section 42 of the Urban Land (Ceiling and Regulation) Act, 1976 or even otherwise it is impossible of performance. It is also submitted that the 2nd defendant was advised that it would be advantageous to take the stand that the property is ancestral, but however the said contention was rejected by the Urban Land Ceiling authority. It was further pleaded that in C.C.No. 4581/76 the declaration under Section 6(1) was taken on file and a draft statement was issued on 30-12-1976 and thereafter on 3-6-1977 objections were raised and subsequently again further objections were submitted on 16-3-1981 in which the plea of joint family was also taken and thereafter the revised order under Section 8 was issued on 25-11-1981, whereby the excess was determined as 3642 sq.meters and the earlier draft statement under Section 8 (1) was ordered to be accordingly amended. Hence, the contention that the Urban Land Ceiling Authority was about to grant permission is not true and in view of the fact that there was excess the Urban Land Ceiling Authorities could not have granted the permission. The filing of the writ petition also was admitted. It was further pleaded that the Government of Andhra Pradesh issued G.O. Ms. No. 136, dated 28-1-1981 stating that the surplus land if agreed to be conveyed to bona fide co-operative society before 26-1-1982, permission could be accorded by the U.L.C. Authorities and inasmuch as excess was determined and the earlier agreement is void and unenforceable the defendant is competent to sell the property to the 6th defendant and the 6th defendant appears to have laid out plots and sold to its own members. It was also pleaded that the agreement of sale is hit by the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 and also void, incapable of performance either in part or in its entirety and cannot be enforced. It was also specifically pleaded that the 6th defendant is not aware of the agreement of sale and the 6th defendant is a bona fide purchaser without notice of prior agreement of sale. It was also specifically pleaded that the transaction is opposed to public policy and also Section 23 of the Indian Contract Act.

7. The 6th defendant and the 10th defendant filed their written statements which had been adopted by defendants 8, 13 and 15 denying all the material allegations and taking a stand that the suit

agreement is invalid and inoperative and is hit by Section 23 of the Indian Contract Act and after obtaining exemption from the Government permitting alienation of the excess land in favour of the co-operative society, sale deed was executed in favour of the 6th defendant in pursuance of agreement and the 6th defendant in turn executed sale deeds in favour of its members and thus they are bona fide purchasers for value without knowledge of the prior transaction.

8. The 11th defendant also filed a written statement taking almost a similar stand. The 16th defendant also filed a written statement wherein it was pleaded that the declarant who is the 2nd defendant has not brought to the notice of the competent authority earlier to the date of submission of the proposals to the Government in terms of G.O. Ms. No. 136, Revenue (U.C.II) Department, dated 28-1-1981 to the effect that the alleged transaction is covered by the agreement dated 12-8-1979 which was entered into subsequent to the commencement of the Urban Land (Ceiling and Regulation) Act, 1976 and it was specifically pleaded that the said transaction is void and invalid. It was also stated that the residential out house is having 1065 sq.metres. Out of the total extent of 5981 sq.metres an extent of 1274 sq.metres of land covered by non-residential structures had been excluded from the holding of the land holder and other details had been narrated and ultimately a stand was taken that a suit for specific performance is not maintainable.

9. On the strength of the pleadings, the following issues had been settled:

> 1. Whether D6 to D15 are bona fide purchasers for valuable consideration without notice of the said agreement dated 12.8.1979 ?
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> 2. Whether the suit agreement is opposed to public policy and have hit by Section 23 of the Contract Act ?
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> 3. Whether the plaintiff is entitled to specific performance of the suit contract of sale or in the alternative for to suit account ?
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> 4. Whether the suit is not maintainable under law, as alleged by D16?
>
> 5. To what relief ?

Subsequent thereto, the plaint was amended by orders in IA.No. 731/85, dated 16-12-1983 under which alternatively another relief was prayed for by the plaintiffs directing the defendants 2 to 5 to execute the sale deed in respect of 1065 sq.metres covered by the building portion allowed to be retained by the 6th defendant under the provisions of Urban Land (Ceiling and Regulation) Act, 1976 on payment of proportionate consideration.

10. The 6th defendant no doubt filed additional written statement which had been adopted by defendants 1, 3, 5, 7, 11 and 12 and additional issues had been framed, which are as follows:

> 1. Whether specific performance for a portion of agreement is enforceable ?

2. Whether relief for specific performance of a portion of the agreement is barred by limitation ?

As already stated supra, after recording evidence, ultimately the suit was partly decreed and aggrieved by the same, only the 1st plaintiff had preferred the present appeal.

10. Sri Subrahmanya Narsu, the learned Counsel representing the appellant/ 1st plaintiff had made the following submissions. The learned Counsel had contended that the dismissal of the appeal as against the other parties will not in any way affect the consideration of the appeal on merits inasmuch as the appellant is not concerned with the portions which had been alienated in their favour and in view of the fact that the relief had been suitably amended, the matter can be decided on merits despite the default order made by this Court as against the subsequent purchasers. The learned Counsel also with all vehemence had contended that the appellant is concerned with the rest of the property which was permitted to be retained by defendants 1 to 5 in the suit and hence in the light of the fact that the execution of the agreement of sale and the receipt of consideration of Rs. 10,000/- and the receipt of advance of Rs. 10,000/- had been admitted, normally the relief of specific performance has to be granted and there is absolutely no impediment to grant the relief as prayed for and as amended by the plaintiffs. The learned Counsel also further would maintain that the trial Court had not appreciated the guiding principles while either granting or refusing the relief of specific performance. The learned Counsel had drawn my attention to Section 20 of the Specific Relief Act, 1963 in this regard and also had drawn my attention to Prakash Chandra v. Angadlal, , Ramesh Chandra v. Chuni Lal, , Kartar Singh v. Harjinder Singh, , Debendranath Mohanty v. Annapurna Mohanty, AIR 1996 Ori. 989. The learned Counsel also had further maintained that the conduct of the parties also should be taken into consideration and the recitals in the agreement clearly go to show that a sale deed shall be executed within three months after obtaining permission from urban land ceiling authorities. The learned Counsel also had maintained that a finding had been recorded by the trial Court that the transaction is not opposed to public policy and is not hit by Section 23 of the Indian Contract Act and having recorded such a finding, negativing the relief of specific performance also is totally unsustainable. The learned Counsel also had drawn my attention to the respective pleadings of the parties and had contended that as far as the plea of readiness and willingness is concerned, it had been pleaded, but however there is no specific denial and no issue had been framed and hence the said plea cannot be permitted to be raised by the contesting respondents in this apeal.

11. Sri C Subba Rao, the learned Counsel had drawn my attention to the respective pleadings of the parties and had contended that the plea of readiness was raised in the context of claiming the relief of damages and there is no specific pleading relating to the readiness and willingness to perform a part of the contract and in this view of the matter, whether there is a specific denial or not and whether an issue was framed in this regard or not, also is a matter to be gone into since the relief of specific performance is a discretionary relief and while granting or negativing the relief this aspect also may have to be looked into. The learned Counsel further contended that by virtue of the default order as against the other purchasers since the specific stand taken by the plaintiffs is that they are entitled to the relief in entirety, there cannot be splitting up of the contract and hence the relief cannot be granted relating to a portion of the property covered by the said agreement of sale. The

learned Counsel also had submitted that by virtue of the default order, there cannot be any decree relating to the rest of the portion since it may result in passing conflicting decrees in the same suit. The learned Counsel also would maintain that it is pertinent to note that there is no abandonment of the rest of the claim and inasmuch as individual sales in favour of the members of the society already had been questioned, there cannot be any relief relating to a portion of the property. The learned Counsel also had drawn my attention to Sections 16 and 20 and also 22 of the Specific Relief Act, 1963.

12. Heard both the Counsel and also perused the evidence of PW1, DW1 and DW2 and also the documents Ex.A1 to Ex.A18 and Exs. B1 to B11.

13. The following points arise for consideration in this appeal:

(a) Whether the appellant/1st plaintiff is entitled to the relief of specific performance as prayed for ?

(b) Whether the appellant/1st plaintiff is entitled to the relief of specific performance relating to a portion of the plaint B schedule property, as amended by the plaintiffs ?

(c) Whether the appellant/1st plaintiff is entitled to the alternative relief of claim of damages ?

(d) Whether the relief prayed for can be granted in favour of the appellant in the light of the order of default dated 3-3-1998 made as against the respondents 8 to 18/purchasers ?

(e) Whether the suit agreement of sale is opposed to public policy and hit by Section 23 of the Indian Contract Act?

(f) If so, to what relief the appellant is entitled to ?

14. Points (a) to (d): For the purpose of convenience, on appreciation of the facts and circumstances of the case. Points (a) to (d) are dealt with together.

15. The appeal is filed only by the 1st plaintiff as appellant and the other plaintiffs are impleaded as respondents 17 and 18 in the appeal against whom, an order of dismissal for default was made on 3-3-1998 and hence unless it is shown that the appellant/1st plaintiff has a right to claim the relief even representing the other plaintiffs in the suit, the relief prayed for by the appellant/1st plaintiff cannot be granted.

16. The 2nd plaintiff who had examined himself as PW1 had stated that defendants 2 to 5 as partners of the 1st defendant firm, executed the agreement of sale Ex.A1, dated 12-8-1979 in favour of the plaintiffs agreeing to sell the plaint schedule property for a sum of Rs. 2,50,000/- by taking an advance of Rs. 10,000/- and the balance of sale consideration to be paid at the time of execution of

the registered sale deed, and the sale deed to be executed three months after obtaining clearance from the U.L.C. by defendants 2 to 5 and vacant possession of the property also has to be given at the time of registration of the sale deed and inasmuch as they failed to execute the sale deed they got issued a registered notice under the original of Ex.A2 demanding them to execute the sale deed and on coming to know that they were trying to alienate the said property in favour of others they got published in Eenadu under the original of Ex.A3, about the fact of entering into the aforesaid agreement of sale and PW1 also deposed about Ex.A4 and also Ex.A5 and Ex.A7. PW1 also had further stated that they filed a writ petition which was dismissed and the same was marked as Ex.A6 and Ex.A7 is a copy of the sale deed executed by 2nd defendant in favour of the 6th defendant. The 4th defendant was examined as DW1 and he deposed that his father, the 2nd defendant in the suit, died and the plaintiffs entered into an agreement of sale with the 1st defendant firm. The 2nd defendant had invested the plaint schedule property as share capital of the said partnership firm and their father, the 2nd defendant, was the managing partner of the 1st defendant firm and DW1 and his brothers 3rd and the 5th defendants, are the other partners of the 1st defendant firm and in the year 1960 his father, the 2nd defendant, purchased the plaint schedule property out of self-earnings. DW1, no doubt admitted the execution of Ex.A1 and receiving Rs. 10,000/- as advance and also admitted having agreed to execute the sale deed within three months after obtaining permission from U.L.C. authorities from the date of such permission and DW1 had further deposed about Ex.B1, the partnership deed of the 1st defendant firm dated 10-5-1961 is the notice Ex.B2, the reply Ex.B3 and rejoinder Ex.B4 and yet another reply Ex.B5 and DW1 also had explained about the issuance of G.O. Ms. No. 136 and G.O. Ms. No. 86 and had deposed mat the Government had issued Ex.B8 - G.O. Ms. No. 86, dated 25-1-1982, permitting them to sell the suit land to the 6th defendant and the plaintiffs filed a writ petition questioning the said G.O. which was dismissed and subsequent thereto the 6th defendant had divided the property into plots and had alienated and DW1 also, deposed that there was never an attempt on the part of the plaintiffs to obtain permission from the 16th defendant. DW1 also had specifically stated that they had not informed the 6th defendant about the prior agreement of sale and in view of G.O. Ms. No. 136 and G.O. Ms. No. 86 the sale was effected in favour of the 6th defendant.

17. The 12th defendant was examined as DW2 who had deposed that he had purchased 203 sq.yards from the 6th defendant under the original of Ex.BlO sale deed, dated 6-5-1982 for a sum of Rs. 6,566/- and since then he has been in possession and enjoyment of the property and subsequently he applied for permission to Visakhapatnam Municipal Corporation to construct a house therein and in pursuance of the same the permission was granted by Municipal Corporation under the original of Ex.B11 and till he had purchased the site from the 6th defendant he was not aware of any agreement of sale in favour of the plaintiffs and he is a bona fide purchaser for valuable consideration without prior notice of said agreement of sale. On appreciation of the evidence of PW1, DW1 and DW2, the trial Court had granted the relief to the extent of refund of Rs. 10,000/-with interest. Except the evidence of PW1, no other evidence had been let-in on behalf of the plaintiffs. The relief of specific performance is an equitable relief. Section 20 of the Specific Relief Act deals with Discretion as to decreeing specific performance and Sub-section (1) of Section 20, specifies as follows:

> "The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guarded by judicial principles and capable of correction by a Court of Appeal."

In M. Lokeswara Rao v. D. Vijaya Lakshmi, , it was held that granting or refusing a decree for specific performance is in the discretion of the Court but the discretion should not be refused arbitrarily and the discretion should be exercised on sound principles of law and can be of correction by appellate Court. In C. Panduranga Rao v. V.Shyamala Rao, , it was held that the party is not entitled to the relief of specific performance as a matter of course even though the execution of the said agreement of sale is either admitted or proved and he must therefore show equity in himself before seeking the relief of specific performance. In the decision referred (supra), it was held by the Apex Court that the ordinary rule is that the specific performance should be granted and it ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. In the decision referred (supra), the Apex Court held that the relief of specific performance in respect of a share of property cannot be refused on the ground that such property may have to be partitioned inasmuch as it is not a legal infirmity and the vendee has right to apply for partition and get the share demarcated. In the decision referred (supra), it was held that where the plot was transferred to a third party by the defendant, the proper form of the decree is to direct the specific performance of the contract between the defendant vendor and plaintiff and direct the subsequent purchaser to join in the conveyance for the purpose of showing that the title is passed. In the decision referred (supra), it was held that the normal rule is in favour of granting the relief of specific performance and the decree cannot be denied merely on the ground that the description of the land given in the agreement was not specific. In Abdul Rarhim v. Tufan Gazi, AIR 1928 Cal 584, it was held that where the plaintiff by his conduct made it impossible for the Court to give effect to the contract in its entirety, the Court will not allow specific performance of a part. In Shyam Sunder Chowkhani v. Kajal Kanti Biswas, AIR 1999 Gau. 101, it was held that an agreement of sale executed by only one of the co-sharers for the entire land cannot be enforced. In P.V. Joseph's Son Mathew v. N. Kuruvila's Son, , it was held that Section 20 of the Specific Relief Act, 1963 reserves judicial discretion to Courts as to decreeing specific performance and the Court should meticulously consider all the facts and circumstances of the case and the Court is not bound to grant the specific performance merely because it is lawful to do so and the motive behind the litigation should also enter into the judicial verdict.

18. In the present case on hand, the trial Court on appreciation of the evidence of PW1 and also DW1 and DW2, had arrived at a conclusion that the plaintiffs are entitled to the relief of refund of Rs. 10,000/- with subsequent interest at 24 per cent from the date of suit till realisation with proportionate costs. It is also pertinent to note that only one of the plaintiffs, aggrieved by the same had preferred the present appeal and as already referred to supra, the appeal was dismissed for default as against respondents 17 and 18, the other plaintiffs in the suit and also respondents 8 to 18, the purchasers and also the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam and in this view of the matter also, the relief prayed for cannot be granted. Apart from this aspect, the evidence of PW1 is clear and categorical under what circumstances the 2nd defendant sold the property to the 6th defendant by virtue of G.O. Ms. No. 136 and G.O. Ms. No. 86

and also had explained that the subsequent purchasers had no notice of the prior agreement of sale and on appreciation of evidence a finding had been recorded to the effect that the subsequent purchasers are bona fide purchasers without notice of the prior agreement of sale and the mere fact that there was publication in Eenadu on 11-5-1981 under the original of Ex.A3 by itself cannot be said that the other parties had knowledge of the prior agreement of sale. Be that as it may, though the suit as framed and the main relief prayed for is to the effect that the plaintiffs are entitled to the relief of specific performance as prayed for, however in the alternative it was strenuously contended by the learned Counsel for the appellant that for the portion of the property which was permitted to be retained by defendants 1 to 5, the relief can be granted in view of the fact that an amendment was made to this effect.

19. It is not in dispute that there is a recital in the agreement of sale relating to obtaining permission from the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976. Apart from it, as against the purchasers also, the appeal was dismissed for default and hence the relief as prayed for, for the entire property cannot be granted. Further, in the light of the evidence of PW1 and also DW1 and DW2, the relief prayed relating to a portion of the property also cannot be granted since the trial Court after discussing all the facts and circumstances in detail, on the ground of equity, had decreed the suit for the refund of the advance amount and interest and I do not find any special or compelling reasons or circumstances so as to arrive at the conclusion that the discretion exercised by the trial Court in this regard is unjustified. Further more, the 4th defendant as DW1 had explained the facts and circumstances in detail and had stated that the plaintiffs had never tried to obtain permission from the competent authority.

20. The learned Counsel for the contesting respondents also had raised a contention stating that the appeal is liable to be dismissed even on the ground that the plaintiffs were unable to establish their readiness and willingness for the performance of the terms and conditions of the agreement of sale. A serious objection was taken by the learned Counsel for the appellant mainly on the ground that this aspect was not specifically raised in the pleading nor at issue was framed in this regard and hence for the first time in the appeal such contention cannot be permitted to be raised. It is no doubt true that no issue had been framed in this regard by the trial Court. But however, whether there is a pleading relating to the readiness and willingness to perform a part of the contract and whether there is evidence in this regard, are all aspects available on record and while appreciating the facts and circumstances of a case, in a suit for specific performance, at least to the limited extent where the discretion can be exercised either to grant the relief or to negative the relief, this aspect can definitely be looked into even at the stage of appeal. It is no doubt true that the way of pleading in this regard had been pointed out by the learned Counsel for the appellant. Apart from this, except the evidence of PW1, there is no other evidence and PW1 in fact had not preferred the appeal at all. Even otherwise, there is no clear evidence in this regard even in the evidence of PW1, In the Law of Specific Relief, by me, 3rd Edition, at page 260, while dealing with Section 16(c) of the Specific Relief Act, 1963 I had observed:

> "Specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has 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 terms the performance of which has been prevented or waived by the defendant. The explanation says that for the purpose of clause (c) if a contract involved the payment of money it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court and the plaintiff must aver performance of or readiness and willingness to perform the contract according to its true construction. A plaintiff in a suit for specific performance should always treat the contract as still subsisting, he has to prove his continuous and willingness from the date of the contract to the time of the hearing of the suit tb perform his part of the contract and a failure to make good that case would undoubtedly lead to a rejection of his claim for specific performance."

In Syed Dastagir v. T.R. Goplakrishna Setty, , it was held by the Apex Court that Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but the plaintiff must aver that he has performed or has always been ready and continues to be willing to perform his part of the contract and to insist on mechanical reproduction of the exact words of a statute would be to insist on the form rather than the essence. It is also no doubt true that the principle that readiness and willingness should be pleaded and proved cannot be treated as a straight-jacket formula, but it is to be determined from the entirety of the facts and circumstances -the intention and also the conduct of the party concerned. Here, even on appreciation of the pleadings and also the evidence of PW1, I am of the opinion that this essential statutory requirement specified under Section 16(c) of the Specific Relief Act, 1963 had not been established and hence inasmuch as the relief of specific performance being the discretionary relief, though a specific issue was not framed, even in an appeal this aspect can be taken into consideration while appreciating the other facts and circumstances of a case.

21. Apart from this aspect, in the alternative it was strenuously contended by the learned Counsel for the appellant that at any rate since the plaintiffs had to suffer serious damage because of the breach of contract, at least they are entitled to the relief of damages as prayed for. I am not inclined to accept this contention especially in the light of the clear evidence of DW1 in this regard. The facts disclose that the 2nd defendant, hoping that there is every possibility of completing the transaction in the light of the assurance that by virtue of the influence which the plaintiffs were said to have been commanding the permission will be secured and the transaction would be finalised, Ex.A1 transaction was entered into. But as can be seen from the facts of the case, that was not done and in view of the subsequent events which had been explained in detail by DW1 and in pursuance of G.Os., defendants 1 to 5 had no other go except to enter into a sale transaction with the 6th defendant and hence in the light of this factual background it cannot be said that negativing the relief of damages by the trial Court to the plaintiffs is in any way unjustified and hence the appellant is not entitled to the said relief. Hence, in the light of the evidence of DW1 and DW2 and also the evidence of PW1 and in view of the fact that one of the plaintiffs alone had preferred the appeal, and the appeal as against the other plaintiffs also had been dismissed for default who were impleaded as respondents, and the appeal also was dismissed for default as against the purchasers, absolutely there are no reasons to interfere with any of the findings recorded by the trial Court relating to these aspects. The Points (a) to (d) are answered accordingly.

22. Point (e):--The trial Court after appreciating all the facts and circumstances of the case had arrived at a conclusion that Ex.Al is neither opposed to public policy nor hit by Section 23 of the Indian Contract Act. Section 23 of the Indian Contract Act reads as follows:

> "What consideration and objects are lawful, and what not-
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> The consideration or object of an agreement is lawful, unless- it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.
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> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

The specific stand taken by the contesting respondents is that the agreement of sale Ex.A1 is void, inoperative and is not enforceable in law in view of the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 and the same is hit by Section 23 of the Indian Contract Act and also opposed to public policy. It is essential to note that one of the conditions of the agreement of sale is relating to obtaining of permission from the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 and in the light of the said fact, it is to be seen whether Ex.Al transaction is either opposed to public policy or hit by Section 23 of the Indian Contract Act.

23. In United Poineer Society v. Mrs. Chand Beebi, 1986 (2) APLJ 79, it was held that though Section 27(1) of the Urban Land (Ceiling and Regulation) Act, 1976 imposed prohibition to alienate any urban or urbanisable land except to the extent indicated therein, Sub-section (2) thereof lifts out its rigour by giving right to a party to enter into a contact subject to obtaining the sanction from the competent authority therein and it is an incident of the contract and hence such an agreement is neither opposed to public policy nor is void under Section 23 of the Indian Contract Act and it is legal and enforceable. In Denzyl Winston Ferries v. Abdul Jaleel, , it was no doubt held that where the suit land was earmarked for residential purpose and covered by master plan it is urban land and sale of such land which is in excess of ceiling limit without permission of the competent authority is not valid and such transaction is hit by Section 23 of the Indian Contract Act. But however, the said decision was rendered on the peculiar facts and circumstances of the said case. In Samptalal Ramelal Kimte v. A. V. Shridhar Naik, (DB), it was held that where the plaintiffs have undertaken to obtain exemption certificate from the competent authority within a particular period and they were unable to obtain, the dismissal of the suit for specific performance and direction to refund the amount was held to be well justified in the facts and circumstances of the said case.

24. Section 27 of the Urban Land (Ceiling and Regulation) Act, 1976 deals with prohibition on transfer of urban property and Sub-section (1) and subsection (2), which are relevant for the present purpose read as follows:

> (1) Notwithstanding anything contained in any other law for the time being in force but subject to the provisions of Sub-section (3) of Section 5 and Sub-section (4) of

> Section 10, no person shall transfer by way of sale, mortgage, gift, lease for a period exceeding ten years or otherwise, any urbanisable land with any building (whether constructed before or after the commencement of this Act) or a portion only of such building for a period of ten years of such commencement or from the date on which the building is constructed, whichever is later, except with the previous permission in writing of the competent authority.
>
> (2) Any person desiring to make a transfer in Sub-section (1), may make an application in writing to the competent authority in such form and in such manner as may be prescribed.

In view of Sub-section (2), the parties to the litigation thought of obtaining necessary permission from the competent authority for the purpose of alienation and in this view of the matter, it cannot be said that Ex.A1 falls under the rigour of subsection (1). While dealing with the aspect of enforceabity of agreement of sale vis-avis Section 23 of the Indian Contract Act, in M.A. Jabbar v. LIC House Building Employees Society, it was observed by this Court:

> "A perusal of the said section shows that it speaks of two requirements, viz., (1) consideration and (2) object of the agreement. Either one of them is lawful unless law forbids it or the Court regards it as immoral or opposed to public policy, in which case either the consideration or the object is said to be unlawful. The section declares in itself that every agreement of which the object or consideration are unlawful is void. It may be mentioned here that we are not concerned in this case with the consideration. There remains the other requirement of the section viz., the object of the agreement. To attract the mischief under Section 23 the object must either be immoral or opposed to public policy....."

In Central Inland Water Transport Corporation Limited v. Brojo Nath, , the Apex Court had an occasion to deal with the expression "opposed to public policy" and at paragraph-93 it was observed:

> "The Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transaction which were once considered agreement public policy are now being upheld by the Courts and similarly where there has been a well-organised head of public policy, the Courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy....."

As already observed by me, inasmuch as the parties had thought of obtaining necessary permission from the competent authority, under the Urban Land (Ceiling and Regulation) Act, 1976 it cannot be said that the suit transaction is in any way hit by either Section 23 of the Indian Contract Act, much less, opposed to public policy and hence the finding recorded by the trial Court in this regard does not deserve any interference in this appeal. The Point (e) is answered accordingly.

25. Point (f) :-- Viewed from any angle, in the light of the oral and documentary evidence available on record and also the facts and circumstances of the case discussed in detail while answering Points (a) to (d), the appeal is devoid of merits and accordingly the same is dismissed. But in the facts and circumstances of the case, without costs,