
AIR 2007 Kar 105 : (2007) 4 KarLJ 293 : (2007) 2 KCCR 1434

Karnataka High Court

Case No: Regular First Appeal No. 939 of 2000

Smt. M.C. Nagalakshmi
and Others

APPELLANT

Vs

Sri. M.A. Farook and
Sri. M.A. Yakub

RESPONDENT

Date of Decision: Dec. 22, 2006

Acts Referred:

Hindu Minority and Guardianship Act, 1956 " Section 8, 8 (2), 8 (3)#Mental Health Act, 1987
" Section 61#Specific Relief Act, 1963 " Section 20, 20 (2) (c), 50, 52

Citation: AIR 2007 Kar 105 : (2007) 4 KarLJ 293 : (2007) 2 KCCR 1434

Hon'ble Judges: Subhash B. Adi, J; S.R. Bannurmath, J

Bench: Division Bench

Advocate: G.S. Visweswara, for M.P. Geethadevi, for the Appellant; S.V. Srinath, for the
Respondent

Final Decision: Dismissed

Judgement

Subhash B. Adi, J.

This is an appeal by the defendants questioning the judgment and decree dated 19th July
2000 in O.S. No. 6041/1992

on the file of the XI Addl. City Civil Judge, Bangalore City.

2. Respondents are the plaintiffs. Suit is one for enforcement of an agreement of sale in
respect, of residential building consisting of ground, first and

second floor, bearing No. 18/1 (old) New No. 11, II Main Road, Vasantha Nagar,
Bangalore-560 052.

3. Plaintiffs' case is that, they entered into an agreement of sale, with the defendants on
13.9.1989 inter alia to purchase the suit schedule property

for a total consideration of Rs. 6,66,250/- and on 13.9.1989, the plaintiffs paid an advance of Rs. 50,000/-. As a part performance of the

contract., defendants delivered vacant possession of eastern portion of second floor of the schedule property to the plaintiffs. Further, sum of Rs. 4

lakhs was to be paid as an additional advance subject to the condition stipulated under the agreement, as the defendant No. 9 was mentally

retarded and was not capable of acting on her own, her mother - first defendant herein being a natural guardian agreed to obtain a certificate from

competent authority before payment of the said sum of Rs. 4 lakhs. It was agreed that the 9th defendant's share to be deposited in a Nationalised

Bank for her maintenance throughout her life. Defendants notwithstanding Clause-13 of the agreement prevailed upon the plaintiffs to pay

additional advance amount of Rs. 4 lakhs as they were in dire need of money.

Accordingly, on 7th October 1989, a sum of Rs. 2,50,000/-was

paid in the hands of first defendant. The defendants in turn delivered vacant, possession of the ground floor to the plaintiffs on same day and also

handed over title deeds in respect of schedule property. Defendants further sought for payment of Rs. 75,000/- as against, agreed further advance

amount of Rs. 4 lakhs. Defendants had agreed not to call upon the plaintiffs to pay a sum of Rs. 75,000/- until they produced the valid certificate

from competent authority in respect, of defendant No. 9. Under the agreement, two years" time was stipulated for completion of the said deed.

However, as an after thought, defendants started placing several obstacles in the way of plaintiffs to get the sale deed executed in their favour, such

as one Smt. Padmavathi Rao, who was mortgagee in possession, refused to receive the amount of Rs. 48,000/- towards the redemption of the

said mortgage. On the other hand, defendants themselves got redeemed the mortgage and occupied that portion of the building and they continued

to remain in occupation. Secondly, the defendants forcibly dispossessed the plaintiffs from the eastern portion of the second floor. Further,

notwithstanding earlier attornment of tenancy in favour of the plaintiffs, two tenants viz., P.G. Unnikrishnan and Smt. Lakshmi Chandrashekara

Shetty, who were paying the rents to the plaintiffs, stopped paying the rents.

4. Plaintiffs further averred that they had paid Rs. 3,75,000/- as against the total sale consideration amount of Rs. 6,66,250/- and they were

always ready and willing to perform their part of the contract. However, the defendants with intention to frustrate the contract, were outline the

hurdles. This made the plaintiffs to issue legal notice on 27.8.1992, which was replied by the defendants on 1.9.1992. Notwithstanding the

defendants not obtaining any order for deposit of 9th defendant's share of amount in a nationalised bank, plaintiffs indicated to the defendants that

they will be willing to deposit the amount, in the joint names of 9th defendant and the first defendant. However, the defendants did not show any

interest in executing the sale deed or comply with the terms of the contract. This made the plaintiffs to file a suit, for specific performance of the

contract.

5. Initially, defendants-1 to 9 filed a written statement. interalia alleging that the suit itself is not maintainable as the plaintiffs were not ready and

willing to perform their part of the contract and they have lost, the right to enforce the contract. Defendants-1 to 8 admitted that they had entered

into an agreement to sell the suit property for consideration of Rs. 6,66,250/- and alleged that, the time was essence of the contract. Further

alleged that defendants had obtained a certificate issued by a Doctor at NIMHANS, Bangalore, who is a competent authority. In spite of the

production of the certificate as required under Clause-13 of the agreement as agreed upon by the plaintiffs, they did not pay Rs. 4 lakhs, instead of

paying Rs. 4 lakhs, the plaintiffs went on postponing the payment on one pretext or the other. The defendants also alleged that out of Rs. 4 lakhs,

the plaintiffs had paid only Rs. 2,50,000/- on 7.10.1989. They also admitted that they delivered the documents of title to the plaintiffs and also

delivered possession of the ground floor. They also admit that plaintiffs had paid further sum of Rs. 75,000/- and were required to pay balance of

Rs. 75,000/- and alleged that plaintiffs have failed to pay the amount, of Rs. 75,000/- even though the defendants had obtained the certificate from

the competent authority in respect of 9th defendant. They also alleged that there is no condition that the defendants were required to produce such

documents pertaining to 9th defendant under the agreement and alleged that the plaintiffs were not ready and willing to perform their part, of

contract.

6. They further alleged that in terms of the agreement, two years" period was fixed for completion of the sale transaction and the plaintiffs failed to

comply with the terms of the contract by not paying Rs. 48,000/- to Smt. Padmarathi Rao, who was in occupation of a portion of the building as a

mortgagee and the plaintiffs did not pay the said amount and there was a pressure from the mortgagee and as such, these defendants were forced

to pay the said amount to Padmavathi Rao and got the property released in their favour. They also denied that the defendants forcibly

dispossessed the plaintiffs from the eastern portion of the second floor of the suit property. They alleged that the plaintiffs were not ready and

willing to perform their part of the contract and when the limitation was running against them, they issued a legal notice calling upon them to intimate

the plaintiffs. their intention to complete the sale transaction. It is also alleged by the defendants that the plaintiffs in order to gain time, the notice

was got issued by them and the defendants gave befitting reply to the same.

7. It is also alleged by the defendants that they have rescinded the agreement and they have also forfeited the advance amount of Rs. 1 lakh as

agreed upon and alleged that the suit for specific performance is not maintainable and such a relief cannot be granted to the plaintiffs and the

defendants will be put to great hardship and they would suffer irreparably as the value of the property is more than Rs. 15 lakhs. They also alleged

that the only source of their residence is the suit property for their livelihood and three daughters are yet to be married. On these allegations,

defendants-1 to 7 resisted the suit.

8. First defendant filed a written statement as a guardian for mentally retarded Kumari Veena on 29.3.2000 and in the said written statement, it is

alleged that suit is not maintainable, same is barred by limitation and also on the ground that the plaintiffs have not performed their part of the

contract in terms of the agreement u. Plaintiffs have also not deposited a sum of Rs. 75,000/- part of advance amount under Ex.PI in a nationalised

bank in the name of Kumari Veena and other allegations made in the plaint were denied by the first defendant as a guardian. With these pleadings,

the defendants contested the suit.

9. The trial court on the basis of the pleadings of the parties, framed the following issues and an additional issue:

1. Whether the plaintiffs prove that the defendants agreed to sell the suit property as per agreement of sale dt. 13.9.1989?

2. Whether the plaintiffs prove that they are ready and willing to perform their part of contract?

3. Whether the plaintiffs prove that the defendants did not comply with the terms and conditions of the agreement?

4. Whether the defendants prove that the suit in the present form is not maintainable?

5. Whether the plaintiffs are entitled to a relief as sought for?

6. What order or decree

ADDITIONAL ISSUE:

Whether minor guardian of defendant No. 9 proves that the suit is barred by time

10. Before the trial court, plaintiff No. 1 was examined as PW-1 and he got Exs.PI to P20 marked in his evidence. Defendant No. 4 was

examined as DW-2 and one Sathyanarayana was examined as DW-1, who is working as Medical Record Technician at NIMHANS. In all

Exs.D1 to D24 were marked in the evidence of the defendants.

11. The trial court on appreciation of the evidence found that the plaintiffs have proved the agreement of sale dated 13.9.1989; and are ready and

willing to perform their part, of the contract and further the defendants have not. complied with the terms and conditions of the agreement.

12. It is this judgment and decree of the trial court has been called in question by the defendants-1 to 9.

13. Sri. G.S. Visweswara, learned Senior Counsel appearing for the appellants - defendants submitted that:

1) Plaintiffs were never ready and willing to perform their part of the contract;

2) The suit is barred by time as against the defendant No. 9 Kumari Veena, as she has been impleaded on 23.2.2000 by which time, the limitation

for filing of suit for specific performance of the contract had lapsed;

3) The suit against defendant Nos. 8 and 9 is not enforceable as defendant No. 8 being minor at the time of the agreement and defendant No. 9

being mentally retarded;

4) Defendant No. 8 has repudiated the contract on attaining the age of majority;

5) Even otherwise, u/s 20 of the Specific Relief Act, the plaintiffs are not entitled for decree for specific performance as the grant of decree could

cause hardship and injury to the defendants.

14. In support of his contentions, learned Senior Counsel referred to paragraph-22 of the written statement and submitted that there is a specific

plea by the defendants that suit is not maintainable as the plaintiffs have not. approached the Court with true and correct facts and have not acted in

terms of the agreement and they were not ready and willing to perform their part of contract. He also relied on para-7 of the written statement and

submitted that the plaintiffs had issued legal notice at the time for filing suit, as the time was running against them. Learned Senior Counsel further

submitted that this conduct clearly shows that the plaintiffs were not ready and willing to perform their part of contract. He also referred to the

evidence of PW-1 and pointed out that in the cross-examination, PW-1 has admitted that:

...It is true to suggest that till the production of certificate, I am liable to withhold Rs. 75,000/-. It is not true to suggest that I have not paid the

balance amount of Rs. 3,25,000/- to the defendant. It is not true to suggest that I have no money. As per Ex.P1 page 5 Clause 6, I have sent

notice to Padmavathi.

Referring to this oral evidence of PW-1, he further submitted that the plaintiffs were not having money to pay the amount. He also referred to

cross-examination of PW-1 and submitted that Rs. 4 lakhs was to be paid at one stretch and he has admitted that:

As per the agreement, the Rs. 4 lakhs rupees was not paid to the defendants in one stretch....

He also submitted that though PW-1 states that he has got document, to show that he is having Rs. 4 lakhs with him, but has further admitted that

the said amount is in the account of his mother and amount is lying in the Amanath Bank and has further admitted that:

...1 was not having Rs. 4 lakhs in my account. I am having my account in State Bank of India through which I used to get my salary....

By relying on the statement of PW-1 in the cross-examination, learned Senior Counsel for the appellants submitted that these admissions of PW-1

clearly show that the plaintiffs were not ready and willing to purchase the property. Further, they had no requisite fund to purchase the same. He

further submitted that the plaintiffs, who were required redeem the mortgage with Padmavathi Rao, did not redeem the same and in turn, it is the

defendants got the mortgage redeemed. learned Senior Counsel submitted that these admissions show that the plaintiffs were not ready and willing

to perform their part of contract.

15. Learned Senior Counsel submitted that defendant No. 8 was minor at the time of agreement and has repudiated the contract Once the minor

repudiates the contract, the plaintiffs are not entitled to seek specific performance of the contract against the defendant No. 8, as she is not bound

by the contract. In support of his submission, learned Counsel relied on Ex.P7 - rejoinder notice to the plaintiffs" notice dated 27.6.1992 and from

Ex.P7, learned Senior Counsel pointed out. that the defendants cancelled/terminated the agreement of sale dated 13.9.1989 on the ground that the

plaintiffs have not performed the contract, according to the recitals of the agreement. He also referred to para-4 of the Ex.P7 and submitted that,

there was no condition for obtaining the orders from the competent court regarding the health of defendant No. 9 and in turn, the defendants had

produced the certificate issued by the competent authority of NIMHANS Hospital. Relying on Ex.P7, he further submitted that the contract is

repudiated by defendant No. 8. Further he submitted that for transfer of the property of the minor, permission of the Court is necessary u/s 8 of the

Hindu Minority and Guardianship Act.

16. He also submitted that u/s 19 of the Contract. Act, plaintiffs cannot ask for the performance of the contracts in respect, of minors" estate. In

support of his contentions, learned Senior Counsel relied on a decision reported in AIR 2002 215 (SC) and submitted that transfer of minor"s

interest by a defacto guardian is per se invalid and such transferee does not acquire any interest in the property; minor on attaining the age of

majority can repudiate the transfer, the transferor is not required to get set aside the contract by filing suit. Elaborating Ms contention, learned

Senior Counsel submitted that, in law, a person, who is not. guardian and who takes interest upon himself, the general management of the estate of

a minor, can be more appropriately described as "defacto manager". Section 11 of the Hindu Minority and Guardianship Act has done away with

the authority of any person to deal with or dispose of any property of a Hindu minor on the ground of his being the defacto guardian of such minor.

Any alienation by a defacto guardian will be governed by the provisions of Section 11 of the Hindu Minority and Guardianship Act and such

alienation being against the statutory prohibition, could be void ab initio and the alienee would not acquire any title to the property. He further

submitted that Section 11 of the Hindu Minority and Guardianship Act protects the minor's estate being misappropriated or squandered by any

person, by a relation or a family friend claiming to be a well-wisher. In this regard, he relied on paragraphs-23, 24 and submitted that transferee of

such alienation does not acquire any interest in the property. He also relied on a decision reported in Kallathil Sreedharan and Another Vs.

Komath Pandyala Prasanna and Another, and referred to Head Note-B and submitted that alienation of minor's share in immovable property by

mother without obtaining previous permission of court is impermissible and further submitted that courts should decline to grant decree for specific

performance as against the minor's property, which would be against the provisions of Section 8 of the Hindu Minority and Guardianship Act. He

also relied on a judgment reported in Biswanath Charit Vs. Damodar Patra and Others, and submitted that in contract by mother of minor, she

cannot convey the property, such conveying of property would amount to violation of Section 8 Sub-section (2) of Hindu Minority and

Guardianship Act and no Court could compel, any person to contravene the law. He further submitted, that mere fact that the agreement was not

trite would not by itself render it straightaway specifically enforceable at the instance of the purchaser without previous permission of the Court.

17. He also referred to Section 61 of Mental Health Act, 1987 and Section 8 Sub-section (3) of Hindu Minority and Guardianship Act and

submitted that the agreement against the minor as well as against defendant No. 9, who is mentally retarded is barred by law. He further submitted

that defendant No. 9 has been impleaded on 23.2.2000 i.e., nearly 11 years after the agreement. The suit as against, defendant No. 9 is barred by

limitation.

18. He also submitted that as against defendant No. 8, who was minor at the time of agreement and defendant No. 9, who is mentally retarded

and who is subsequently impleaded, the contract to the extent of their 2/9th share is not enforceable and the remaining 7/9th share being residential

and the plaintiffs being not ready and willing to perform their part of contract, they are not entitled for the decree for specific performance, as it

would fall u/s 20 of the Specific Relief Act. He further submitted that by application dated 27.3.2006 in I.A. IV, defendants have sought for an

amendment, of the written statement under Order VI Rule 17 read with Section 151 of CPC inter alia for insertion of paragraphs-8(a), (b), (c), (d),

(e) and (i). He also submitted that grant of decree would cause irreparable hardship and injury to the defendants and even if the Court comes to

the conclusion that the agreement is held to be valid as against defendant Nos. 1 to 7, the suit schedule property being only a residential property,

grant of decree would be against the provisions of Section 20 of the Specific Relief Act. In support of this contention, learned Senior Counsel

submitted that the defendants have pleaded that grant of decree for specific performance would cause great hardship to them and in the cross-

examination of DW-2, it is stated that the father of defendants during his life time raised debts and loans and after his death, with the intention to

clear off the debts, the defendants had decided to sell the suit property in favour of plaintiffs and due to the acts of the plaintiffs, the defendants

were to face the difficulties. Learned Senior Counsel submitted that the defendants have pleaded and have also stated in their evidence that they

would be put to great hardship and injury and submitted that the court should exercise its discretion in favour of defendants by refusing to grant the

decree for specific performance. He also submitted that the amendment application be allowed to plead the repudiation of the contract by

defendant No. 8. He also submitted that defendants have filed another application under Order XLI Rule 27 CPC producing the documents

showing the decree passed in O.S. No. 3360/1985 against, the defendant No. 3 for an amount of Rs. 3,39,892/- and decree in

O.S.No.6041/1992 for loan of Rs. 34,000/-. These documents were sought to be produced by the defendants to show that, the defendants were

in distress position to sell the property as they were in need of money to discharge the loan and submitted that these attending circumstances clearly

establish that Court should exercise its discretion in favour of defendants.

19. Learned Counsel for the plaintiffs - respondents herein in reply submitted that Mental Health Act is not applicable to this case. In this regard,

he relied on Section 2 Clause (1) and submitted that mental ill means, other than the mental retardation. In support of this, he relied on Ex.D12 and

submitted that the defendant No. 9 is not mentally ill and is having mild degree of mental retardation and submitted that this does not amount to

mental ill and further provisions of Mental Health Act are not applicable to such illness of mild mental retardation.

20. Insofar as the limitation of seeking decree for specific performance against defendant No. 9, learned Counsel for the respondents submitted

that the limitation question was considered and the defendant No. 9 having been impleaded and treated as party to the proceedings by virtue of an

order dated 23.2.2000, the said order binds defendant No. 9. He also submitted that it is not universal law that amendment would go back to the

date of application. In this regard, he relied on a judgment reported in Sampath Kumar Vs. Ayyakannu and Another, Head Note-C. In support of

his contention, he also relied on Ex.D1, the medical history of defendant No. 9 and submitted that the Doctors were not competent to give

certificate for the legal matters. He also submitted that, the trial court appointed mother to act as guardian for defendant No. 9 and defendant No.

9 though her guardian defendant No. 1 has filed written statement. Relying on the written statement filed by the defendant No. 1 on behalf of

defendant No. 9 as guardian, learned Counsel for the respondents further submitted that the court has protected the interest, of defendant No. 9.

He also relied on order dated 23.2.2000 passed by the trial court on I.A.IV under Order I Rule 10 dated 21.7.1995 to implead Kum.Veena as

defendant No. 9; I.A.IV-A under Order XXXII Rule 3 dated 27.9.1995 to appoint the mother - defendant No. 1 as the guardian of defendant

No. 9; I.A.XII under Order XXXII Rule 3 read with Section 151 dated 6.7.1999 to hold an enquiry and LA. 14 filed by the defendants seeking

permission to file objection to the applications of the plaintiffs. He pointed out from the said order that the trial court has held that Veena is a

proper and necessary party to decide the issue completely and effectually. She being a mentally retarded, her mother - first defendant is appointed

as guardian. While relying on the order passed by the trial court on the said applications referred to above, learned Counsel for the respondents

submitted that the defendant No. 9 having been impleaded as a party to the proceedings and having been represented through guardian appointed

by the court, it is not now open for the appellants to contend to the contrary. He also submitted that the impleading of defendant No. 9 goes back

to the date of the suit and the interest of the defendant No. 9 has been protected by the guardian, who has filed the written statement. He also

pointed out from the written statement filed on behalf of defendant No. 9 by the defendant No. 1 as a guardian and submitted that nothing has been

said as to the capacity to appear as a guardian and further submitted that even though written statement is filed on behalf of defendant No. 9

except stating that the plaintiffs are not ready and willing to perform their part of the contract, no other pleadings are forthcoming in the written

statement of defendant No. 9.

21. He also referred to the written statement filed by the defendants and submitted that there is no repudiation of contract by the defendant No. 8.

Though defendant No. 8 was minor at the time of agreement, but on the date of the filing of the suit, she had become major and when the written

statement was filed, she was a major and has not filed separate written statement pleading that she is repudiated the contract. In turn, in the written

statement filed by the defendants, agreement of sale has been admitted.

22. He further submitted that defendant No. 8 being a major on the date of filing of the suit, has not chosen to file separate written statement.

Further in the written statement filed by the defendants, there is a clear admission of the agreement. He further submitted that defendants cannot

raise the contention of repudiation by defendant No. 8 and also submitted that the provisions of Sections 8 and 11 of the Hindu Minority and

Guardianship Act are not attracted, as the defendant No. 8 was not a minor on the date of filing of the written statement and was capable of

contesting the suit.

23. He relied on a judgment reported in : (2004)8SCC785 in the matter of Nangali Amma Bhavani Amma v. Gopalkrishnan Nair and Ors. and

submitted that transaction entered into in violation of Section 8 Sub-section (2) of Hindu Minority and Guardianship Act is voidable at the instance

of minor and not void. Referring to Section 8 Sub-section (3) of the Hindu Minority and Guardianship Act, learned Counsel submitted that the

transaction will not become void, as minor is capable of affirming or ratifying the transaction on attaining age of the majority and he further

submitted that in case of avoidance of the transaction, the minor must file a suit within prescribed time u/s 60 of the Limitation Act. Relying on

para-8 of the said judgment, he submitted that the transaction entered into by natural guardian in contravention of Section 8 Sub-section (2) is

merely voidable at the instance of minor. He further submitted that defendant No. 8, who was minor at the time of agreement, having become

major, has not filed a separate written statement denying the transaction and in turn, in the written statement filed by the defendants, there is a clear

admission of the transaction. There is no denial of agreement by the defendant No. 8.

24. He also relied on a judgment reported in Biswanath Charit Vs. Damodar Patra and Others, and submitted that the agreement would not: be

void altogether but only voidable at the instance of the minor. Relying on para-10 of the said judgment, learned Counsel for the respondents

submitted that the question of seeking permission u/s 8 Sub-section (2) of Hindu Minority and Guardianship Act would only be a futile exercise

and such a permission is not required as the minor, who has become major and who is party to the suit, He also relied on a judgment reported in

Bhupal and Others Vs. Mam Chand and Others, and submitted that the contract entered into on behalf of the minor by natural guardian is a

competent contract and the contract for the benefit of minor is enforceable. In this regard, he also relied on another judgment of the Apex Court

reported in Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another, .

25. He further relied on Ex.P1- the sale agreement and referred to Clauses-13 and 14 and submitted that the contract fixed the period of two

years for its enforcement from the date of agreement, as the contract was to be enforced on 8th defendant becoming major. By referring to this

clause, learned Counsel for the respondents submitted that the agreement became enforceable only after the 8th defendant becomes major and as

such, the suit having been filed after the 8th defendant became major, the question of application of Section 8 Sub-section (2) or (3) or Section 11

of the Hindu Minority and Guardianship Act does not arise.

26. He also referred to Ex.P2 - the receipt dated 7th October 1989 for payment of further advance of Rs. 2,50,000/- and also referred to Ex.P2

(a) dated 11th November 1989 and submitted that the vendors had agreed that, they will not ask further advance amount at any cost before

producing the certificate from the competent authority of Kumari Veeria. Relying on Exs.P1 and P2, learned Counsel for the respondents

submitted that the agreement is enforced only after the 8th defendant became major and the balance of consideration amount of Rs. 75,000/- was

to be paid in terms of Ex.P2 (a) after the defendants - appellants producing the valid certificate from competent authority. He also relied on

Ex.D12 and submitted that in terms of Ex.P2, the defendants had obtained the certificate on 3.9.1991 and the respondents -plaintiffs without any

delay had issued legal notice on 27.8.1992. In support of his contention, he relied on the cross-examination of DW-2 wherein he has admitted that:

...I have got a sister by name Kum.Veena. It is true that she is mentally retarded. It is also true to suggest that the plaintiff insisted to produce a

certificate from the NIMHANS to the effect that Kum.Veena was a mentally retarded. The contents of the agreement regarding the sale of the suit

property executed in favour of the plaintiff are true and correct. I do not dispute it, It is also true to suggest that the defendants were under

obligation to give a certificate obtained from a competent authority regarding the mental retardance of Deft No. 9. That certificate was given to the

plaintiff before he could pay us Rs.3,25,000/. That certificate was sent to the plaintiff on 11.11.89. Ex.D12 is the certificate. Ex.D13 was given on

11.11.89. On 5.9.91, Ex.D12 was given.

He also referred to the statement of DW-2 in cross-examination and submitted that a petition was filed u/s 7 of Wards & Guardians Act for

appointment of guardian of Veena - defendant No. 9 and Ex.P16 is the certified copy and the same was dismissed as per Ex.P17. By relying on

Ex.D12, learned Counsel for the respondents submitted that it is admitted by DW-2 that they were required to obtain a certificate and the

certificate was obtained as per Ex.D12 only on 3.9.1991 and immediately thereafter the legal notice was issued. He further submitted that the

contract is enforceable not only against defendant Nos. 1 to 7, but also against defendant Nos. 8 and 9. He also submitted that DW-2 in his cross-

examination has admitted that he would not insist on the payment of balance of Rs. 75,000/- until the certificate in respect of Kumari Veena with

regard to her unsoundness of mind is produced and further he pointed out that DW-2 has admitted that:

...It is true to suggest that on 7.10.1989 I had not kept ready the certificate regarding unsoundness of my sister Veena to be given to plaintiffs. It is

true to suggest that so far we have not obtained any certificate from the competent authority as to whom the share of the amount of my sister is to

be paid.

27. He also pointed out from the cross-examination of DW-2 that they had filed an application on 14.12.1989 before the competent court for

appointment of the guardian, who could receive the share of Veena. By relying on these admissions, learned Counsel for the respondents submitted

that the appellants were under obligation to obtain a certificate from competent authority and they have admitted that they had not obtained the

certificate from the competent authority as regards to defendant No. 9 in relation to whom her share of amount to be paid. He further submitted

that the defendants have not complied with the terms of the agreement and were not ready and willing to perform their part of contract and further

submitted that the plaintiffs were always ready and willing to perform their part of contract. He further pointed out from the cross-examination of

DW-2 wherein DW-2 has admitted that he came to know that the plaintiffs got a draft for a sum of Rs. 48,000/- and admitted that he had

informed Padmavathi that she would take the money directly from the plaintiffs and hand over possession to the plaintiffs. By pointing out this

admission of DW-2 that even the payment of mortgage amount of Rs. 48,000/- was kept ready by the plaintiffs, he referred to Ex.P12 - notice

issued by the plaintiffs on 28th June 1990 to Padmavathi inter alia stating that they are ready to discharge the mortgage, that they have kept the

amount ready and had also informed said Padmavathi that in case if she refuses to accept the money before 20.8.1990, they will initiate legal

action. He also referred to Ex.P13 - notice issued on behalf of Padmavathi to plaintiff No. 4 wherein she has stated that, the plaintiffs were

occupying the entire ground floor and the second floor and are demanding for acceptance of Rs. 48,000/- by her and in this regard, she has also

stated in her notice to the defendants, that she is keeping the property vacant and the prospective purchasers i.e., plaintiffs are pressurizing to

accept Rs. 48,000/- and deliver possession to them and she further stated that in spite of her request to the defendants, the defendants have not

sorted out the matter and she will be obliged to accept the said amount of Rs. 48,000/- from the plaintiffs if the defendants fail to make payment.

By relying on these documents, learned Counsel for the respondents submitted that plaintiffs have not only paid Rs. 50,000/- on the date of

agreement, they also paid a further amount even before the compliance by the defendants. This evidence clearly show that the plaintiffs were

always ready and willing to perform their part of contract.

28. Learned Counsel for the respondents submitted that these admissions and the readiness and willingness shown by the plaintiffs establish that the

plaintiffs were not only always ready and willing to perform their part of contract, but the said fact is also admitted by the defendants and further

submitted that: there is no lapse on the part of the plaintiffs in the matter of performance of the contract.

29. As against the allegation of distress sale, learned Counsel submitted that two years" time was fixed for performance of the contract. If it is a

distress sale, the defendants could not have taken two years" time. He further submitted that the court has taken utmost care to protect the interest

of defendant No. 9 by allowing the application filed under Order XXXII Rule 3 and under Order II Rule 15. In this regard, he relied on a

judgment reported in 1998(4) KarLJ 211 Head Note-B and submitted that it is not necessary for the party claiming specific performance of the

contract; to deposit balance of sale consideration with the Court along with his plaint as proof of his readiness and willingness until the Court

directs to do so.

30. In order to seek benefit of Section 20 Sub-section (2) Clause (c) of Specific Relief Act defendants had to place facts on record and make the

pleadings in the written statement. In the absence of the pleading, an argument raised with reference to Section 20 Sub-section (2) of the Specific

Relief Act cannot be permitted to be raised nor it could be considered. He also submitted that mere termination of the contract, stated in the reply

notice is not sufficient. He also relied on judgments reported in AIR 1982 KAR 264 paragraph-12 and Rajeshwari Vs. Puran Indoria, . Relying on

these decisions, learned Counsel submitted that, discretion is required to be exercised on sound and reasonable ground, guided by judicial

principles and decision should be capable of correction by a court of appeal. The discretion to be exercised u/s 20 of the Specific Relief Act is not

legal straitjackets but to ensure that the Judges are not led into the trap of legalism on the validity of agreement; Judges cannot approach the matter

with a mind sentimental to the rights of the parties but must take into account the relative hardships in granting or refusing the relief. Relying on this

decision, learned Counsel further submitted that discretion u/s 20 of the Specific Relief Act cannot be exercised just for asking and that there is no

specific pleading nor there is any evidence and the fact that the agreement itself provided two years" period for its enforcement, indicates that no

hardship would be caused to the defendants.

31. He also submitted that the repudiation must be in clear and unambiguous terms. He also submitted that amendment of written statement at this

stage cannot be permitted as the defendants only to overcome the finding, amendment will not serve any purpose, in turn, it will protract the

proceedings. There is no justification in seeking the amendment of the written statement when the facts and the evidence are clear and the

admissions on the part of the defendants clearly show that the defendants are bound by the agreement and are liable to execute the sale deed. With

these submissions, learned Counsel prayed that the findings arrived at by the trial court on consideration of the evidence on record does not call for

interference.

32. In the light of the submissions made by rival parties, the following points arise for consideration:

1) Whether u/s 8 Sub-sections (2) and (3) of the Specific Relief Act, 1956, the contract is not enforceable as against defendant No. 8, who was

minor at the time of agreement?

2) Whether the contract against defendant No. 9 is unenforceable, as defendant No. 9 is mentally retarded and incapable of entering into contract?

3) Whether the suit is barred by limitation as against defendant No. 9, who is impleaded on 23.2.2000 by which time, the limitation period for filing of the suit had expired

4) Whether the plaintiffs were always ready and willing to perform their part of the contract?

5) Whether the court below failed to exercise the discretionary power prescribed u/s 20 of the Specific Relief Act?

33. As regards to point No. 1, in the agreement -u, 8th defendant is shown as represented by mother Smt. M.C. Nagalakshmi i.e., defendant No.

1. Agreement is dated 13th September 1989. At that time, 8th defendant is shown as aged about. 17 years. Clause 14 of the agreement reads as

under:

14. The balance of sale consideration of Rs. 1,57,250/- (Rupees One Lakh Fifty Seven Thousand Two Hundred and Fifty only) shall be paid by

the purchasers to the vendors at the time of execution and registration of the sale deed, i.e., within two years from the date of this agreement as

aforesaid in Clause 10 supra and/or after the Eighth Vendor, who is now minor, attaining majority; whereupon the vendors shall convey the

scheduled property to the purchasers, their nominee or nominees, as the case may be, under proper Sale Deed to be drafted by the Purchasers"

Advocate. A fixed sum of Rs. 24,000/- (Rupees Twenty four thousand only) agreed to be payable by the purchasers to the vendors along with the

payment of the balance sale consideration of Rs. 1,57,250/- referred to above which amount shall not form part and parcel sale consideration.

wherein the vendee is required to pay balance of sale consideration of Rs. 1,57,250/- at the time of execution and registration of sale deed i.e.,

within two years from the date of the agreement or after the 8th defendant namely, H. Pushpalatha, who was minor then, attaining the age of

majority. Clause-10 read with Clause-14 of the agreement makes it clear that the vendee - plaintiff has taken care to protect the interest of the

minor inasmuch as two years" period is fixed for execution and registration of the sale deed or after the 8th defendant becoming major. Suit is filed

on 10th September 1992 i.e., almost three years from the date of agreement. At the time of filing of the suit, 8th defendant had already become

major. She has also joined with the other defendants in filing the written statement as found by the learned trial Judge at Para-3 of the judgment. In

the written statement filed by the defendants, defendants have admitted the execution of the agreement, inter alia stating that they have agreed to sell

the property for a consideration of Rs. 6,66,250/-. However, they disputed the ready and willingness to purchase the suit schedule property.

34. Defendant No. 8 though was minor at the time of execution of the agreement, however, she had an opportunity of repudiating or cancelling the

agreement in case her interest has been materially affected on account of the execution of the agreement by the guardian. However, defendant No.

8, who had become major on the date of filing of the suit, has not repudiated the contract. In fact, contract is admitted by the defendants. As such,

it cannot be said that the contract, entered into between the plaintiffs and defendants including on behalf of defendant No. 8 as a minor is not

enforceable to the extent of minor"s interest is concerned.

35. Learned Senior Counsel appearing for the appellants by referring to paragraph-8 of the written statement submitted that minor has repudiated

the contract. In para-8 of the written statement, what is stated is that the plaintiffs have not adhere to the terms and conditions of the agreement and

it is on this ground, the defendants stated that the question of they executing the sale deed does not arise and it is in this context, it is stated in para-

8 that defendants have rescinded the agreement and they have forfeited the advance amount of Rs. 1,00,000/- as agreed upon. Under Ex.P1 -

agreement, Clause-15 deals with default clause and under Clause-15, in case of default committed by the purchasers, the vendors will have option

to forfeit a sum of Rs. 1,00,000/-. It is in terms of the Clause-15 of the agreement, the defendants have stated in para-8 that they are entitled to

forfeit Rs. 1,00,000/- for the breach of the agreement committed by the plaintiffs. It is in this context, the defendants have stated that the contract is

rescinded not on the ground that the minor attaining the age of majority has rescinded the contract nor it shown any repudiation. As stated earlier, it

is the case of the defendants that they have entered into the agreement and the written statement having been filed on behalf of the 8th defendant

also, it cannot be said that the minor has repudiated nor there is any repudiation or cancellation of the agreement on the ground that the 8th

defendant, who was minor at the time of executing the agreement and on attaining the age of majority, has repudiated the contract. As such, in our

opinion, the contention of the learned Senior Counsel that the minor has repudiated the contract is devoid of merits.

36. Learned Senior Counsel in this context also referred to para-2 of the written statement and submitted that defendants have repudiated the

contract. But para-2 of the written statement does not state that the minor has repudiated the contract. It only refers to the readiness and

willingness of the plaintiffs and on account of the failure of the plaintiffs not performing their contract, it is stated that the plaintiffs have lost their

right. He also referred to Ex.P7 - a notice issued by the defendants and stated that by issue of notice denying the right of the plaintiffs amounts to

repudiating the contract.

37. What is required to be seen here is, as to whether the minor, who entered into contract through the guardian, on her attaining the age of

majority, has repudiated the contract by stating so? By reading of written statement and the evidence led by the defendants and from the fact that

the minor had become major at the time of filing of the suit and the fact that the contract is not enforced before the minor has become major, unless

the minor shows that she has repudiated the contract, she is bound by the contract.

38. Learned Senior Counsel referred to decisions reported in AIR 2002 215 (SC) and had referred to paras-23 and 24 to show that alienation of

minor's property is void, no sale deed could be executed in relation to minor's property. Similarly, he had also referred to Kallathil Sreedharan

and Another Vs. Komath Pandiyala Prasanna and Another, ; Biswanath Charit Vs. Damodar Patra and Others, . There is no doubt as to the

principle enunciated in the above referred decisions. However, this is not a case where any alienation or transfer of minor's property has been

sold, it is clear from Clause-14 of the agreement of sale that the sale deed would be executed on minor attaining age of majority. It is also not a

case of the mirror that the sale deed is executed by the guardian, admittedly suit is filed after the minor became major, and the written statement

shows the admission of agreement of sale. Hence, the contention of learned Senior Counsel is devoid of merits.

39. The second contention is that, the suit is barred by limitation as against defendant No. 9, as she has been impleaded on 23.2.2000, by which,

time for seeking decree for specific performance of the contract has expired. He relied on Section 61 of the Mental Health Act stating that it is the

Manager appointed under the Mental Health Act may, in the name and on behalf of the mentally ill person can execute conveyances and

instruments of transfers by way of sale, mortgage or otherwise of property of the mentally ill person as may be permitted by the District Court.

What is required to be noticed in this case is, as to whether the defendant No. 9 is incapable of entering into contract or as to whether defendant

No. 9 is required a Manager to be appointed? In this case, Ex.D1 is a medical history of defendant No. 9, which shows that the defendant No. 9

is mentally retarded. Ex.D12 is a certificate issued by the National Institute of Mental Health & Neuro Sciences, Bangalore wherein it is certified

that the defendant No. 9 is diagnosed to be having mild degree of mental retardation.

While looking into Ex.D12, it does not show as to whether the defendant No. 9 is incapable of entering into contract. Apart from this, before the

trial court, the plaintiffs had filed LA.No.4-A under Order XXXII Rule 3 of CPC seeking leave of the court to appoint mother as a guardian of

defendant No. 9 and the trial court by its order dated 23.2.2000, referring to the evidence of DW-2 i.e., fourth defendant and also referring to the

Ex.P1 - agreement wherein it is mentioned that the defendant No. 9 is mentally retarded and her share of the amount is required to be kept in fixed

deposit, allowed the application and appointed the mother of defendant No. 9 i.e., defendant No. 1 as a guardian to prosecute the case of the

defendant No. 9. The said order has not been questioned. Object of the Mental Health Act is to take care of the estate of the person, who is

mentally ill or mentally retarded. In this context, the provisions of Section 61 of the Mental Health Act confers power on the District Court to find

out whether the person is, in fact, mentally ill and incapable of managing the properties. In such circumstances, the power is conferred on the

District Court u/s 52 to appoint Manager. Section 50 of the Act provides even for the relatives to make an application to the District Court within

the local limits in whose jurisdiction the alleged mentally ill person resides, for appointment as a Manager to the property. Section 61 of the said

Act confers power on the Manager to execute conveyance under the order of the Court. In this case, the plaintiffs have made an application to the

Court below seeking appointment of mother of defendant. No. 9 as her guardian and the Court has appointed her as a guardian to prosecute the

case and also to protect the interest of the defendant No. 9. It is also stipulated under the agreement that the share of defendant No. 9 is required

to be kept in deposit by obtaining necessary certificate from the competent authority of the NIMHANS, Bangalore. These circumstances clearly

show that the court below has taken utmost care in protecting the interest of the defendant No. 9 even though the Doctor has stated that the mental

retardation of defendant No. 9 is mild. By looking into the evidence and the order passed by the court below on the application on I.A.No.4-A,

we feel that what is required to be done under the provisions of the Mental Health Act, has been complied by the court below, though the Act

stipulates that it is the District Court alone, which is required to be done, in the light of the order passed by the court below on LA. No. 4-A and in

the light of the written statement separately filed by the defendant No. 9 through the mother guardian and also in the light of the arrangement made

under the agreement to deposit the amount of the defendant No. 9's share, we do not find any prejudice has been caused to the defendant No. 9

by entering into contract with the plaintiffs through the mother guardian.

40. Section 21 provides limitation in relation to substitution or adding of new plaintiffs or defendants, which reads as under:

21. Effect of substituting or adding new plaintiff or defendant.-(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or

added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party;

Provided that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may

direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in Sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during

the pendency of a suit or where plaintiff is made a defendant or a defendant is made a plaintiff

Proviso to Section 21 Sub-section (1) is in the nature of exception to Section 21 Sub-section (1) of the Limitation Act, inasmuch as, if the Court is

satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such

plaintiff or defendant shall be deemed to have been instituted on any earlier date. In this case, though defendant No. 9 was not impleaded as a

party at the time of institution of the suit, however, both under Ex.P1 -agreement of sale as well as in the plaint, it has been mentioned that

defendant No. 9 is mentally retarded. It is also mentioned in the agreement that her portion of the amount has to be deposited in the Bank subject

to obtaining of a certificate from the competent authority. It is not disputed by the parties as regards to the mental retardation of defendant No. 9.

In addition to this, the trial court on I.A.4-A has appointed the defendant No. 1 - mother as a guardian of defendant No. 9. Looking into the terms

of the agreement and also taking into account that the trial court has appointed the mother as a guardian, we feel that though defendant No. 9 has

been added subsequent to the suit, it will not in any way affect the relief sought for by the plaintiffs on the ground of limitation. All the other

promisors are parties. Hence, in our considered view, the interest of the defendant No. 9 has been protected and there is no justification in the

contention of the learned Senior Counsel.

41. As regards to the ready and willingness of the plaintiffs to perform their part of contract, learned Senior Counsel for the appellants submitted

that under Clause-2 of the agreement, the plaintiffs were required to pay Rs. 4,00,000/- and was also required to redeem the mortgage. Learned

Senior Counsel appearing for the appellants has submitted that the plaintiffs have not paid Rs. 4,00,000/- as required under Clause-2 of the

agreement and have also not complied with the clause No. 3 of the agreement, wherein they were required to pay mortgage amount, of Rs.

48,000/- to get the mortgage discharged. He further submitted that the plaintiffs were required to deposit share amount of defendant No. 9 i.e.,

Miss Veena in terms of Clause-13 in a nationalized bank. He further submitted that fixation of period of two years and non-compliance of the

terms of the contract disentitles the plaintiffs from seeking decree for specific performance.

42. In order to prove the readiness and willingness, the plaintiffs are required to plead and prove that they are always ready and willing to perform

their part of contract. The plaint averments clearly show that plaintiffs have pleaded that they are always ready and willing to perform their part of

contract. The first plaintiff has himself got examined as PW-1 and in his evidence has stated that as against sale consideration of amount of Rs.

6,66,250/-, the plaintiffs had paid Rs. 50,000/- as advance amount on the date of agreement, Rs. 2,50,000/- on 7.10.1989, Rs. 75,000/- on

11.10.1989, in all they had paid Rs. 3,75,000/- to the defendants. In support of his statement, he also relied on Ex.P2, a receipt executed by the

defendants for having received Rs. 2,50,000/-. The share amount, of defendant No. 9 was not deposited as the defendants in terms of Clause-13

of Ex.P1 were required to obtain a certificate from competent authority and as they had failed to obtain the certificate from competent authority,

the said amount was not deposited in the nationalized bank. Plaintiffs have stated, that they had offered Rs. 48,000/- to Padmavathi Rao, who was

residing in the first floor as a mortgagee. However, the defendants did not allow them to redeem the mortgage. In support of his statement, they

relied on Ex.P3, a letter addressed to Padmavathi Rao stating therein that under the agreement of sale dated 13.9.1989, the plaintiffs have been

authorized to redeem the mortgage and has also further called upon her to accept and hand over vacant possession. He also relied on Ex.P13,

registered legal notice issued by Padmavathi Rao to the defendant No. 4 informing that the plaintiffs are insisting on accepting the mortgage amount

and are demanding delivery of possession. This evidence clearly shows that in terms of the agreement u, the plaintiffs had shown their ready and

willingness to perform their part of contract. It is submitted by the learned Senior Counsel for the appellants that the plaintiffs had not paid Rs.

4,00,000/- in terms of Clause-2 of the agreement even though plaintiffs had written letter to NIMHANS on

7.10.1989 and certificate was obtained on 3.9.1991. As far as the payments made by the plaintiffs to the tune of Rs. 3,75,000/- is not in dispute.

Ex.P3 and P12 also prove that the plaintiffs had offered the mortgage amount. As such, it cannot be said that the plaintiffs had not complied with

the terms of the contract. Exs.P3, P12 and P13 clearly show that the plaintiffs had exercised their rights under Ex.P1 to discharge the mortgage

amount. It has come in the evidence that Rs. 75,000/- was withheld for want, of proper certificate from the competent authority, as it was required

in terms of Clause-3 of the agreement to protect the interest of the defendant No. 9, admittedly remaining amount is paid i.e., Rs. 3,25,000/- out of

Rs. 4,00,000/-. In the light of the evidence on record, it clearly show that the plaintiffs had not delayed the performance of their contract. Hence,

the contention of learned Senior Counsel that, the plaintiffs have not proved their readiness and willingness to perform their part of contract is not

acceptable.

43. The other contention urged by the learned Senior Counsel is that the trial court has failed to exercise the discretionary power conferred on it

u/s 20 of the Specific Relief Act in favour of the appellants by declining to grant decree for specific performance. It is submitted by the learned

Senior Counsel for the appellants that the appellants were in need of money and they sold the property under distress. In this context, he relied on

a decree passed in O.S.No.3360/1985, O.S. No. 6041/1992 by filing an application in I.A. 11/2006 before this Court. Admittedly, the

agreement is dated 13th September 1989. The alleged suits referred to are of 1985 and 1992. Agreement itself provides for two years" period for

getting the sale deed. Clause-14 of the agreement fixes two years" period for payment of balance of sale consideration or after the 8th defendant

becomes major. The long period fixed under the agreement clearly shows that there was no distress. Further, the period fixed under the agreement

is only to ensure that, the 8th defendant, who was minor at the time of agreement, attains the age of majority. O.S.No.6041/1992 refers a loan

transaction of 1975 and the decree in O.S.No.3360/ 1985 is dated 5.10.1999. Absolutely there is no co-relation to the agreement of sale and the

loan transaction nor there is any reference under the agreement that it is on account of the pressure or compulsion of discharge of the loan, the

agreement was entered into. Looking into the facts and circumstances of the case, it does not appeal, that the agreement of sale was entered under

any compulsion or it is a distress sale. Except this submission, no other submissions were made by the learned Senior Counsel. Hence, we do not

find any justification to invoke Section 20 of the Specific Relief Act to deny the decree in favour of the plaintiffs.

In the light of the discussion made above, we do not find any justification to interfere with the judgment and decree of the trial court. Accordingly,

appeal is dismissed. The judgment and decree dated 19th July 2000 passed in O.S. No. 6041/1992 by the XI Addl. City Civil Judge, Bangalore

City is confirmed.

However, no order as to the cost in this appeal.

SRBMJ & SBAJ:

22/12/2006 R.F.A. No. 939/2000

After pronouncement of the order, learned Counsel appealing for the appellants sought orally to stay the judgment passed on the ground that the

appellant wants to approach the Apex Court challenging the same and if in the meanwhile, the interim order is not granted, the appellant will be put

to irreparable loss and the purpose of filing appeal before the Apex Court, would be frustrated.

Taking into consideration the fact that the suit of the respondents - plaintiffs for enforcement of the agreement of sale has been decreed and to get

the fruits of decree, there is enough time for the appellant to approach the Apex Court as the decree cannot be executed overnight. Hence, we see

no reason to grant leave.