

IN THE HIGH COURT OF KARNATAKA,

DHARWAD BENCH

DATED THIS THE 27th DAY OF FEBRUARY 2024

THE HON'BLE MR JUSTICE ANANT RAMANATH HEGDE

REGULAR FIRST APPEAL NO.100196 OF 2014 (SP)

BETWEEN:

SRI MOHAMMED FARUGHUDDIN,
S/O JAWADALI, AGE:49 YEARS,
OCC:AGRICULTURE AND SERVICE,
R/O: KAUP, TQ and DIST: UDUPI,
REPRESENTED BY HIS GPA HOLDER SRI. A.M.FAROKHI

...APPELLANT

(SRI SOURABH SUNDAR, ADVOCATE FOR
SRI K L PATIL APPEARED THROUGH VC)

AND:

1 . SRI RAMACHANDRA BALU SHINDE,
SINCE DECEASED BY HIS LRS

1(a) SMT KASTURI,
W/O RAMACHANDRA SHINDE,
AGE: 60 YEARS, OCC:HOUSEHOLD.

1(b) SRI TANAJI,
S/O RAMACHANDRA SHINDE,
AGE: 40 YEARS, OCC:EMPLOYED.

1(c) SHURUTI,
D/O RAMACHANDRA SHINDE,
AGE: 36 YEARS, OCC:HOUSEHOLD.

1(d) AVAKKA,
D/O RAMACHANDRA SHINDE,
AGE: 32 YEARS, OCC: HOUSEHOLD
ALL R/O H.NO.20, NAVA AYODHYA NAGAR,
OLD HUBLI, HUBBALLI,
DIST: DHARWAD,
(AMENDMENT CARRIED OUT AS PER
ORDER DATED 01.08.2022)

...RESPONDENTS

(BY SRI S P SHANKAR, SR. COUNSEL A/W
SMT MAMATA G KULKARNI, ADVOCATE FOR R1 (A, B & D)
SRI PRASHANTH S KADADEVAR ADVOCATE FOR R1(C))

THIS RFA IS FILED UNDER SECTION 96 OF CPC., AGAINST THE JUDGMENT AND DECREE DATED: 26.08.2014, PASSED IN OS NO.406/2007, ON THE FILE OF PRINCIPAL SENIOR CIVIL JUDGE AND JMFC., HUBLI, DISMISSING THE SUIT FILED FOR SPECIFIC PERFORMANCE OF THE AGREEMENT OF SALE.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 15TH FEBRUARY 2024 AND COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

JUDGMENT

1. The Plaintiff filed a suit for the specific performance of a contract to enforce the agreement for sale dated 20.07.2006. In the alternative, Rs.11,51,000/- with interest @ 15% per annum is claimed towards refund of earnest amount and damages.

2. The plaintiff claims Rs.5 lakhs is paid as advance consideration amount, on 20.07.2006 by PW-1, the power of attorney holder of the plaintiff, and the balance Rs.6,51,000/- was to be paid at the time of registration of the sale deed. The agreement stipulated six months to complete the sale transaction.

3. The plaintiff pleaded that he was always ready and willing to perform his part of the contract and the defendant did not come forward to execute the sale deed.

4. The defendant resisted the suit. The defendant admitted execution of the agreement. However, took a plea that the time was the essence of the contract. The defendant further contends that the plaintiff did not pay the balance consideration amount within six

months as stipulated. The defendant claimed that he orally revoked the agreement for sale dated 20.07.2006 as the transaction is not completed within six months.

5. The trial Court has concluded that the agreement for sale dated 20.07.2006 is proved. However, the decree for specific performance is declined holding that the plaintiff failed to prove his readiness and willingness to perform his part of the contract. The trial Court passed a decree for refund of the earnest amount of Rs.5,00,000/- along with interest at the rate of 6% per annum as against the claim of 15% per annum. The decree for compensation is also declined.

6. The trial Court held that the defendant has orally revoked the agreement for sale. The defendant had also taken a contention (by way of an amendment of written statement) that power of attorney produced by PW1 marked at Ex.P.10 is concocted and there was no power of attorney in favour of PW1 when the agreement was entered on 20.07.2006. The finding on this issue is against the defendant.

7. Aggrieved by the decree refusing specific performance of the contract, the plaintiff is in appeal.

8. The defendant has accepted the decree for refund of the earnest amount.

9. Learned counsel Sri.K.L.Patil, appearing for the appellant raised the following contentions:

- (i) The suit for specific performance is decreed for refund of the earnest amount overruling defendant's contentions. The agreement is held to be proved and the defendant did not challenge the decree for refund of the earnest money. Thus, he cannot dispute the execution of the agreement for sale.
- (ii) Time is not the essence of the contract when it comes to the sale of immovable property and this well-established principle is not considered by the trial Court in proper perspective. The trial court erred in holding that the time was the essence of the contract dated 20.07.2006.
- (iii) As per the terms of the agreement if balance consideration amount is not paid within 6 months, then the defendant must seek cancellation of the agreement by repaying earnest sale consideration amount. The defendant did not get the agreement cancelled and did not refund the advance consideration amount. Thus, the finding that the defendant has cancelled the agreement is erroneous.
- (iv) The defendant has admitted in the cross-examination that the plaintiff is a man of sufficient means. It established plaintiff's readiness and willingness to perform the contract.

- (v) Soon after noticing the public notice inviting objections to the proposed sale of the properties by the defendant, to a third party, the plaintiff filed the suit for the specific performance of the contract. The trial Court erred in holding that the plaintiff was not ready and willing to perform his part of the contract.
- (vi) In the alternative, if specific performance is not possible for any valid reason, there should have been a decree for compensation in addition to the decree for refund of the amount with 15% interest on the amount claimed.

10. In support of his contention, the learned counsel for the appellant has relied on the following judgments:

- (a) ***Man Kaur (Dead) by LRs vs. Hartar Singh Sangha (2010) 10 SCC 512***
- (b) ***Swarnam Ramachandran vs. Aravacode Chakungal Jayapalan, AIR online 2004 SC 907***
- (c) ***Balasaheb Dayandeo Naik (Dead) through LRs & Ors vs. Appasaheb Dattatraya Pawar AIR 2008 SC 1205***
- (d) ***Gaddipati Divija vs. Pathuri Samrajyam AIR online 2023 SC 290***
- (e) ***M/s Greater Ashoka and Land Development Company vs. Kanti Prasad Jain (Deceased) through LRs. SLP No.23655-56/2018***

11. Learned Senior counsel Sri S.P.Shankar appearing on behalf of the respondent/defendant would raise the following contentions:

- i. It is demonstrated in the cross-examination of the Pw-1 (the power of attorney holder of plaintiff) that Pw-1 has spent Rs.5 lakhs (Amount allegedly with him after paying Rs.5 lakhs as advance consideration amount) which the plaintiff claims to have given to purchase the property. Hence, PW1 had no money to complete the sale transaction.
- ii. The plaintiff alone could have spoken about his readiness and willingness to perform his part of the contract and he shied away from the witness box. The alleged power of attorney holder is incompetent to speak about the intention of the plaintiff to perform his part of the contract.
- iii. The agreement for sale marked at Ex.P17 does not appear to be the one entered into on behalf of the principal. The agreement does not refer to the power of attorney alleged to have been executed in favour of PW-1. Even in the plaint, there is no reference to the alleged power of attorney in favour of PW-1. The alleged power of attorney (Ex.P10) dated 02.02.2003 is concocted and antedated.

iv. Plaintiff sought two reliefs. Relief (a) is for the specific performance of a contract. Relief (b) is an alternative relief for refund of the earnest amount and compensation. The Court has granted the decree for refund of the earnest amount. Thus, the plaintiff is not an aggrieved person and has no right to challenge the decree granting refund of the earnest amount which is granted pursuant to the prayer made in the plaint itself.

12. The learned Senior counsel appearing for the respondents relied upon the following judgments:

- (i) *Vidyadhar vs. ManikRao and another (1999)3 SCC 573***
- (ii) *Man Kaur (Dead) by LRs. vs. Harthar Singh Sangha (2010) 10 SCC 512***
- (iii) *N P Thirugnanam (Dead) by LRs vs. Dr.R.JaganMohan Rao and others AIR 1996 SC 116***
- (iv) *Loonkaran Sethia etc vs. Mr.Ivan E John & others etc , AIR 1977 SC 336***
- (v) *Mohinder Kaur vs. Sant Paul Singh (2019) 9 SCC 358***
- (vi) *Janki Vashdeo Bhojwani & another vs. Indusind Bank Ltd & others AIR 2005 SC 439***
- (vii) *Lt.Cdr. MC Kendall vs. S. Chandrashekar ILR 1991 Kar 4142***
- (viii) *Gangabai vs Vijay kumar and others AIR 1974 sc 1126***
- (ix) *Sharnamma vs Renuka and others (RSA No.7034/2011)***

13. The question whether the respondent in an appeal, without there being any cross objection *can challenge the adverse finding resulting in an adverse decree*, and can seek reversal of the decree or part of the decree is no longer *res integra*. The question is lucidly answered by the Apex Court in **BANSARI AND OTHERS VS. RAM PHAL (2003) 9 SCC 606**. The relevant portion of the said judgment is extracted as under.

10. xxxxxxxx *A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:*

- (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.*
- (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.*
- (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.*

11. *In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he*

seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. xxxxx xxxxxxxxxxxxxxxx.

12. *The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross-objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside, or modified to his advantage. xxxxxxxxxxxxxxxx..... It follows as a necessary corollary from the above said statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross-objection.*

14. In the case on hand, the trial Court has passed a decree for refund of the earnest amount. The decree for specific performance is refused. Thus, both the plaintiff and defendant were entitled to challenge the decree to the extent of denial of relief claimed by them. The plaintiff has filed appeal and claiming a decree for specific performance. The defendant has not filed an

appeal. The defendant has accepted the decree for refund of earnest amount. The decree for refund of money is based on the finding that the execution of the agreement for sale is proved.

15. The alternative prayer in the plaint qualified by the expression, "*Alternatively if this Hon'ble Court comes to the conclusion that for any reason the specific performance is not to be granted,*". The words " for any reason" has to be understood as "valid reason" as such the plaintiff is an aggrieved party when the specific performance is refused.

16. In view of the law laid down in **BANARASI** supra, the option to challenge the adverse finding in a judgment, being a respondent, without there being any cross objection, is available only when the respondent can **support** the decree and not when he attacks the decree to set aside it either partially or fully.

17. Referring to the judgment of the Hon'ble Apex Court in **GANGABAI vs VIJAY KUMAR AND OTHERS** reported in **AIR 1974 SC 1126**, which is followed by the co-ordinate bench of this Court in **SHARNAMMA vs RENUKA AND OTHERS** (RSA No.7034/2011), it is urged that the challenge to an adverse finding without cross objection by the respondent is maintainable. Closer scrutiny of the facts in both cases referred to above would reveal that in both cases, the decrees were in favour of the respondents

who challenged the adverse findings in the judgments in an appeal filed by the other party. The position in this case is different. There is not just an adverse finding, but also an adverse decree against the respondent which is not questioned by either filing an appeal or cross objection.

18. Thus, for the reasons recorded above, the respondent who has not filed cross objection cannot assail the finding on proof of agreement dated 20.07.2006 or the power of attorney. Hence it is not necessary to analyse the evidence and judgments cited in support of the contention that the agreement is not proved.

19. Other points that arise for consideration are;

- i. Whether the time was the essence of the contract dated 20.07.2006?
- ii. Whether the defendant/respondent has rescinded the contract?
- iii. Whether the plaintiff/appellant has proved his readiness and willingness to perform his part of the contract?
- iv. Whether the plaintiff/appellant is entitled to a decree for specific performance of contract or damages in the alternative?

20. Whether the time was the essence of the contract has to be understood primarily from the terms and conditions of the

contract. If there is other evidence or circumstances which throw light on the controversy, they must be analysed.

21. The relevant clauses in the agreement for sale dated 20.07.2006 are extracted below:

ನಮ್ಮ ಮನೆತನದ ಅಡಚಣೆಯ ಸಲುವಾಗಿ ಜರೂರ ಹಣ ಬೇಕಾಗಿದ್ದರಿಂದ ಸದರ ಜಮೀನು ಮಾರಾಟಕ್ಕೆ ಹಚ್ಚಲಾಗಿ ನೀವು ಎಲ್ಲರಿಗಿಂತ ಹೆಚ್ಚಿನವ ಯೋಗ್ಯ ಕಿಮ್ಮಿತ್ತಿಗೆ ಖರೀದಿಗೆ ಬೇಡಿದ್ದರಿಂದ ನಿಮಗೆ ಖಂಡಮಕ್ತಾ ಹನ್ನೊಂದು ಲಕ್ಷ ಐವತ್ತೊಂದು ಸಾವಿರ ರೂಪಾಯಿ (11,51,000-00) ಗಳಿಗೆ ಖರೀದಿಗೆ ಕೊಡಲು ಒಪ್ಪಿಕೊಂಡು ಇವತ್ತಿನ ದಿವಸ ಸಂಚಗಾರ ಅಂತಾ ಐದು ಲಕ್ಷ ರೂಪಾಯಿ (5,00,000-00) ಗಳನ್ನು ರೊಕ್ಕ ಪಡೆದುಕೊಂಡಿದ್ದೇನೆ. ಬಾಕಿ ಉಳಿದ ರಕಂ ಆರು ಲಕ್ಷ ಐವತ್ತೊಂದು ಸಾವಿರ ರೂಪಾಯಿ (6,51,000-00) ಗಳನ್ನು ನೀವು ನನಗೆ ಇವತ್ತಿನಿಂದ 6 (ಆರು) ತಿಂಗಳದೊಳಗಾಗಿ ಖರೀದಿ ಪತ್ರ ನೋಂದಾಯಿಸಿಕೊಳ್ಳುವ ಕಾಲಕ್ಕೆ ಮೆ:ಸ:ರ ಸಮಕ್ಷಮ ಕೊಡಬೇಕು. ಸದರಿ ಖರೀದಿ ಪತ್ರದ ಸ್ಟಾಂಪ್ ಡ್ಯೂಟಿ ವ ನೋಂದಣಿ ಖರ್ಚು ನೀವು ವಹಿಸಿರುತ್ತೀರಿ. ಸದರಿ ಜಮೀನು ಖರೀದಿ ಕಾಲಕ್ಕೆ ನಿಮಮ್ಮ ಕಬಜಾಕ್ಕೆ ಕೊಡುತ್ತೇನೆ.

ಸದರಿ ಅವಧಿಯ ಒಳಗಾಗಿ ನೀವು ಖರೀದಿ ಪತ್ರ ನೋಂದಾಯಿಸಿಕೊಳ್ಳದಿದ್ದಲ್ಲಿ ಸದರಿ ವ್ಯವಹಾರ ರದ್ದುಪಡಿಸಿಕೊಂಡು ಸದರಿ ನೀವು ಕೊಟ್ಟ ಸಂಚಗಾರ ರಕಂ ನಿಮಗೆ ಪರತ ಕೊಡುತ್ತೇನೆ. ಇದಕ್ಕೆ ಯಾವುದೇ ತರಹದ ಬಡ್ಡಿ ವಗೈರೆ ಇರುವುದಿಲ್ಲ.

(Emphasis Supplied)

22. From the above said clauses in the agreement, no difficulty in holding that six months' time is fixed for payment of balance consideration amount by the purchaser. At two places in the agreement, six months' time is fixed for payment of the balance consideration amount. In addition, it is also evident that the right to cancel the contract is also available to the vendor in case the balance consideration amount is not paid within the time prescribed.

This is apparent from the expression “ಸದರಿ ಅವಧಿಯಲ್ಲಿ ಖರೀದಿ ಪತ್ರವನ್ನು ನೋಂದು ಮಾಡಿಸಿಕೊಳ್ಳದೇ ಇದ್ದರೆ ಸದರಿ ಕರಾರು ಪತ್ರವೂ ರದ್ದಾಗುತ್ತದೆ ಎಂದು ನಿಷಿ-17 ರಲ್ಲಿ ಬರೆಯಲಾಗಿರುತ್ತದೆ.”

23. Sri K. L. Patil, the learned counsel appearing for the plaintiff/appellant would contend that the obligation is cast on the vendor to get the agreement cancelled and to repay the earnest consideration amount. Since it is not cancelled by executing a deed followed by repayment of earnest consideration amount, the contract continues to subsist and leads to the conclusion that time is not the essence of the contract.

24. Probably, this is one plausible interpretation. However, how the parties have understood the terms of contract is relevant and same needs consideration. For lack of precision in the language employed in the terms of the contract, or for any reason, if it attracts dual or multiple interpretations, then, the Court has endeavor to ascertain the intention of the parties from the evidence and attending circumstances.

25. At this juncture, it is necessary to refer to the relevant portion of the evidence of PW1 in the cross-examination.

ಖರೀದಿ ವ್ಯವಹಾರವು ಒಟ್ಟು ರೂ.11,51,000-00 ಆಗಿದೆ. ವಾದಿ ನನ್ನ ಕಡೆ ಆಸ್ತಿ ಖರೀದಿ ಮಾಡುವ ಸಲುವಾಗಿ ನಗದು ಹಣವನ್ನು ಇಟ್ಟು ಹೋಗಿದ್ದನು. ಅದರಲ್ಲಿ ನಾನು ರೂ.5,00,000-00 ಗಳನ್ನು ಕೊಟ್ಟಿದ್ದೇನೆ. ವಾದಿ ನನ್ನ ಮನೆಯಲ್ಲಿ ರೂ.10,00,000-00

ನಗದು ಹಣವನ್ನು ಇಟ್ಟು ಹೋಗಿದ್ದರು, ಸದರಿ ವ್ಯವಹಾರದ ಕಾಲಕ್ಕೆ ಹುಬ್ಬಳ್ಳಿಯಲ್ಲಿ ಸ್ಟೇಟ್ ಬ್ಯಾಂಕಿನಲ್ಲಿ ವಾದಿಯದು ಒಂದು ಅಕೌಂಟ್ ಇತ್ತು. ಹುಬ್ಬಳ್ಳಿಯಲ್ಲಿ ವಾದಿಯ ಹೆಸರಿನಲ್ಲಿ ಖಾತೆಗಳು ಯಾವ ಯಾವ ಬ್ಯಾಂಕಿನಲ್ಲಿದ್ದವು ಎಂದು ನಾನು ಕೇಳಿಲ್ಲ. ರೂ.5,00,000-00 ಗಳನ್ನು ಕೊಟ್ಟ ನಂತರ ಇನ್ನೂ ರೂ.5,00,000-00 ನನ್ನ ಬಳಿ ಉಳಿದಿತ್ತು. ಅದನ್ನು ನಾನು ಖರ್ಚು ಮಾಡಿದ್ದೇನೆ.

ಖರೀದಿ ಮಾತುಕತೆಯ ಕಾಲಕ್ಕೆ 6 ತಿಂಗಳೊಳಗಾಗಿ ಸಂಪೂರ್ಣ ಹಣ ಕೊಟ್ಟು ಖರೀದಿ ಮಾಡಿಕೊಳ್ಳಬೇಕೆಂದು ಕರಾರು ಆಗಿರುತ್ತದೆ. ಅದೇ ಪ್ರಕಾರ ಸಂಚಗಾರ ಪತ್ರವನ್ನು ಬರೆಯಲಾಯಿತು. ಸದರಿ ಅವಧಿಯಲ್ಲಿ ಖರೀದಿ ಪತ್ರವನ್ನು ನೋಂದು ಮಾಡಿಸಿಕೊಳ್ಳದೇ ಇದ್ದರೆ ಸದರಿ ಕರಾರು ಪತ್ರವೂ ರದ್ದಾಗುತ್ತದೆ ಎಂದು ನಿಪಿ-17 ರಲ್ಲಿ ಬರೆಯಲಾಗಿರುತ್ತದೆ. ಮತ್ತು ನಾವು ಕೊಟ್ಟ ಸಂಚಗಾರ ಹಣವನ್ನು ಯಾವುದೇ ಬಡ್ಡಿ ಇಲ್ಲದೆ ಪರತ್ ಕೊಡಬೇಕು ಎಂದು ಬರೆಯಲಾಗಿರುತ್ತದೆ. ಖರೀದಿ ವ್ಯವಹಾರವನ್ನು ಮಾಡುವುದಕ್ಕಿಂತ ಪೂರ್ವದಲ್ಲಿ ಈ ದಾವೇದ ಆಸ್ತಿಗೆ ಸಂಬಂಧಪಟ್ಟ ಕಾಗದಗಳನ್ನು ನಾನು ನೋಡಿರುವೆ, ದಾವೇದ ಜಮೀನನ್ನು ನಾನು ನೋಡಿದ್ದೇನೆ. ದಾವೇದ ಆಸ್ತಿಗೆ ಸಂಬಂಧಪಟ್ಟಂತೆ ಕಾಗದಗಳು ಎಲ್ಲವೂ ಸರಿಯಾಗಿ ಇದ್ದವು.

(Emphasis Supplied)

26. The admission of Pw-1 extracted above is unambiguous and categorical of what is stated therein. It is also relevant to note that Pw-1 is a practicing advocate. Thus, his admission cannot be equated with an admission of a lay man. Probably it stands on a higher pedestal. And following can be readily noticed in his evidence;

- (i) that the contract stipulated six months from the date of contract to pay the entire balance consideration amount;
- (ii) if the amount if not paid within six months, the contract gets cancelled;

- (iii) All title deeds pertaining to the properties agreed to be sold were in order;

27. On analysis of the evidence, it is forthcoming that except executing the sale deed on receipt of the balance consideration amount, nothing else was required to be done by the defendant/respondent. In other words, the payment of balance consideration by the plaintiff was not dependent on anything to be done by the defendant other than execution of sale deed on receipt of balance amount.

28. Nothing is placed on record to hold that the parties agreed to relax the condition relating to the time stipulated in the agreement for sale. Even there is no pleading to this effect. Though, the principle that time is not the essence of the contract in a suit for specific performance of immovable property deserves its consideration in appropriate cases, said principle cannot be applied as if it is a Statute. The said principle must be applied by considering the facts and circumstances of each case. In addition to the aforementioned cross examination of Pw-1, it is relevant to refer to the following portion of the cross-examination of Pw-1 which is as under:-

ಆರು ತಿಂಗಳೊಳಗಾಗಿ ಖರೀದಿ ಪತ್ರವನ್ನು ಮಾಡಿಕೊಳ್ಳಬೇಕು ಇಲ್ಲದಿದ್ದರೆ ಪ್ರತಿವಾದಿಗೆ ಕೊಟ್ಟ ಹಣ ಅವರಿಗೆ ದಕ್ಕುತ್ತದೆ ಎನ್ನುವ ಕರಾರಿಗೆ ನಾನು ಪಾವರ್-ಆಪ್ ಅಟಾರ್ನಿಮೆಂಟ್‌ನಿಂದ ಒಪ್ಪಿಕೊಂಡಿದ್ದೆ ಮತ್ತು ಅದನ್ನು ವಾದಿಗೆ ತಿಳಿಸಿದೆ. ಅವರು ಒಪ್ಪಿಕೊಂಡರು.

29. The above said evidence also points to the inevitable conclusion that the time was indeed an essence of the contract.

30. It may not be out of place to mention here that in the last couple of decades, the value of the immovable properties is soaring high and that too in a short span of time. The general principle that the time is not an essence of the contract when it comes to immovable property, is not a statutory prescription. It is a principle evolved by Courts on equitable consideration. Indeed, such equitable consideration had strong justifications in good old times, where hardly there was any change in the property value for a considerable length of time. However, many things concerning real estate have changed beyond comprehension. Perhaps the general principle that the time is not an essence of the contract when it comes to immovable property, certainly calls for a relook in the present-day context. This Court is not saying that the said principle is obsolete in the present-day context. However, the kind of laxity shown earlier on the party who took his own sweet time to approach the court seeking specific performance of contract of immovable property, probably cannot be applied in the same measure. Thus, the Courts need to be a bit circumspect while applying the said principle.

31. If, the terms of the contract stipulate the time frame for payment of the consideration amount by the purchaser and nothing was required to be done by the vendor except executing the sale deed on receipt of the entire consideration amount and when there is an admission in the cross-examination which would point to the fact that the time was the essence of the contract, the principle that the time is not the essence of the contract cannot be applied to dilute the rigour of the agreement.

32. This Court has also referred to the judgments cited by the appellant to urge the point that the time is not an essence of the contract in case of an agreement to sell immovable property. Those judgments are rendered in the context of agreements and evidence placed in those cases. Having analysed the agreement for sale and evidence on record, this Court is of the view that the ratio in the judgments cited cannot be made applicable to the present case. On consideration of the terms of the agreement and the evidence on record, this Court is of the view that the time was indeed the essence of the contract dated 20.07.2006.

33. The next point that requires consideration is, "whether the contract dated 20.07.2006 stood cancelled immediately after the expiry of six months from the date of the agreement".

34. Admittedly, the sale deed is not executed within six months from the date of the agreement. It is already noticed that the plaintiff did not pay the balance consideration amount within six months. It is admitted in the cross-examination by Pw-1 that non-payment of the balance consideration amount will result in cancellation of the agreement as per the terms of the agreement. It is relevant to repeat the relevant portion of the said admission:

ಸದರಿ ಅವಧಿಯಲ್ಲಿ ಖರೀದಿ ಪತ್ರವನ್ನು ನೋಂದು ಮಾಡಿಸಿಕೊಳ್ಳದೇ ಇದ್ದರೆ ಸದರಿ ಕರಾರು ಪತ್ರವೂ ರದ್ದಾಗುತ್ತದೆ ಎಂದು ನಿಪಿ-17 ರಲ್ಲಿ ಬರೆಯಲಾಗಿರುತ್ತದೆ.

35. This admission on the part of Pw-1 indicates that Pw-1 has admitted that there is a cancellation clause in the agreement in the event of non-payment of the balance consideration amount. However, it is to be noticed that an obligation is cast on the vendor to get the agreement cancelled and to pay the earnest consideration amount if the balance consideration amount is not paid within six months. Thus, notwithstanding the admission by Pw-1 which is extracted above, this Court is of the view that the cancellation of the agreement is not automatic. The admission in the cross examination is not always conclusive. If the said admission if read in the backdrop of what is recited in the agreement, one can conclude that there must be a formal agreement (either oral or in writing) canceling the agreement and the same is to be evidenced by repayment of the consideration amount.

36. It is relevant to note that the defendant has taken a stand that he has canceled the agreement by orally informing the plaintiff. However, it is an admitted fact that he has not repaid the earnest consideration amount which is an obligation cast on the defendant/respondent in the event of cancellation of the agreement. Though, this Court is not holding that repayment of the earnest consideration amount is a condition precedent for cancelling the agreement, the fact that the amount is not repaid is a factor that must be taken into consideration.

37. In this view of the matter, particularly in the absence of any other credible evidence either oral or documentary which evidences the cancellation of the agreement, the agreement is not canceled as contended by the defendant. The trial Court erred in holding that the agreement was revoked.

38. The next point for consideration is, "whether the plaintiff has proved his readiness and willingness to perform his part of the contract"?

39. As already held by this Court the time was indeed the essence of the contract dated 20.07.2006. This Court has also held that the agreement is not canceled. Merely because the agreement is not cancelled by the defendant, it *ipso facto* does not mean that the time fixed for performance gets extended. For such extension,

there must be an agreement either oral or documentary. No such agreement extending the time fixed for performance is pleaded. Hence though the respondent has failed to prove revocation of agreement, the plaintiff must prove his readiness and willingness to perform his part of the contract before expiry of the time fixed.

40. As already noticed, except for executing the registered sale deed on receipt of the balance consideration amount of Rs.6,51,000/-, nothing was required to be done by the defendant. Entire obligation to repay the consideration amount was on the plaintiff and six months was stipulated for the purpose as already held. The trial Court has concluded that the plaintiff was not ready and willing to perform his part of the contract.

41. On behalf of the appellant, it is sought to be urged that the financial capacity of the plaintiff to pay Rs.6,51,000/- was never doubted by the defendant as such, it is to be presumed that the plaintiff was ever ready to perform his part of the contract. It is the well-settled position of law that readiness and willingness are to be established from the date of the agreement till the date of the execution of the final part of the contract.

42. Though, the PW-1 in his evidence has stated that the plaintiff was always ready and willing to perform his part of the contract, the plaintiff did not take any steps from 20.07.2006 (date

of agreement) to 31.08.2007 (date of notice) for getting the sale deed executed. The PW-1 in his evidence has admitted that he had spent Rs.5,00,000/- which was allegedly paid by the plaintiff. This is one of the factors that would demonstrate that the Pw-1 who was supposed to complete the transaction on behalf of the plaintiff was not having requisite balance consideration amount. It is not his case that alternate arrangement for money was made to complete the sale transaction.

43. Though the defendant in the cross-examination has admitted that the plaintiff is wealthy, that by itself is not sufficient to hold that the plaintiff was ready to perform his part of the contract. The financial soundness at the most signifies the readiness but not necessarily the willingness. Under Section 16(c) of the Specific Relief Act, 1963 both "readiness" and "willingness" have a different connotation and flavor. Mere processing the money to meet the obligation to pay the balance consideration amount by itself does not prove willingness. At the most, the plaintiff in such a situation will be signifying his readiness. The willingness contemplated under Section 16(c) of the Specific Relief Act, 1963 requires something more than just being ready with the balance consideration amount. For this reason, this Court is of the view that though a passbook in the name of plaintiff's wife is produced to show that Rs.8,00,000/- was available in the account of plaintiff's

wife, that itself is not enough to hold that the plaintiff was ready and willing to perform his part of the contract.

44. In this background, if the evidence is analysed it is forthcoming that the plaintiff did not issue any notice to the defendant within six months from the date of execution of the agreement for sale dated 20.07.2006. It is also forthcoming that no steps are taken immediately after the expiry of the six months contemplated under the agreement dated 20.07.2006. The records indicate that only on 31st August 2007, the plaintiff issued the notice to the defendant calling upon him to execute the sale deed.

45. The PW-1 has produced two documents namely the letters allegedly sent to the defendant under Certificate of Posting asking the defendant to execute the Sale Deed. The alleged letters are undated. Though, it is urged that the letters have dispatched in the month of January and April, 2007, those documents do not inspire confidence as no reference is made to the said notices either in the plaint, or in the notice issued by the Advocate for the plaintiff.

46. There is one more reason to suspect the said notices said to have been issued in January and April 2007. The notices marked at Ex.P4 and P6 both dated 31.08.2007 do not tally with each other. In one notice marked at Ex.P4, which is the office copy

of the advocate who sent the notice, an additional recital "*My client has kept the balance amount ready and he is always ready and willing to perform his part of the contract*" is found. The cursory perusal of above extracted line in Ex.P4 reveals that it is an interpolation. The font and the color of the ink of the interpolated line is distinctly different from the rest of the contents. Surprisingly, said sentence is not found in the notice dated 31.08.2007 marked at Ex.P6 which is allegedly sent to the defendant.

47. Lack of credible evidence relating to any positive steps by the plaintiff, from the date of agreement till the expiry of six months contemplated in the agreement, and inaction on the part of the plaintiff close to six months after the expiry of six months contemplated in the agreement to institute the suit, or to have extension of time, would make the Court lean in favour of the finding of the trial Court which on appreciation of evidence, (and which of course had the benefit of observing the demeanor of the parties) has concluded that the plaintiff failed to prove readiness and willingness to perform his part of the contract. For the reasons recorded, this Court is of the view that the finding on issue No.2 must be upheld.

48. Now the Court has to consider whether the plaintiff/appellant is entitled to the relief other than the specific performance of the contract.

49. The plaintiff claimed relief for specific performance of the contract dated 20.07.2006 as a main prayer.

50. In the alternative, the plaintiff has sought for a refund of Rs.11,51,000/- along with interest @ 15% per annum which includes Rs.5,00,000/- the advance consideration amount and Rs.6,51,000/- the balance payable. The prayer for a refund of Rs.6,51,000/- as compensation probably stems from the premise that the plaintiff is deprived of the value of the said value which he would have acquired had there been a sale.

51. As already noticed, the trial Court granted a decree for refund of the earnest amount paid along with 6% interest. The prayer to award compensation of Rs.6,51,000/- is rejected. At the same time, the prayer to award 15% interest is declined in part and interest @ 6% is awarded from the date of the suit till the realisation of the amount.

52. On going through the appeal memo, it is noticed that the plaintiff has only questioned the decree declining specific performance of the contract and is not challenging the part of the decree for awarding compensation of Rs.6,51,000/- and part of the

interest which is declined. Thus, it is urged by the learned Senior counsel that the Court can only consider the appeal as one claiming specific performance of contract and there is no prayer for considering the claim for awarding compensation as the decree rejecting compensation is not questioned and has attained finality.

53. On going through the appeal memo, it is seen that the plaintiff/appellant is questioning the decree rejecting specific performance and there is no challenge to the part of the decree rejecting the alternative prayer for awarding compensation. However, it is to be noticed that the prayer in the plaint is to grant a decree for a specific performance, and in the alternative, the prayer is to pass a decree for a refund of the earnest amount and the compensation.

54. This Court is of the view the relief of specific performance of contract is a larger relief and a prayer for refund of earnest amount and damages is a lesser relief. Without sticking the technicalities of the pleading in appeal memorandum, this Court is of the view in the facts of the case, the alternative prayer in the plaint can be read in the appeal. The court fee paid on the main prayer and alternative prayer is the same. In addition, more than anything else, in the written submission dated 30.01.2024 filed by the respondents, it is indicated that the respondents are willing to pay a reasonable compensation, if awarded by the Court.

55. The agreement for sale is in respect of land measuring 2 acres and 27 guntas. The boundaries of the properties indicate that the land is adjacent to a national highway. This Court can certainly take judicial note of the fact that there is a considerable escalation in the value of the land. It is also relevant to note from a recital in the agreement for sale, the plaintiff came forward to purchase the property from the defendant who needed money and received Rs.5,00,000/- in advance. That payment must have provided some sort of succor to the defendant who was in dire need of money.

56. This Court should also bear in mind that the trial Court has awarded 6% interest on the consideration amount of Rs.5,00,000/- which if calculated comes approximately to Rs.4,87,500/-. The defendant has not questioned the decree for refund of earnest amount and also the interest awarded on it.

57. The plaintiff has claimed damages of Rs.6,51,000/- which according to him is the balance payable on the sale agreement. Since the Court has concluded that the time was the essence of the contract and the plaintiff did not prove readiness and willingness to perform the contract, there cannot be a decree for compensation of Rs.6,51,000/- as claimed. Since this Court is awarding the compensation despite the plaintiff not performing his part of the contract, and it is primarily based on the concession by

the respondents who left to the discretion of the Court to award a reasonable compensation, this Court is of the view that interest of justice will be met if 60% of the compensation amount of Rs.6,51,000/- claimed i.e., Rs.3,90,600/- which is rounded off to Rs.4,00,000/- is awarded with 7% interest per annum from the date of the suit till realisation of the amount. Thus, the plaintiff/appellant is entitled to Rs.5,00,000/- towards refund of earnest amount and Rs.4,00,000/- towards compensation, and with 7% interest per annum on Rs.9 lakhs from the date of the suit till realisation.

58. In the peculiar circumstances of the case, the costs are made easy.

59. Hence the following:

ORDER

- (i) Appeal is ***allowed in part.***
- (ii) The judgment and decree dated 26.08.2014 in O.S.No.406/2007 on the file of Principal Senior Civil Judge, Hubballi is modified.
- (iii) The plaintiff/appellant is entitled to refund of earnest amount of Rs.5 lakhs and compensation of Rs.4 lakhs along with interest @ 7% per annum on Rs.9 lakhs from the date of the suit till realisation.

(iv) The respondents shall pay the amount decreed,
within three months from this date.

**Sd/-
JUDGE**

BRN/CHS/GVP
List No.: 1 SI No.: 27