

A.K. Lakshmipathy (died) by LR and Others Vs Rai Saheb Pannalal Hiralal Lahoti Charitable Trust and Others

Court: Andhra Pradesh High Court

Date of Decision: Feb. 23, 2005

Acts Referred: Contract Act, 1872 " Section 55, 74

Specific Relief Act, 1877 " Section 18

Specific Relief Act, 1963 " Section 11(2), 13, 13(1), 16

Transfer of Property Act, 1882 " Section 54, 55, 55(1), 55(2), 55(6)

Trusts Act, 1882 " Section 46, 47, 48

Urban Land (Ceiling and Regulation) Act, 1976 " Section 19(1)

Citation: (2005) 5 ALD 658 : (2005) 6 ALT 238

Hon'ble Judges: V.V.S. Rao, J

Bench: Single Bench

Advocate: Vilas V. Afzulpurkar, in CCCA No. 88 of 1993 and R. Vijayanandan Reddy, in As No. 673 of 1995, for the Appellant; Vilas V. Afzulpurkar in As No. 673 of 1995 and R. Vijayanandan Reddy in CCCA No. 88 of 1993, for the Respondent

Final Decision: Dismissed

Judgement

V.V.S. Rao, J.

These two appeals are filed against the judgment and decree in O.S. No. 31 of 1985 dated 25.8.1993 passed by the

Court of the Principal Subordinate Judge, Ranga Reddy District. C.C.C.A. No. 88 of 1993 is filed by the plaintiffs and A.S. No. 673 of 1995 is

filed by the defendants insofar as the trial Court directed the defendants to refund a sum of Rs. 1,00,000/- (Rupees one lakh only) to plaintiffs

which they have paid to the defendants as an advance. The suit was filed by the plaintiffs for specific performance of agreement of sale deed dated

6.12.1978. The trial Court dismissed the suit insofar as the said prayer is concerned and passed a decree for refund of the advance amount.

Aggrieved by the judgment, both the parties are before this Court. For the sake of convenience, the parties are referred to as they are arrayed in

the suit.

2. The plaint allegations, in brief, are as follows: The property bearing Municipal No. 1-11-251 comprising a double storied building with two

garages, one open garage, one servant's room, well with electric motor and pump standing in an area admeasuring 9400 sq. yards at Begumpet,

Hyderabad, originally belonged to one Rai Saheb Pannalal Lahoti by a Will dated 21.4.1956. He made certain bequeath and appointed second

defendant and one Smt. Bhima Bai as joint executors of the Will. After death of Bhima Bai, her daughter, the third defendant and adopted son

Suresh Chandra Lahoti (fifth defendant) stepped into the shoes of Bhima Bai. In his Will, Rai Saheb Pannalal Lahoti desired that 1/4th of the estate

property to be utilized as a fund for hospitals and educational institutions in moieties as the executors deemed fit. Pursuant to such wish, by a Deed

of Trust dated 10.6.1974, the second defendant created a trust with the corpus earmarked in the Will of late Lahoti duly appointing defendants 3

and 4 as additional trustees apart from second defendant as first trustee. The trust known as Rai Saheb Pannalal Hiralal Lahoti Charitable Trust,

the first defendant herein, owned properties in Hyderabad and Hingoli in Maharashtra. The office of the first defendant Trust was at Calcutta. The

Trust represented by its trustee, the second defendant, executed agreement of sale dated 6.12.1978 in favour of first plaintiff, Laxmipathy, agreeing

to sell the suit schedule property admeasuring 9,400 sq. yards with constructions thereon. As against agreed consideration of Rs. 6,00,000/-,

Laxmipathy paid a sum of Rs. 1,00,000/- as advance and further agreed to pay the balance of Rs. 5,00,000/- on or before 5.6.1979 and obtain

sale deed thereafter. Under the suit agreement, the vendees agreed to secure permission and/or exemption from the competent authority under the

provisions of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter called, ULC Act) and on its part, the vendor agreed to assist in

every way by signing all necessary papers and documents from time to time and also to execute sale deed in favour of the first plaintiff or his

nominee/ nominees. The execution of suit agreement was preceded by preparatory negotiations. It is alleged that the trustees of first defendant

agreed to obtain further sanction/ sanctions required from the Endowments Department or other appropriate authority for alienating the trust

property and also argued that all the trustees would join registration of sale deed.

3. The competent authority under ULC Act by proceedings dated 27.4.1979 informed that the property of the first defendant stands exempted

from the provisions of the ULC Act u/s 19(1)(iv) of the said Act provided that the land continues to be required and used for the purposes of the

trust. In two subsequent meetings between the second defendant on One hand and plaintiffs 1 and 7 on the other hand, it is alleged, the latter

requested second defendant to clarify the position as to whether under Endowment laws of State of Andhra Pradesh that permission of

appropriate authority is necessary. The second defendant left Hyderabad, refused to obtain any permission from the Endowment authorities

informing that no such permission is necessary. It is also alleged that second defendant was bent upon to terminate the agreement and return the

advance amount. Therefore, first plaintiff sent telegraphic notice on 29.5.1979 followed by a registered notice dated 31.5.1979. Thereafter, there

was correspondence between the parties through their advocates. The second defendant without giving the clarification sought by the plaintiffs as

to marketability of title demanded the payment of Rs. 5,00,000/-. The plaintiffs sent reply on 5.6.1979 agreeing to pay an amount of Rs.

5,00,000/- subject to the defendants delivering vacant possession and obtaining certificate from Endowments Department. The plaintiffs also sent

another communication dated 6.6.1979 through their advocate informing that a cheque for Rs. 5,00,000/- drawn on Syndicate Bank, with

photostat copy of the cheque, with an endorsement thereon ""good for payment"". The second defendant by communication dated 7.6.1979

informed the plaintiffs that amount of Rs. 1,00,000/- was forfeited and that the agreement was cancelled. Alleging that the said cancellation and

forfeiture is illegal, the suit is filed on 30.1.1980 for specific performance of agreement of sale and further praying the Court for an enquiry into the

title of the first defendant trust to the suit schedule properties and the power and competence of the trustees defendants 2 to 4 to sell the property

and also for such other prayers.

4. The second defendant filed written statement on behalf of the first defendant denying the. plaint allegations. While admitting the execution of the

agreement, receipt of advance amount and various terms of agreement of sale, the second defendant stated as follows. As per the agreement of

sale, execution of sale deed could be postponed but the balance of sale consideration must be paid by the vendee before the time stipulated. The

plaintiffs have not honoured the said condition. The trustees passed resolution empowering the second defendant to deal with the property of the

Trust and a copy of the resolution was handed over to the plaintiffs. Plaintiff No. 1 got draft sale deed prepared, tracing the history of the land

showing the title and names of the purchasers on the terms and conditions of the sale deed which was submitted to ULC authorities. After due

negotiations, said agreement was prepared. Therefore, the question of enquiry about the validity and the legality of the sale or the authority of the

Trust to convey the title to the plaintiffs does not arise. Similarly, obtaining sanction from the Endowments Department does not arise, as the office

of the Trust was located in Calcutta in West Bengal. The rules under West Bengal law alone are applicable and permission of endowment authority

in Andhra Pradesh is not required. The first defendant denied the allegation that the Trust did not produce title deeds pertaining to the property and

it is further stated that all the documents were given sufficiently in advance and a draft sale deed was also prepared after satisfying about the title of

the Trust. In any event as per terms of the agreement any permission is required, the same has to be obtained by the plaintiffs only. The plaintiffs

who got prepared the sale deed committed breach of terms of contract by not paying valid sale consideration before the time stipulated. It is

further stated that plaintiffs did not take any action for finalizing sale and that the plaintiffs made unreasonable demands ignoring terms of the

agreement. It is also alleged that if the registration of the Trust in Andhra Pradesh is required, the suit agreement is void and no specific

performance can be enforced against defendants. The plaintiffs entered into an agreement after satisfying themselves about the title of the first

defendant and also fully aware of revocation of the previous agreement and therefore they cannot go back on the terms of the agreement in spite of

making time as essence of the contract. The plaintiffs were not willing and ready to abide by terms stipulated in the agreement and plaintiffs cannot

substitute any terms or add new terms to the suit agreement. The suit agreement is void and unenforceable under the provisions of Sections 46, 47

and 48 of the Indian Trusts Act, 1882 read with Section 11(2) of the Specific Relief Act.

5. The plaintiffs also filed rejoinder denying various counter allegations made by the defendants.

6. The trial Court framed as many as 17 issues for trial. They are as under:

1. Whether there is necessity for impleading the defendants 2 to 4 as parties to the suit in their individual capacity and whether they are not proper

or necessary parties?

2. Whether the time was the essence of the contract regarding the agreement between the parties?

3. Whether any sanction from the Endowment Department of A.P. or other authorities was required for the completion sale?

4. Who is amongst the parties, who is the person to obtain permission or exemption from the competent authority and Urban Land Ceiling and

Regulation Act, Hyderabad and from Income Tax Officer, Calcutta?

5. Whether the 1st defendant dealt with the plaintiff Nos. 2 to 8 at all or whether he dealt with only first plaintiff?

6. Whether the plaintiffs have raised imaginary demand which were not made clear to the defendant at any time, and whether the defendants are

not bound to such demands of the plaintiffs?

7. Whether the demands made in the telegram notice, dated 29.5.1979 are all unreasonable, and not required, and not contemplated as per the

terms and conditions of the agreement, dated 6.12.1978?

8. Who are the parties that actually committed the breach of the contract?

9. Whether the plaintiffs having asked for the refund in the alternative in the letter of their advocate dated 31.5.1979 cannot now seek the relief for

specific performance on the agreement, dated 6.12.1978?

10. Whether the defendants should furnish a bank guarantee in a sum of Rs. 6,00,000/-?

11. Whether 1st defendant is justified in forfeiting the advanced sum of Rs. 1,00,000/-?

12. Whether the plaintiffs are entitled to any specific performance as prayed for or to the alternative relief?

13. Whether the defendants are entitled for a decree for Rs. 10,000/- and also a decree for Rs. 5,000/- p.m. from April, 1980 till the disposal of

the suit?

14. Whether the plaintiffs are entitled to specific performance prayed for and for delivery of vacant possession of the schedule property?

15. Whether all the trustees are bound, and should be directed to join in executing the sale deed, and to get the same registered?

16. Whether the agreement, dated 6.12.1978 as not validly or illegally rescinded by defendants, and was never repudiated by the plaintiffs?

17. To what relief ?

7. The plaintiffs examined seventh plaintiff as P.W.1 and first plaintiff as P.W.3. They also examined P.W.2 and P.W.4 and marked Exs.A.1 to

A.29 to prove their case. Defendant No. 2 examined himself as D.W. 1 and Exs.B. 1 to B.33 were marked for them. Ex. 1 is the suit agreement

of sale dated 6.12.1978 executed by the first defendant, in favour of first plaintiff and Ex.A.2 is the receipt issued by second defendant in favour of

first plaintiff acknowledging the receipt of an amount of Rs. 1,00,000/- by way of a demand draft. Ex.A.3 is the list of documents given by second

defendant to the first plaintiff and Exs.A.5 and A.6 are proceedings of the Special Officer and competent authority under U.L.C. Act. Exs.A.7 to

A. 17 are the notices exchanged between the parties through their lawyers between the period from 29.5.1979 to 23.6.1979 including Exs.A. 15

and A. 17, whereby and whereunder the suit agreement was cancelled and the advance amount was forfeited by defendant No. 2 acting on behalf

of defendant No. 1. Exs.B.30 and B.31 are resolutions authorising second defendant to deal with the property and Exs.B.14 and B.21 are income

tax clearance certificate and encumbrance certificate respectively.

8. On consideration of the oral and documentary evidence, the learned trial Judge held that the plaintiffs insisted upon all the trustees to perform

additional conditions as condition precedent to execute the registered sale deed by defendant No. 1, though it was ready to execute the registered

sale deed and that defendants validly rescinded the agreement, Ex.A.1. Accordingly, the learned Judge while directing refund of Rs. 1,00,000/-

dismissed the suit with costs.

9. Sri E. Manohar, learned Senior Counsel appearing for appellants in A.S. No. 673 of 1995 and respondents in C.C.C.A. No. 88 of 1993 made

the following submissions. Plaintiff No. 7, who negotiated the sale, and plaintiff No. 1, who obtained the agreement Ex.A.1, were very much aware

of earlier agreement, and also the termination of sale agreement with another party. In that background, the plaintiffs verified all the documents

relevant for evaluating marketability of the title of suit schedule property and with eyes wide open, and with free will entered into contract of sale

with the first defendant represented by second respondent. As per the terms of Ex.A 1 agreement, the vendees are required to obtain all necessary

permissions including permission under the ULC Act, the vendees are also required to pay the balance of sale consideration of Rs. 5,00,000/-

(Rupees five lakhs only) on or before 6.6.1979 and obtain registered sale deed from the defendant No. 1. The payment of balance of sale

consideration cannot be postponed by vendees though the execution of sale deed may be postponed by the parties. The plaintiffs are bound by

various clauses in the agreement of sale and therefore they cannot go back and insist upon defendant No. 2 to clarify doubts about title, alienability

by the trustees of the first defendant trust. By doing so, it is the plaintiffs, who committed breach of terms of the contract and failed to perform their

part of the contract, which resulted the termination of the contract and forfeiture of advance amount of Rs. 1,00,000/-. Further, plaintiffs by issuing

Ex.A. 10, notice dated 5.6.1979 insisted upon incorporating various new conditions and clauses in Ex.A.1 agreement and agreed to be ready and

willing only when those conditions are incorporated. In view of this, enforcement of agreement Ex.A.1 would not arise. Insofar as forfeiture of the

advance amount paid by the plaintiffs is concerned, second defendant exercised right to forfeit advance amount lawfully and hence decree for

refund of said amount is unsustainable. If the amount is directed to be refunded to the plaintiffs, who failed to perform their part of the contract, the

same would amount to denying defendants their right under Ex.A.1 agreement, which is sought to be specifically enforced by the plaintiffs

themselves.

10. The learned Senior Counsel also submits that the first defendant trust has its head office in Calcutta and therefore under West Bengal

Endowment Law, no permission is required for alienating the trust property. When the trust is registered at Calcutta in the State of West Bengal,

the Law of West Bengal alone is applied and A.P. Charitable and Hindu Religious Institutions and Endowments Act, 1987 (the Endowments Act)

has no application. Therefore, the plaintiffs" by insisting upon such permission in spite of the second defendant giving necessary clarification

resiled from the contract. The learned Counsel placed reliance on The State of Bihar and Others Vs. Charusila Dasi, and Anant Prasad

Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others, , in support of the said contention. The learned Counsel also relied on the

decisions in Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan, , Rahat Jan v. Hafiz Mohammad Usman, AIR 1983 All. 343, Smt. Chand Rani

(dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., , K.S. Vidyanadam and Others Vs. Vairavan, and Sri P. Purushotham Reddy and Another

Vs. Pratap Steels Limited, , in support of his contentions.

11. Sri Vilas V. Afzul Purkar, the learned Counsel for appellants in C.C.C.A. No. 88 of 1993 and respondents in A.S. No. 673 of 1995 argued

as follows. u/s 55(1)(b) and (c) read with Section 55(2) of the Transfer of Property Act, 1882, a seller is bound to disclose all the relevant

information and produce all documents of title relating to the property and the vendee is entitled to seek clarification regarding reasonable doubts

about the title of the property agreed to be sold. The plaintiffs were not given the relevant documents of title in respect of the entire suit schedule

property and therefore when the plaintiffs asked for those documents, it is the second defendant who did not co-operate with the plaintiffs with a

view to avoid the contract. The defendants themselves committed breach and therefore the plaintiffs cannot be said to have resiled from the

contract. The plaintiffs are always ready and willing to perform the contract and they have even sent a xerox copy of the cheque for Rs. 5,00,000/-

"good for payment" before the stipulated date, which the defendants refused to accept the same with a view to defeat the rights of the plaintiffs.

When other persons approached offering higher price to the suit schedule land, defendant No. 2 avoided the queries made by the plaintiffs and

refused to furnish the documents requested by the plaintiffs. Unless and until the defendants satisfied that they had title to alienate the property,

defendants are under no obligation to part with balance of sale consideration. In view of Ex.A.32, which is resolution of all other trustees

authorizing the sale of the suit schedule property by defendant No. 2 to the plaintiffs and by reason of Sections 47 and 48 of Indian Trusts Act,

1882, Ex.A.1 is not rendered void. The learned Counsel placed reliance on Madurai Chetty v. Babu Saheb, AIR 1920 Mad. 859 : (1919) 52 1C

971 and Subbayya Chowdary v. Veerayya, 1955 An.WR 502.

12. In his reply arguments, the learned Senior Counsel for defendants submits that even according to the plaintiffs Ex.A.1 was not signed by all the

trustees and that the permission of the Commissioner under Endowments Act was not obtained and therefore the agreement is unenforceable as it

is void. Sections 47 and 48 of the Indian Trusts Act require the execution of trusts by all the trustees and therefore Ex.A.1 cannot be enforced.

That plaintiffs never asked for title deeds for the purpose of certain clarification and that it is not correct by issuing Ex.A.4 notice what they asked

for or the original documents and not for the title deeds. The plaintiffs did not at any time ask the second defendant for title deeds. The contention

that the second defendant did not satisfy the plaintiffs on the clarifications sought is not correct. Whenever plaintiffs raised doubts, defendant No. 2

gave clarifications regarding the title of first defendant to the suit property, regarding the delegation made to second defendant by other trustees and

regarding the applicability of West Bengal Endowment Law, under which no permission is required. If the plaintiffs are not satisfied with the

clarifications given by second defendant, the latter cannot be blamed. Plaintiffs admitted the title of defendant No. 1 and capacity of defendants to

sell the property and therefore Section 55(1) and 55(2) of Transfer of Property Act have no application.

13. In the background facts and having regard to the rival contentions, two points that arise for consideration are (i) Whether the plaintiffs have not

committed breach of contract of sale? and (ii) Whether the second defendant acting on behalf of first defendant was not justified in terminating the

contract and forfeiting the advance amount of Rs. 1,00,000/-? Both the points need to be considered together as they are interdependent.

Law and Precedents

14. In the light of core submissions made by learned Counsel, a brief reference may be made to the rights of the seller and buyer of immovable

property and the right of the buyer to enforce specific performance of the contract of sale. One needs to notice Section 55 of the Transfer of

Property Act, 1882 (hereafter called, the TP Act) and Section 13 of the Specific Relief Act, 1963 as well as certain related provisions. Section 55

of the TP Act - though not exhaustive; is charter of rights and liabilities of buyer and seller, insofar as the same is relevant, reads as under:

Section 55. Rights and liabilities of buyer and seller--In the absence of a contract to the contrary, the buyer and the seller of immovable property

respectively are subject to the liabilities, and have the rights mentioned in the rules next following, or such of them as are applicable to the property

sold:

(1) The seller is bound--

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and

which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or

power;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) to (g) - Omitted

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has

power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done

no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to and shall go with the interest of the transferee as such, and may be enforced

by every person in whom that interest is for the whole or any part thereof from time to time, vested.

(3) to (6) - Omitted

An omission to make such disclosures as are mentioned in this section, Paragraph (1), Clause (a), and Paragraph (5), Clause (a), is fraudulent.

15. The beginning words of Section 55 of TP Act would make it very clear that the buyer and seller of immovable property are subject to liabilities

and have rights mentioned in the rules under sub-sections (1) to (6) of Section 55. However, if there is any contract to the contrary, these rules

have no application. The phrase "...in the absence of a contract to the contrary ..." with which Section 55 begins would show that if the rights,

duties, liabilities and obligations of the seller and buyer form part of covenants of agreement of sale of immovable property, Rules in Section 55 of

TP Act are not applicable. Of course, any contract which is unconscionable and contrary to law and public policy is void. Under Sub-section (2)

of Section 55 of the TP Act, it is entitled to assume that the buyer has a subsisting transferable right in the property agreed to be demised under a

contract of sale. Further, when the contract is silent, under Clause (a) read with Clauses (b) and (c) of Sub-section (1) of Section 55 of the TP

Act, the seller shall disclose to the buyer any material defect in the property, which is aware and produce on the request of the buyer the

documents of title relating to the property which are in seller's possession or power. Further, the seller is bound to answer to the best of his

information of relevant questions put to him by the buyer in respect of the title to the property. However, u/s 55(1)(a) of the TP Act, the seller is

bound to disclose only such material defects, which the buyer could not with ordinary care discover. When it comes to evaluation of marketability

of title to the covenanted property, the law also requires the buyer to verify the title before the sale is finalized u/s 54 of the TP Act and if any

defect is found in the title, which is passed on, the law does not blame only the seller. That is the reason why Section 55(1)(a) and (b) of the TP

Act are cautiously worded. The words "... which the buyer could not with ordinary care discover ..." and "... to the best of his information of

relevant questions ..." appearing in Clauses (a) and (c) would certainly require such interpretative process because as per Section 55 of the TP

Act, the omission to disclose the things u/s 55(1)(a) of the TP Act renders the transaction fraudulent. Unless and until buyer proves in terms of

Section 55(1)(a) and (c) of the TP Act that seller failed to discharge the liabilities and obligations in terms thereof, the transaction cannot be termed

as fraudulent. It may also be noted that the sale of immovable property is a transfer of ownership in exchange for price paid by the buyer or

promised to be paid by the buyer and a contract for sale of immovable property shall take place "on terms" settled between the parties. Therefore,

if there are settled terms between seller and buyer, including marketability of title, rules u/s 55 of the TP Act have no relevance.

16. A fraudulent contract or a contract obtained by fraud is void. A void contract cannot be specifically enforced. However, a contract of sale of

immovable property with allegedly imperfect title in the seller is neither void nor voidable per se. An allegation of imperfect title in the property,

which is subject-matter of contract of sale by itself cannot be a ground for the buyer to avoid the contract and postpone his performance on

grounds of purported material defects in seller's title to the property. Section 13 of the Specific Relief Act, 1963 deals with rights of a buyer

against "a person with no title or imperfect title". The same reads as under:

13. Rights of purchaser or lessee against person with no title or imperfect title:-(1) Where a person contracts to sell or let certain immovable

property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this chapter), has the following rights,

namely:

(a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make

good the contract out of such interest;

(b) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor,

the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title

and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;

(c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money

and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem, the mortgage and to obtain a valid discharge, and,

where necessary, also a conveyance from the mortgagee;

(d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect

title, the defendant has a right to a return of his deposit, if any, with interest and costs on the interest, if any, of the vendor or lessor in the property

which is the subject-matter of the contract.

(2) The provisions of Sub-section (1) shall also apply as far as may be, to contracts for the sale or hire of movable property.

17. The above provision deals with three situations. These are as under:

(i) Where the seller transfers the property with imperfect title and subsequently acquires interest in the property, the buyer has a right to compel the

vendor to make good the contract out of such interest; if necessary by compelling concurrence of other persons.
Section 18 of the Specific Relief

Act, 1877 except for minor variations is in part similar with Section 13 of the New Act. The Courts have held that a defect of title is one which

exposes the purchaser to adverse claims to the land and have pointed out (a) restrictive covenants, (b) encumbrances, (c) property liable to be

acquired, (d) existence of partition decree allotting a portion to the co-sharer, (e) title being voidable at the option of third party and (f) the

absence of concurrence of persons whose consent is necessary to validate the transfer as defects of title.

(ii) The second situation deals with a case of mortgage. When the vendor sells mortgaged property professing the same to be unencumbered, the

purchaser has a right to compel the vendor to redeem the mortgage, obtain valid discharge and also ask for conveyance from the mortgagee of the

property.

(iii) In a case where the specific performance of contract cannot be enforced and the suit is dismissed by the Court on ground of want of title or

imperfect title, the buyer has a right to the return of the deposit with interest thereon and shall also have a lien in the property to the extent of the

deposit, interest and costs of the suit.

18. A reference may also be made to Section 11 of the Specific Relief Act, which reads as under:

11. Cases in which specific performance of contracts connected with trusts enforceable:- (1) Except as otherwise provided in this Act, specific

performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is in the performance wholly or partly

of a trust.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

19. A plain reading of the above provision would show that a contract made by a trustee in exercise of its power or in breach of trust cannot be

specifically enforced though a Court can always, in its discretion enforce the performance wholly or partly of a trust. This provision, however, has

to be read with the relevant provisions of Indian Trusts Act, 1882, especially Sections 47 and 48 of the said Act, which stipulate that unless and

until the instrument of trust provides a trustee cannot delegate his duties to a co-trustee or to a stranger but the provision also treats appointment of

attorney to do ministerial act as not amounting to delegation.

20. The position in law as emanating from various provisions of TP Act, Specific Relief Act and Indian Trusts Act cannot be ignored while

considering the submissions of the learned Counsel for the appellants in C.C.C.A. No. 88 of 1993 and also appreciate the two decisions on the

point relied by the learned Counsel. To reiterate, the learned Counsel vehemently contended that the plaintiffs seeking clarification regarding the

title of the vendors to the property agreed to be sold does not amount to breach of contract and it is only in accordance with the rights conferred

by Section 55(1)(b) and (c) read with Section 55(2) of TP Act. Be it noted that there cannot be any dispute on the principle of law as noticed

hereinabove. It is the prerogative of the buyer to raise a reasonable doubt and seek reasonable information which is within the knowledge of the

seller and also recognized principle of law that buyer can always compel the vendor/ vendors to rectify the defects and pass on unencumbered title

to the buyer in which event the contract is not rendered voidable. The two decisions relied on by the learned Counsel do not lay down any other

new principle.

21. In *Madurai Chetty v. Babu Saheb* (supra) a Division Bench of Madras High Court was dealing with the suit for specific performance of

agreement for sale of immovable property. After entering into agreement, the purchasers discovered that the vendor pursuant to release deed given

by his grandmother had executed a mortgage deed for suit house. The vendor's Advocate, however, demanded the buyers to complete the sales

transaction which was demurred by the purchasers on the ground that the vendors did not get mortgage discharged. There was exchange of

correspondence between the Advocates of sellers and buyers which ultimately resulted in rescission of the contract by the vendors. In the suits for

specific performance the purchasers succeeded. In the original side appeal before the High Court, a Division Bench having noticed the admitted

fact that the ownership and title of the vendor was encumbered, in that, the suit property had been mortgaged by the vendors grandson, dismissed

the appeals observing as under:

... A purchaser is entitled to a good and a marketable tide. If the tide is found to be doubtful so as to require investigation he cannot be compelled

either to rescind the contract or to accept without investigation the doubtful tide. He may, it is well settled in England, sue for specific performance

of the contract and ask for an inquiry into the tide by the result of which he will be bound... (the) vendors were entitled to call upon the purchasers

to complete the contract within a stated time without further investigation and to rescind the contract for their failure to do so. On the other hand,

the purchasers were entitled to sue for specific performance and an inquiry into tide....

22. In Subbayya Chowdary v. Veerayya (supra) the facts as summarized in the head-note would show that A executed an agreement of sale in

favour of B agreeing to sell agricultural land for Rs. 11,400/- and also received Rs. 1,500/- as advance on the date of execution. The buyer was

put in possession. The vendor also agreed to settle any dispute that may arise at his expense. As per the agreement, balance of sale consideration

was agreed to be paid within a month from the date of agreement and in default of which it would carry half rupee interest. The buyer paid various

amounts subsequently. But, the seller issued a telegram demanding that the buyer should pay the outstanding amount before the stipulated date

failing which the suit for specific performance be filed. In reply to the telegram the buyer while expressing his readiness, asked the seller to show

the documents of title and also vouchers to prove that mortgage on the property standing in favour of one D was discharged. The buyer also

informed that if the seller fails to show the documents as requested, he would not be liable to pay the interest at agreed rate. There was further

exchange of notices on the same lines. Ultimately, the buyer filed a suit against the seller as well as mortgagee for specific performance of contract

executed in his favour by A. He prayed the Court to direct A to execute sale deed of suit property either in favour of C, second plaintiff in the said

suit, or in his own favour. The trial Court held against the buyer and dismissed the suit with costs. The plaintiff came in appeal to this Court. Initially

the matter was heard by a Division Bench. The two learned Judges who heard the appeal deferred in their views. The Hon"ble the Chief Justice

Koka Subba Rao (as he then was) allowed the appeal and decreed the suit holding that the purchaser is entitled to"" ask for information to satisfy

himself on the question of title as well as on the question of discharge of mortgages and further that the plaintiff (buyer) was ready and willing to

perform his part of the contract. On the contrary, the other learned Judge constituting the Bench Hon"ble Sri Justice Umamaheswaram dismissed

the appeal and confirmed the judgment of the trial Court holding that the request made by the vendor to the buyer to complete the contract and to

pay the amount within reasonable time and perform the terms of the contract was in accordance with law. The learned Judge also observed that if

the parties to the contract are aware of prior mortgage or prior encumbrances in the property, the buyer cannot avoid to perform his part of the

contract raising the same questions when a demand is made by the vendor for performance of buyer's part of the contract.

23. In view of difference of opinion, the matter came to be referred to the Hon"ble Sri Justice Chandra Reddy who agreed with the view taken by

the Hon"ble the Chief Justice (as he then was) and as a result, the appeal was allowed directing the seller to execute the sale deed within two

months thereafter. The learned Judge relied on *Madurai Chetty v. Babu Saheb* (supra), *Srinivasadas Bavri v. Meher Bai*, (1916) 32 MLJ 175

Hirachand Amersey v. Tayagopal, ILR (1942) 49 Bom. 245, and made the following observations:

These rulings show that in order to make out a good tide to the property the vendors must show that the property is free from all encumbrances,

that the vendee could not be expected to take a tide with a cloud thereon, or compelled either to accept a doubtful title without investigation or

rescind the contract. He could file a suit for specific performance and ask for an inquiry into the tide by the result of which he would be bound.

They also establish that the existence of a mortgage over a property would make the tide thereto incomplete, and that knowledge on the part of the

purchaser of defects in tide of the vendor does not take away his rights to the statutory covenants unless there is a specific provision to cover such

defects also. The non-repudiation of liability to discharge mortgages by the vendor cannot furnish a valid ground for not meeting the demand for

inquiry into tide.

Yet again, it was observed therein:

The principle that a purchaser could elect either to be released from an agreement which became voidable on account of the conduct of the vendor

or to perform it and ask for compensation is enunciated in *Beasant v. Richards*, 48 ER 203. If the 1st plaintiff was within his rights in calling upon

the 1st defendant to satisfy him that the property agreed to be purchased by him was free from encumbrances, the 1st defendant was not entitled

to call upon the 1st plaintiff to pay the balance of sale-price and take a conveyance without complying with the requisition or without even telling

him that he should be compensated for any loss that might be sustained by him consequent upon his failure to pay off the mortgage debt, if any,

outstanding and later on put an end to the contract on the ground that the vendee did not perform his part of the contract.

24. As can be seen the two cases relied on by the learned Counsel are cases where prior to agreement of sale the vendor had mortgaged the

property agreed to be sold and the Courts therefore held that the buyer was entitled to demand that the vendor should first discharge the mortgage

and produce necessary certificate before demanding the buyer to perform his part of the contract. Both the cases were also squarely covered by

Section 55 of the TP Act. As noticed supra, the rules contained in Section 55 are attracted only in the absence of contract to contrary, and not

otherwise. Therefore, we need to refer to the agreement of sale entered into by the first plaintiff with the first defendant trust by extracting some of

the important clauses in the agreement verbatim. Be it also noted that second respondent representing first defendant trust entered into agreement

with first plaintiff and subsequently first plaintiff requested the first defendant to execute different sale deeds in favour of other plaintiffs. The

important clauses in the agreement which need to be noted are reproduced herein below:

That the vendor is the full and absolute owner in possession of premises bearing Municipal No. 1-11-251, Double Storied Building with 2 garages,

one open garage, one servant's room, well with Electric Motor and Pump thereon, along with electric fittings in the bungalow, as per plan annexed

herewith having an area of about 9400 Sq.Yards lands, having been purchased on the basis of Registered Sale Deeds Documents No. 1373

Pages 32 and 33, dated 24.6.1352 Fasli (1942 A.D.) regarding Survey No. 53 of village Begumpet and Document No. 2531 dated 1.10.1349

Fasli of Survey No. 56 of Begumpet Village, and other connected sale deeds of lands and the structures including bungalow constructed thereon

by late Rai Saheb Pannalal Lahoti....

1. The vendees have negotiated and now finalised and entered into this agreement of sale of Bungalow No. 1-11-251, along with surrounding

lands situated at Begumpet for a consideration of Rs. 6,00,000/- (Rupees six lakhs only) with the vendor, and paid an advance of Rs. 1,00,000/-

(Rupees one lakh only) now at the time of entering into this agreement of sale. The vendor has passed a separate receipt for the advance and

earnest amount of Rs. 1,00,000/- (Rupees one lakh only) by D.D. No. 227628, dated 6.12.1978, drawn on Syndicate Bank, Hyderabad in

favour of vendor. The balance amount of Rs. 5,00,000/-(Rupees five lakhs only) is to be paid within six (6) months from the date of this

agreement.

2. The vendees are free to pay the balance sale consideration of Rs. 5,00,000/-(Rupees five lakhs only) in full earlier than stipulated time and take

vacant possession of the premises agreed to be sold by this agreement.

3. Payment of the balance amount of Rs. 5,00,000/- (Rupees five lakhs only) on or before 6.6.1979 is the essence of this agreement. If the

vendees fail to pay the balance amount in time as aforesaid for whatsoever reason the advance earnest amount paid to-day shall stand forfeited and

vendees shall have no rights whatsoever on the suit schedule property and they shall not in any case be entitled to ask for refund of the earnest

money which by his non-payment of the balance amount, as aforesaid shall irrevocably stand forfeited.

4. The Head Office of the trust is at Calcutta and all the Trustees reside outside Andhra Pradesh and hence it shall be difficult and inconvenient for

the Trust or for the Trustees to pursue the matter before the Urban Ceiling Authority and as the vendees have agreed to do the needful, vendor

shall on his part assist in every way, and shall sign all necessary papers and documents to secure permission and/or exemption for transfer of the

scheduled property from vendor to vendee's name from time to time at the cost of the vendees including signing a vakalat for appointing an

Advocate for the purpose.

5. That after taking possession, vendees shall erect at their cost the compound wall or barbed wire fencing at the Northern side within six months.

All the other three sides already have compound walls.

8. That at the time of registration of the sale deed of the scheduled property or on full payment of sale consideration as stated above, the vendor

undertakes to produce non-encumbrance certificate as well as clearance certificate from the Income Tax Department.

9. That the vendor undertakes to handover old tide deeds and other papers for the record of the vendees.

10. Time will be essence of the contract.

11. ...Under no circumstances, the vendor will forego his right to receive the sale price as agreed above. However, the vendor undertakes to give

an irrevocable General Power of Attorney in favour of the vendees authorizing the vendees to conduct the proceedings on behalf of the vendor to

get the scheduled property exempted and/or transferred to the vendees and till then enjoy it without any hindrance and also, if it comes to, to

receive compensation on behalf of the vendor. If before the due date of balance payment of Rs. 5,00,000/- (Rupees five lakhs only) to be paid to

the vendor by the vendees exemption from Urban Ceiling Authority is not obtained, it shall be the responsibility and liability of the vendees to make

full balance payment in time and take possession of the scheduled property. The Registration of the scheduled property can be effected at any time

thereafter and the vendor solemnly affirms that after receipt of full payment of the property sold to the vendees by the vendor, he shall be morally

and legally duty bound to execute and register the sale deed of the scheduled property in favour of the vendees or his nominee /nominees at

anytime mutually agreed upon after 15 days notice in writing from the vendees to the vendor. If necessary, the vendor shall execute an irrevocable

General Power of Attorney in favour of vendees or his nominee/nominees for the peaceful enjoyment of the scheduled property for which the

vendees already made full payment.

(emphasis supplied)

25. A plain reading of the above clauses would show that time is essence of the contract. The parties also covenanted two important aspects. One

is payment of balance of sale consideration on or before 6.6.1979. A look at Clause 10 read with Clauses 1, 3 and 11 would show that the

payment of balance of consideration of Rs. 5,00,000/- on or before 6.6.1979 is rigid condition which cannot be relaxed. However, as per the

Clause 11 it is the registration of the sale deed that can be done at any time after the purchasers make payment of Rs. 5,00,000/- and take

possession of the schedule property. What the parties to Ex.A.1 intended does not admit two opinions. It only point to one condition precedent

essential for the successful completion of sale transaction between first plaintiff and first defendant. The condition precedent is vendee shall have to

pay balance sale consideration of Rs. 5,00,000/-on or before 6.6.1979 and take possession before taking necessary steps for registration of sale

deed which can even wait as agreed to by the parties. Another important facet which can be culled out is that the first plaintiff accepts that first

defendant is the full and absolute owner of the suit premises and this is mentioned in the preamble itself by referring to a sale deed and other

connected sale deeds. It is rational to draw an inference from various clauses of the agreement that the purchasers entered into sales transaction

on terms settled between them"" and it would be impermissible for either of the parties to the contract to turn around and attempt to introduce new

conditions unilaterally as covenants of the agreement to suit their diplomatic overtures.

26. As already pointed out, the provisions in Section 55 of the TP Act have no application when there is consensus ad idem qua the contract of

sale between the parties manifesting itself in the form of a written agreement of sale. It is not the case of the plaintiffs that there was a clog on suit

schedule property by reason of any mortgage created by the defendants. Therefore they cannot raise any objections which they did not raise at the

time of entering into Ex.A.1 either with regard to the competence of defendant No. 2, the marketability of title to the suit schedule property or

applicability of endowment laws. Nor the plaintiffs can take recourse to Section 13(1)(c) of the Specific Relief Act.

27. Whether the objections raised by the plaintiffs and clarifications sought by them are reasonable failing u/s 55(1)(b) and (c)? The plaintiffs

examined plaintiff No. 7, V.A. Gupta as P.W.1 and plaintiff No. 1, A.K. Lakshmi pati as P.W.3. They also marked Ex.A.1 (agreement of sale),

A.3, A.5, A.6 and Exs.A.7 to A. 17 to show that they were well within their rights under law to seek necessary clarifications regarding clear title to

the property agreed to be demised. In rebuttal, defendant No. 2 examined himself as D.W.2 and relied on the admissions made by P.Ws.1 and 3.

They also relied on the same documents which are marked by the plaintiffs and also Exs.B.14 (tax clearance certificate) B.29 to B.33 (resolutions

of the trustees) and Exs.B.16 and B.17 and certificate issued by Special Officer and Competent Authority, Urban Land Ceiling, Hyderabad, to the

effect that the property of the first defendant stands exempted from the provisions of ULC Act. The learned Counsel for the plaintiffs submits that

at the time of entering into agreement, second defendant did not furnish the copies of the sale deed under which the property was purchased by the

first defendant and that second defendant provided to give clarifications regarding the authority of the second defendant to enter into sales

transactions and the applicability of endowment clauses. Therefore, he would urge that plaintiffs were justified in issuing various notices Exs.A. 7,

A.8, A.10, A.12 and A.16 seeking such clarifications. He also contends that even before the last date for payment of balance of sale

consideration, plaintiffs have sent a cheque drawn on Syndicate Bank for Rs. 5,00,000/- with Manager's endorsement that the cheque is ""good for

payment"" and therefore they have not committed breach of contract.

28. Agreement of sale Ex.A.1 was obtained by first plaintiff Lakshmi pati, who was examined as P.W.3. In his deposition, he admitted that the

transaction was finalized in the presence of one real estate broker Shivarajprasad Mishra and further stated that he or other plaintiffs never asked

the second defendant to get permission from Endowment Department. He even admitted that there was no agreement between the parties that

vendor should give all clarifications whenever the vendees ask for. He further deposed that under law they wanted to get necessary clarifications

before completing the sales transaction. He entertained a doubt about the said property from 28.5.1970 because there were other brokers

approaching the second defendant. The important admission he made is that they are satisfied and ready to go ahead with the purchase.

29. The other important witness for the plaintiffs is plaintiff No. 7, V.A. Gupta, who was examined as P.W.I. He is the Chartered Accountant who

was handling income tax matters of the first plaintiff for more than two-and-a-half decades. He also admitted that as per Ex.A. 1 time for payment

of balance of sale consideration was 6.6.1979 and that as per the understanding, second defendant agreed that all the trustees would join the

execution of the sale deed in favour of the plaintiffs if the purchasers bear the travel expenses. From his evidence, it becomes clear that on the date

of Ex.A.1 second defendant handed over the Will of Pannalal as per which the trust came to be created, the document in relation to trustees and

trust deed and also allowed the plaintiffs to take copies of the same as per Ex.A.3, list of documents. It also becomes clear from the agreement

that time is essence of the contract and the plaintiffs entered into agreement after satisfying with the title of the vendors. He further stated that ""they

were satisfied with all conditions laid down in Ex.A.1 "" that ""as per Clause (2) of Ex.A. 1, they did not offer the balance sale price before the

stipulated time."" P.W.I was also present when the agreement was entered into and he admitted the same. P.W.I further admitted that second

defendant issued notices asking the plaintiffs to complete the sales transaction by paying balance sale consideration before stipulated time and that

plaintiffs offered to pay balance sale consideration on four new conditions. These new conditions are that vacant possession of plot schedule

should be given to plaintiffs, that second defendant should get clarification from A.P. Endowments Department, that second defendant should give

irrevocable bank guarantee for repayment of money paid by them in case Endowments Department refuses permission and that second defendant

should enter into agreement with plaintiffs incorporating those conditions.

30. Thus, reading evidence of P.W.I and P.W.3 together three conclusions are irresistible. These are (i) plaintiffs 1 and 7 entered into Ex.A.1

agreement with first defendant represented by second defendant after fully satisfying about the title of the first defendant; (ii) the time is essence of

the contract and if the purchasers failed to pay balance sale consideration of Rs. 5,00,000/- on or before 6.6.1979, it would amount to breach of

contract; and (iii) the plaintiffs agreed to pay balance sale consideration before the stipulated date subject to second defendant executing another

agreement incorporating three more conditions as dictated by plaintiffs 1 and 7. A reference to Exs.A.7, A.8, A.10, A.12 and A. 16 which are the

notices issued by or on behalf of the plaintiffs to the second defendant reflect the same position as is spoken to by P.W.I and therefore elaborate

reference to these is not necessary. In all these notices, the plaintiffs sought clarifications with regard to joining of all trustees in execution of sale

deed, clarification regarding applicability of Endowments Act, and second defendant entering into another agreement by way of indemnifying the

vendees for any loss due to defect in the title. With regard to these objections, second defendant promptly sent replies which are marked as

Exs.A.9, A. 11, A. 14 informing that all the trustees have executed resolution delegating the power to second defendant, that they are also willing

to abide by the sale deed, that A.P. Endowments Act has no application to the first defendant trust, and that as per West Bengal Endowments Act

there is no necessity to obtain permission. Ex.A.28 is trust deed and Ex.A.29 is resolution of the trustees dated 25.10.1974 whereunder all the

trustees ratified action of second defendant in entering into sale transaction with plaintiff No. 1.

31. As the last date for payment of money was fast approaching the plaintiffs resorted to a clever thing. They sent Ex. A. 12 notice dated 6.6.1979

along with photostat copy of cheque Ex.A. 13 drawn on Syndicate Bank for Rs. 5,00,000/- with an endorsement that it is "good for payment".

Presumably they did it to escape the wrath of clause in Ex.A. 1 which empowers the vendor to cancel the agreement and forfeit advance amount of

Rs. 1,00,000/-.

32. To this, second defendant gave reply on 7.6.1979 and ultimately by Ex.A.17 second defendant terminated the agreement and forfeited an

amount of Rs. 1,00,000/-.

33. Ex.A.1 agreement is comprehensive contract which does not admit any doubts. The terms regarding payment of balance of sale consideration,

handing over possession of the suit schedule property and completion of transaction by execution of sale deed are clearly mentioned and in such

circumstances, the rules contained in Section 55 of the TP Act have no application at all. Even otherwise, when plaintiffs went on asking for

clarifications after clarifications, and though second defendant sent suitable replies clarifying the position, balance amount was not paid. When the

plaintiffs could issue Ex.A. 13 and sent a photostat copy of the cheque, nothing prevented the plaintiffs to approach second defendant and pay the

amount by cash or demand draft. Sending photostat copy of the cheque (not even the original cheque), does not in any manner amount to

complying with conditions in Ex.A.1. Indeed, the lone witness examined on behalf of defendants never uttered any word that he was not ready and

willing to accept the payment of balance of sale consideration in a proper manner. In such circumstances, the Courts have taken a view against the

purchasers.

34. In Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, , the decision on which both the learned Counsel placed reliance, the Hon"ble

Supreme Court referring to Section 55 of the Contract Act, 1872, while observing that fixation of the period within which the contract is to be

performed, does not make the stipulation as to time of the essence of the contract, laid down as under:

... It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in

compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the

essence of the contract. Intention to make time of the essence, if expressed in writing must be in language which is unmistakable: it may also be

inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract.

Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if

having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the

relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere

incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the

essence.

(emphasis supplied)

35. The above legal position was reconsidered in Chand Rani v. Kamal Rani (supra) by a Constitution Bench of the Supreme Court. The facts

therein show that on the date of execution of the agreement for sale of house and house-plot, the vendee paid Rs. 30,000/- by way of earnest

money and agreed to pay Rs. 98,000/- within ten days of execution of the agreement and balance of Rs. 50,000/-at the time of registration of sale

deed dated 31.10.1971. It was also agreed that if vendee failed to pay sale consideration, the earnest money stands forfeited in favour of vendor.

The vendee filed suit alleging that the vendor failed to perform her part of the contract. In defense, the vendor alleged that the vendee failed to pay

the amount within a period of ten days from the date of execution of the agreement which was the essence of the contract and that the vendee

never tendered balance of sale consideration and therefore she cannot claim specific performance. The trial Judge came to the conclusion that time

was not essence of the contract and that plaintiff Chand Rani was ready and willing to perform her part of contract. Against the judgment and

decree of the trial Court ordering specific performance, an appeal came to be filed before High Court of Delhi. A Division Bench of High Court of

Delhi held that non-payment of sale consideration by Chand Rani before the agreed date would enable the defendant to treat it as breach of

contract, that the request of the plaintiff to obtain income tax clearance certificate and redemption of the property before payment of balance of

sale consideration would amount to varying terms of the contract and that the transaction failed due to non-payment of sale consideration. While

reversing the decree of the trial Court for specific performance, however, the High Court granted relief of refund of earnest money to the plaintiff.

36. In appeal to Apex Court, Constitution Bench of the Supreme Court in Chand Rani v. Kamal Rani (supra) considered two questions, namely,

whether time is essence of the contract and whether the plaintiff was ready and willing to perform the contract. Insofar as the first question is

concerned, after referring to Gomathinayagam Pillai v. Palaniswami Nadar (supra), Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Another, ,

Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, and Indira Kaur and

Ors Vs. Sheo Lal Kapoor, , the Constitution Bench laid down as under:

From an analysis of the above case-law, it is clear that in the case of sale of immovable property there is no presumption as to time being the

essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the

conditions are:

1. from the express terms of the contract;
2. from the nature of the property; and
3. from the surrounding circumstances, for example: the object of making the contract.

(emphasis supplied)

37. The Supreme Court considered the sale agreement between vendor and vendee and having regard to ""payment schedule clause"", especially the

words ""within a period of ten days only"", the Court came to the conclusion that time was made essence of the contract.

38. As observed by the Supreme Court in Chand Rani v. Kamal Rani case (supra) (Paragraphs 24, 26 and 27 of AIR), when the final notice by

way of ultimatum is given by the vendors, the best thing the vendees could have done is just pay the amount to the vendors and agitate the matter

further. Having failed to do so, the plaintiffs cannot be allowed to throw the blame on the vendors. When the plaintiffs could go on issuing notice

after notice to the vendors, probably to project that they were always ready and willing to perform their part of the contract, nothing prevented

them to adhere to the solemn agreement between first plaintiff and second first defendant, especially when P.Ws.1 and 3 admit that they entered

into agreement after fully satisfying with the title of first defendant to the property. Insofar as the applicability of Endowment Act is concerned,

D.W.I clarified that it is only West Bengal Law that would apply under which no permission is required. In this context, mere reference to The

State of Bihar and Others Vs. Charusila Dasi, and Anant Prasad Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others, , to the effect

that relevant law applicable to a charitable trust would be the law of that particular State in which a charitable institution is registered, would be

suffice. Therefore, the defendants were justified in taking such a stand.

39. Further, if what is contended by the plaintiffs is true, the agreement itself is rendered unacceptable because (i) it was not signed by all the

trustees; (ii) permission of the Endowment Commissioner was not obtained; and (iii) under Sections 47 and 48 of the Trusts Act unless and until it

is specifically delegated, the trust deed cannot be executed only by one trustee. The stand taken by the plaintiffs also appears to be inconsistent.

On one hand, they insisted upon such conditions which would render Ex.A.1 void and on the other hand they sought to specifically enforce the said

agreement of sale. After perusing the various notices exchanged between the parties, it becomes clear that the plaintiffs never specifically asked the

second defendant to furnish copies of the title deeds presumably because as admitted by P.W. 1 and P.W.3 they had no doubt about the title of

the first defendant to the property agreed to be sold.

40. Whether a party to an agreement of sale of immovable property, can subsequently stipulate unilateral conditions to be binding on the other

party? In Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan, , Justice A.N. Ray (as His Lordship then was) held that when the plaintiff who seeks a

specific performance of agreement has to prove readiness and willingness to perform his part of the contract in relation to a real agreement

between the parties and not the agreement or conditions which such plaintiff stipulate or assumes. It was held that when insistence on warranty of

title was not agreed in the contract, plaintiff cannot subsequently insist upon such warranty. It was observed as under:

The words ""real agreement"" would mean either the agreement that the plaintiff and the defendant had between the parties or it would mean the real

agreement which the Court finds it to be real agreement. The question of readiness and willingness however would assume different aspects in

relation to the real agreement. If at the trial it transpires that the real agreement is not what the plaintiff alleges and the readiness and willingness

which the plaintiff displayed was in relation to a different agreement, the plaintiff would be within the mischief of the doctrine of readiness and

willingness as the plaintiff is in my opinion in the present case. It is manifest in the correspondence that the plaintiff insisted on performing the

agreement not by paying the entire consideration money but by paying it in what the plaintiff described as deferred payment.

(emphasis supplied)

41. In *Rabat Jan v. Hqfiz Mohammad Usman*, AIR 1983 All. 343 Justice K.N. Singh (as he then was) relying on Calcutta decision above referred

to made the following observations with regard to Section 16(c) of the Specific Relief Act.

Section 16(c) of the Specific Relief Act 1963 contains a mandatory provision, according to which no relief for specific performance of the contract

can be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the

essential terms of the contract which are to be performed by him. Explanation to this section further lays down that the plaintiff should aver and

prove his readiness and willingness to perform the contract according to its true construction. Readiness and willingness to perform his part of the

contract is to be judged on the true construction of the agreement. The plaintiffs readiness and willingness must be in accordance with the terms of

the agreement. The plaintiff cannot add any additional condition for the performance of his part of the contract. The readiness and willingness of the

plaintiff to perform the contract should, therefore, be in accordance with the terms contained in the agreement. The readiness of the plaintiff must

be in relation to the real agreement between the parties. If it transpires that the real agreement is not what the plaintiff alleges and the readiness and

willingness which the plaintiff displayed was not in relation to the agreement, the plaintiff would be within the mischief of the doctrine of readiness

and willingness to perform the contract and he will not be entitled to any relief.

(emphasis supplied)

42. The plaintiffs by sending Ex.A.10 notice dated 5.6.1979 (this is also admitted by P.W. 1) insisted upon four new terms and also tried to

compel the vendors to incorporate the terms as the plaintiffs stipulated and execute another agreement. Therefore, an inference is to be drawn that

readiness and willingness expressed by the plaintiffs to perform their part of the contract is certainly not with reference to the terms and conditions

of Ex.A.1, but the terms and conditions which they stipulated in Ex.A. 10. Therefore, on the authority of Calcutta and Allahabad decisions referred

to hereinabove, it must be held that the plaintiffs are disentitled to specifically enforce the contract for sale of immovable property. They cannot be

said to be ready and willing to perform their part of the contract with regard to real agreement of sale and the Court in exercise of its discretion

cannot lean in favour of such plaintiffs who went on raising one objection after the other with regard to various stages in the completion of sale

transaction.

43. The defendants also filed A.S. No. 673 of 1995 insofar as the trial Court directed them to refund the sum of Rs. 1,00,000/- which the second

defendant received under Ex.A.2, receipt. It is the submission of the learned Senior Counsel for the defendants that second defendant exercised

right to forfeit advance amount under agreement of sale Ex.A.1. Such forfeiture of the amount which does not amount to illegality cannot be

directed to be refunded when the advance amount was lawfully forfeited. He again placed reliance on Rahat Jan v. Hafiz Mohammad Usman

(supra). This is strongly refuted by the learned Counsel for the plaintiffs contending that termination of agreement of sale and forfeiture of advance

amount by the second defendant is illegal and therefore plaintiffs suit should be decreed.

44. Ex.A.1 agreement does not provide for refund of advance amount paid by the first plaintiff on the date of agreement under Ex.A.2. In fact,

Clause 3 stipulates that if the vendors failed to pay balance amount in time ""for whatsoever reason"", the advance amount paid shall stand forfeited

and the vendee shall have no right whatsoever over the schedule property. It also emphasizes that the vendees shall not in any case are entitled to

ask for refund of earnest money which shall irrevocably stand forfeited for non-payment of balance amount by the vendees. Clause 11 further

postulates that if the vendor is forced to surrender any land to the Government, the vendor will not be liable to receive less than fixed sale

consideration of Rs. 6,00,000/-. The plain language of Clauses 3 and 11 would not support the submission of the learned Counsel for the plaintiffs.

The moment the vendees failed to pay balance sale consideration of Rs. 5,00,000/- on or before 6.6.1979, the advance amount shall stand

forfeited and vendees shall not be entitled to ask for refund. The parties are bound by Clause 3. In Md. Ziaul Hague v. Calcutta Vyaper Pratisthan

(supra) Calcutta High Court also considered the question whether the plaintiff is entitled for refund of any portion of amount paid at the time of

agreement. It was observed therein:

Now that the plaintiff has lost, the question is whether the plaintiff is entitled to any portion of this money. As far as the earnest money is concerned

there is no case of forfeiture of the earnest money. There is no oral evidence to that effect nor has the defendant proceeded on the basis of

forfeiture. The argument advanced on behalf of the defendant was that if there was no contract, money was not recoverable. It was said that if the

agreement was ineffective the entire money was irrecoverable. Reliance was placed by Counsel on behalf of the defendant on the decision in 19

Cal WN 933 : AIR 1916 Cal 774 and on the observations at p.935 of the report (Cal WN): (at p.775 of AIR). I have already indicated that

damages awarded in that case were wrong because there was no contract which was capable of specific performance. The money in the present

case was paid by the plaintiff to the defendant in aid of an agreement. It is true that the plaintiff has failed to prove the case of agreement. It is also

correct that as far as the plaintiff is concerned the plaintiff cannot invoke in aid the mode of agreement in support of a suit for specific performance.

In the present case the money that was paid by the plaintiff to the defendant was pursuant to some agreement which the parties entered into. For

some reason or other that agreement is not capable of specific performance. The money that was paid to the defendant, if it is allowed to remain

with the defendant would in my opinion be allowing the defendant unjust enrichment. I am therefore unable to allow the defendant to remain in

possession of the money. It make it quite clear that it is not that the money is being awarded to the plaintiff either in lieu of specific performance or

as damages for the plaintiff is not entitled either to specific performance or to damages.

45. The following passage from Rahat Jan v. Hafiz Mohammad Usman (supra) relied on by the learned Senior Counsel may also be noticed.

Learned Counsel for the defendant-respondents, on the other hand, urged that even if the Court has power to grant relief for refund of the earnest

money, to the plaintiff, no such relief should be granted in view of the specific terms contained in the agreement itself. According to Clause (2) of

the agreement the parties agreed that if for any appropriate reason the second party, namely, the plaintiff fails to get the sale deed executed the

earnest money paid to the first party, namely, the defendants, shall be forfeited and the same shall not be liable to be refunded. This clause is in

consonance with the provisions, contained in Section 74 of the Contract Act. Since the execution of the sale deed could not be done on account of

the plaintiffs failure to perform his part of the contract, the earnest money paid by him to the defendants is not refundable in accordance with the

terms of the agreement. Such a contingency in a contract has been held to be valid by the Supreme Court in Maula Bux Vs. Union of India (UOI),

, where under the terms of a contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already

paid as security for guaranteeing due performance of the contract to the party complaining of the breach of the contract the undertaking is of the

nature of a penalty. In the instant case the claimant clearly stipulated that if the plaintiff appellant failed to get the sale deed executed without there

being any appropriate reason for the same, the earnest money shall not be refunded. I have already recorded a finding that the plaintiff was not

justified in insisting upon the defendants to put him in possession of the property before the payment of Rs. 3,400/-could be made and this was in

breach of the terms of the agreement. The plaintiff had no reasonable ground to avoid to perform his part of the contract under the agreement and

as such, the earnest money paid to the defendants cannot be refunded.

46. The facts in the above two cases are slightly different. In this appeal, the plaintiffs in the notice dated 6.6.1979 which is marked as Ex.A.12

informed the Counsel for second defendant that plaintiffs have kept ready cheque for Rs. 5,00,000/-and that plaintiffs have done everything

required of them to fulfil the agreement. They also enclosed Ex.A. 13 photostat copy of the cheque for Rs. 5,00,000/-. In reply to Ex.A. 12,

second defendant sent Ex.A. 14. While reiterating that the advance amount of Rs. 1,00,000/- has been forfeited and the transactions stands closed

further informed as under:

However, towards goodwill gesture my client is ready to return the sum of Rs. 1,00,000/-. Hence, a cheque was drawn in favour of your client Sri

A.K Lakshmipathi (Cheque No. 290032 dated 7.6.1979 for Rs. 1,00,000/-on State Bank of Hyderabad, Hingoli) and the same has been handed

over to me for passing it on to your client when your client Sri A.K Lakshmipathy calls on me. You may therefore direct your client Sri A.K.

Lakshmipathy to collect the cheque and treat the matter as closed. If in spite of this your client precipitates the matter it will be at the cost of your

client. The liberal outlook taken by my client in returning the advance sum shall not be construed in any manner the weakness of my client nor

committing any breach of any term of contract on the part of my client. If your client fails to collect the cheque from me within a maximum period of

three days, my client reserves the right to forfeit the advance. This return of cheque is without prejudice to my client's rights to take any steps.

47. A reading of Ex.A14 along with the photostat copy of the cheque for Rs. 1,00,000/- Ex.A.15 and the evidence of D.W.I would show that the

intention of the defendants was to refund the advance amount of Rs. 1,00,000/-. One cannot forget that D.W.I was a former M.L.A. and also a

Lawyer. He was managing huge properties of first defendant trust and without any compulsion he himself expressed desire to refund the amount

presumably for the reason that first defendant trust established as per the wishes of a philanthropic person who does not want to be enriched

unlawfully. Therefore, till second defendant informed by sending letter through his Lawyer Ex.A.17 there was no forfeiture in fact. Any reliance,

therefore, on Clause 3 of Ex. A. 1 cannot be of any avail and hence it has to be held that the defendants waived their right under Clause 3. As

already seen as, the vendees failed to pay balance sale consideration on or before 6.6.1979, the advance amount shall stand forfeited. Accepting

the same, second defendant got issued Ex.A.14 notice calling upon the plaintiffs to collect the cheque Ex.A.15 for Rs. 1,00,000/-. Taking this into

consideration, this Court finds that the conclusion arrived at by the trial Court is unassailable.

48. In the result, for all the above reasons, the appeal filed by the plaintiffs being C.C.C.A. No. 88 of 1993 and the appeal filed by the defendants

being A.S. No. 673 of 1995 are dismissed/directing the parties to bear their own costs in this Court.