

(1993) 2 ALT 193

Andhra Pradesh High Court

Case No: Letters Patent Appeal No"s. 48 and 216 of 1986

Dundoo Arvind Kumar
minor by father and
guardian Sri Dundoo
Ekamber

APPELLANT

Vs

Umi Hani Begum and
Vishandas

RESPONDENT

Date of Decision: March 19, 1993

Acts Referred:

- Specific Relief Act, 1963 - Section 10, 16

Citation: (1993) 2 ALT 193

Hon'ble Judges: P. Ramakrishnam Raju, J; M.N. Rao, J

Bench: Division Bench

Advocate: J.V. Suryanarayana Rao, in LPA 216/86 and P. Ramachandra Reddy, in LPA 48/86, for the Appellant; J.V. Suryanarayana Rao, for 2nd Respondent in LPA 48/86, S.L. China Kesava Rao and P. Ramachandra Reddy, in LPA 216/86, for the Respondent

Judgement

P. Ramakrishnam Raju, J.

These two Letters patent Appeals are filed by the plaintiff and the subsequent purchaser respectively, questioning the decree and Judgment in C.C.C.A.3/83, allowing the appeal filed by the plaintiff in O.S.No. 791/79 on the file of the II Additional Judge, City Civil Court, Hyderabad.

2. As the subject-matter is the same and the parties are also common in both the L.P. As. they are disposed of by this common judgment. The parties in the appeals will be referred to as they are arrayed in the main L.P.A. 216/86.

3. The first respondent entered into an oral agreement on 3-2-1978 with the appellant, being minor, represented by his father as guardian, to purchase a ground-floor mulgi bearing Municipal No. 3-3-38 at Subash Road, Secunderabad as described in the plaint

schedule for a sum of Rs. 20,000/- and has paid an advance amount of Rs. 1,000/- on the same date through a demand draft in favour of the minor- 1st respondent issued by Andhra Bank, Rashtrapati Road, Secunderabad. In fact, the first respondent's husband was running a watch repairing shop in the said premises, by name Khan Watch Company. The appellant's father has similarly entered into agreements for sale of six more mulgies in favour of four other tenants. After receipt of the advance, the appellant's father in fact filed O.P.202/86 on the file of the Additional Judge, City Civil Court, Secunderabad u/s 8(2)(A) of the Hindu Minority and Guardianship Act, 1956, showing the first respondent and other intending purchasers as the respondents and the said O.P. was allowed and permission was granted by an order dated 18-8-1978 accepting the plea that if the "mulgies" are sold at market rate and the same is deposited in a Nationalised Bank, it would fetch more income to the minor than the rents fetched by the said "mulgies". Thereafter, the plaintiff approached the appellant's father who told her that she would get a notice from him after effecting the registration of the other four shops in favour of the respective buyers and as such, she was required to wait till her turn comes for registration. It is also the case of the first respondent plaintiff that the sale deeds in respect of the other "mulgies" were registered by the father of the appellant on 1-2-1979 and 28-8-1979 and that the request of the first respondent to execute the sale deed in her favour was not complied with by the appellant's father and he insisted on double consideration. Therefore, she issued a telegraphic notice on 28-8-1979, for which she got a contentious reply from the father of the appellant. Therefore, she was constrained to file the suit against the appellant.

4. The appellant filed his written statement admitting the agreement of sale in respect of the plot schedule "mulgi" for Rs. 20,000/- but denied the receipt of Rs. 1,000/- as advance through a Fixed Deposit Receipt. It is further contended in the written statement that it is understood that the balance of sale consideration should be paid before 31-03-1979 and get the sale deed registered so that the sale consideration can be put in fixed deposit in a Nationalised Bank for a period of three years, so that the provisions of Capital Gains Act would not attract and the interest accrued thereunder, would be beneficial to the minor and with that idea, O.P.202/78 was filed before the Chief Judge, City Civil Court at Secunderabad and permission was obtained for alienating the minor's property. It is also further stated that the order in the said Original Petition, also clearly shows that permission was granted subject to depositing the proceeds in a Nationalised Bank initially for a period of three years and that as the first respondent failed to turn up with money for nearly one ;and half years and as the exemption from capital Gains Tax was withdrawn with effect from 1-4-1979, he is not bound to execute the sale deed, since the object for which permission was granted by the District Court was defeated and as the plaintiff was never ready and willing and as time was the essence of the contract as seen from the order of the District Court and as she has committed breach of the terms of the agreement, he is not bound to execute the sale deed.

5. The first respondent examined her husband as P.W.1 and marked Exs. A-1 to A-15, while the appellant examined two witnesses who are the cashier of their hotel and the second respondent herein and marked Exs. B-1 to B-6. The trial Court has framed six issues and after considering the evidence on record, dismissed the suit holding that there is lack of sanction for the sale of mulgi bearing No. 3-3-38 from the competent court; that the plaintiff has failed to deposit the balance of consideration in the Nationalised Bank for a period of three years before 31-3-1979 and consequently, she has committed breach of the terms of the agreement and that it would cause hardship to the minor if specific performance is granted in these circumstances. Aggrieved by the said Judgment, the first respondent preferred C.C.C.A.7/83. When the appeal was posted for hearing before the learned single Judge, an application was filed to implead the second respondent herein, as the second respondent in the said appeal, stating that since the second respondent is claiming to have purchased the plaint schedule property, though infact, he purchased only the "mulgi" bearing No. 3-3-36 and not the schedule property, out of caution he may be impleaded as the second respondent. That is how the second respondent is before the Court.

6. The learned single Judge on a considration of the entire material on record, allowed the appeal holding that there was agreement for sale of "mulgi" bearing No. 3-3-38 only, in favour of the 1st respondent and that she was always ready and willing to perform her part of the contract: that she was not guilty of any breach of the terms of the contract; that time was not the essence of the contract as there was no condition agreed to between the parties to deposit the balance of sale consideration by 31-3-1979 and if there was any loss to the minor for not being able to claim the exemption of Capital Gains, the guardian of the minor alone is responsible and accordingly, decreed the suit for specific performance. Aggrieved by the said Judgment, both the respondents have filed the above two separate appeals.

7. Sri J.V. Suryanarayana Rao, learned Senior Counsel appearing for the appellant in L.P.A.216 of 1986, submitted that the plaintiff is not entitled for specific performance of the contract inasmuch as she failed to obtain the Fixed Deposit Receipt from a Nsationalised Bank for a period of three years in favour of the minor before 31-3-1979 as per the understanding between the parties and as the plaintiff was never ready and willing to perform her part of the contract for over one and half years and since she has abandoned the contract and in view of the fact that there was no everment in the plaint that she was ready with the money and willing to take the sale deed from 3-2-1978, the date of oral agreement up to the date of the suit and inasmuch as the time is essence of the contract which has to be culled out from the intention of the parties, particularly that of the minor"s father to keep the sale proceeds in a Nationalised Bank for three years, so that the exemption from the Capital Gains Tax can be obtained and thereby secure more advantage to the minor by way of interest and with this idea only, permission in O.P.202/86 was obtained and the conditions imposed in the said order would amply reflect this intention.

8. Sri S.L. Chenna Kesavarao, learned Counsel for the first respondent, on the other hand submitted that time is not the essence of the contract; nowhere 31-3-1979 is agreed to be the cut off date between the parties for payment of balance of sale consideration and as the minor's father has withdrawn the amount of Rs. 1,000/- paid as advance through F.D.R. on 3-2-1978 which amount was meant to be kept in fixed deposit only, the plaintiff in order to show her bona fides kept the balance amount of Rs. 19,000/- in Fixed Deposit in her name; she was always ready and willing to perform her part of the contract, but as the minor's father was postponing the execution of registration of the sale deed stating that she should wait till the other four registrations in respect of the other tenants are over, and since the other registrations are over only by 10-9-1979 and as such, she waited with the hope that her sale deed would be executed as soon as the other deeds were executed and the fact that the other registrations under Exs. A-5 and A-6 were done on 27-8-1979 and 10-9-1979 respectively, i.e., long after 31-3-1979 clearly shows that time was not the essence of the contract and as the minor's father demanded double the amount and as the appellant refused to execute the sale deed violating the terms of the contract, disputes started.

9. The point for consideration in these appeals is, whether the plaintiff-first respondent is entitled to specific performance of the agreement of sale entered into on 3-2-1978?

10. It is seen that the appellant (sic. first respondent) had obtained a Fixed Deposit Receipt for Rs. 1,000/- on 3-2-1978 from Andhra Bank, R.P. Road, Secunderabad in favour of the appellant and gave it to the appellant's father. Although the appellant's father denied the same in his written statement initially for reasons best known to him, in view of Exs. A-12 and A-14, certificate and the letter written by the Manager, Andhra Bank, R.P. Road, it is positively established that the plaintiff's husband had deposited a sum of Rs. 1,000/- in Fixed Deposit - vide Fixed Deposit Receipt No. 68/78/19 on 3-2-1978 in the name of the minor-appellant, repayable after five years i.e., on 3-3-1983. However, as per Ex. A-14, it is clear that the said F.D.R. was encashed by the appellant's father, Mr. Dundoo Ekamber on 7-12-1978. Therefore, it cannot be disputed that the amount of Rs. 1,000/- was advanced by the plaintiff and after obtaining Fixed Deposit Receipt on 3-2-1978, the appellant's father filed O.P.202/78 on 22-2-1978, before the Additional Chief Judge, City Civil Court, Secunderabad for permission to alienate minor's property. In the said application, marked as Ex. A-10, what all mentioned was that the Malgies belonging to the minor are old constructions; that they are fetching very low income of Rs. 650/- per month and if the said "mulgies" are sold and the amounts are deposited for a long term till the minor attains majority, a higher rate of interest can be obtained and it would be more beneficial to the minor. It is also further stated that if the sale proceeds are deposited for five years in a Scheduled Bank, it is expected to fetch a monthly income of Rs. 1500/- as against the current rent of Rs. 650/- and therefore, it would be more advantageous to the minor. Nowhere it is stated that he is contemplating to dispose of the "mulgies" before 31-3-1979 so as to obtain the benefit of exemption from Capital Gains Tax. Be that as it may, the first respondent has filed counter as fourth

respondent therein, which is marked as Ex. A-11, wherein she stated that she has agreed to purchase the premises bearing No. 3-3-38 for Rs. 20,000/- It is significant to note that she has stated in para-5 therein, that she is ready and willing to purchase the same for the said price. Permission was granted as sought for.

11. Before we proceed to consider the question whether the plaintiff was ready and willing to perform her part of the contract, the short dispute regarding the identity of the "Mulgi" will have to be examined. As already seen in the counter filed by the first respondent herein, in O.P.202/78 she has stated that she agreed to purchase the "Mulgi" bearing No. 3-3-38 which is the first document that emanated from the plaintiff. In the Schedule-II of the decree in O.P.202/78, dated 18-08-1978 it is clearly mentioned that the first respondent, viz., Mrs. Umi Hani is the intending purchaser for shop bearing No. 3-3-38. In her telegraphic notice Ex. A-3 dated 28-08-1979 which is the next document in order, the plaintiff mentioned the same number as 3-3-38. In the reply notice marked as Ex. A-4, the said number has not been disputed by the appellant. In the plaint also, the plaintiff attached schedule mentioning the premises bearing No. 3-3-38 only. In the written statement, it is not only not denied by the appellant but it is positively admitted that the premises bearing No. 3-3-38 was agreed to be sold to the plaintiff only. That apart, it is the admitted case of both parties that the plaintiff's husband has been running a Watch Repairing shop by name Khan Watch Company and she wanted to purchase the said premises. Even the appellant has stated in O.P.202/78 that the "Mulgies" are in the occupation of the tenants i.e., the respondents therein, who are the tenants in the occupation of the respective portions of the ground-floor and they or their nominees, have offered to purchase their respective portions for the prices shown therein. So, it is admitted that the tenants who are in occupation of their respective portions have agreed to purchase the said portions in their occupation. That apart, Ex. A-9, an extract from the Assessment Register of the Municipal Corporation of Hyderabad, Secunderabad Division for the year 1979-80, shows that in portion bearing No. 3-3-38, M/s Khan Watch Company is shown as the tenant. Ex. A-8, an Encumbrance Certificate issued by the Sub-Registrar Maredupalli, Secunderabad shows that a search was made from 10-9-1978 to 27-12-1980 in respect of portion bearing No. 3-3-38 and that no encumbrance has been found, thereby showing that there was no alienation of this portion. So, these facts leave no doubt that the "Mulgi" bearing No. 3-3-38 was alone agreed to be sold to the plaintiff and there was never any doubt about its identity since it was in the occupation of the plaintiff's husband all through, who is running a Watch Repairing Shop. Even the trial Court found that the plaintiff's husband was the tenant of the portion bearing No. 3-3-38 only and what was agreed to be sold was the said "Mulgi" only. The learned single Judge has clearly found that the agreement relates to the "Mulgi" bearing No. 3-3-38 only. For all these reasons, we hold that the plaintiff had entered into an agreement with the appellant-minor, represented by his father to purchase the "Mulgi" bearing No. 3-3-38 only.

12. Reverting to the question of readiness and willingness on the part of the plaintiff, it is already noticed that she has stated in her counter in O.P.202/78 that she is ready and willing to purchase the same for Rs. 20,000/-. After the permission was granted by the Additional Chief Judge, City Civil Court, Hyderabad on 18-8-1978, though the appellant claims that time was the essence of the contract and that balance of consideration should be put in deposit in a Nationalised Bank in the name of the minor for a period of three years before 31-3-1979, it does not appear that he has executed and registered sale deeds before that date in respect of the other tenants. Exs. A-5 and A-6 show that they were executed and registered in August and September, 1979 respectively. One other circumstance which has to be borne in mind is that permission was granted only on 18-8-1978. So, there was no possibility of obtaining the sale deed before that date. The learned Counsel for the appellant has made a submission that inasmuch as there was a delay of 18 months, the appellant is entitled to refuse to honour the terms of the agreement. The delay would not be one and half years, as contended, if counted from the date of grant of permission. In any event, the appellant has executed the sale deeds upto 10-9-1979 in favour of the other tenants. The plaintiff has issued a telegraphic notice much earlier i.e., on 28-8-1979. No explanation is forthcoming on what basis the appellant has obliged the vendees under Ex. A5 and Ex. A-6 and refused the same treatment to the plaintiff. What is more curious is, under Ex. A-5 sale deed, the balance of sale consideration was paid on 27-8-1979 before the Sub-Registrar; while under Ex. A-6, the balance of sale consideration was paid on 10-9-1979 by way of cheque - vide No. 224730 dated 7-9-1979 drawn on Vysya Bank Limited, Abids Road, Hyderabad. In none of these transactions, the balance of sale consideration was paid before 31-3-1979 nor was it paid through Fixed Deposit Receipts drawn from Nationalised Banks for a period of three years in the name of the minor-appellant. Therefore, the contention of the learned Counsel for the appellant that payment of balance of sale consideration before 31-3-1979 through Fixed Deposit Receipt for a period of three years from a Nationalised Bank in the name of the minor is an integral part of the contract and that time is the essence of the contract cannot be accepted. That apart when the plaintiff has issued a telegraphic notice on 28-8-1979 stating that the plaintiff is ready with the consideration and that the appellant's father is avoiding performance, a reply telegraphic notice was given by the appellant's father under Ex. A-4 dated 31-8-1979. In this reply notice, it was not even mentioned that time was the essence of the contract and that 31-3-1979 was the cut off date or that the benefit of exemption of Capital Gains was lost and therefore, the plaintiff has committed breach of the contract. What all is stated in the said reply was that the plaintiff has delayed the matter unduly for one and half years and in spite of repeated demands, she did not come forward to purchase the portion by paying consideration. One fails to understand why such an important term of the contract like, time is the essence of the contract or 31-3-1979 was the outer limit for payment of balance of consideration in view of the fact that exemption from Capital Gains Tax was lost since balance of consideration was not paid by that date, were not mentioned if they are really true, in the said reply notice. Therefore, the allegation that time is the essence of the contract and that 31-3-1979 is the cut off date for payment of balance of consideration and unless the

amount is deposited for three years in a Fixed Deposit in a Nationalised Bank in the name of the minor, breach of contract would occur, is an after thought. Having executed sale deeds in respect of the other "Mulgies", the appellant's father refused to register the sale deed in favour of the plaintiff in September, 1979 in spite of receiving a telegraphic notice from the plaintiff only with an ulterior motive. Even then, the learned Counsel for the appellant basing on the directions contained in the order in O.P. 202/78 viz., on the execution of the separate sale deed, the respective amounts shall be deposited in Fixed Deposits in any Nationalised Bank in the name of the minor-Aravinda Kumar, initially for a period of three years and thereafter, the petitioner is permitted to apply this Court to invest the money in any Government undertakings offering higher rates of interest. In any event, the money shall be in deposit till the minor-Aravinda Kumar, attains majority. The registration will be effected only on production of the fixed deposit receipts, contends that they are mandatory and that in view of the direction that the amount should be kept in a fixed deposit in a Nationalised bank for a period of three years, it should be inferred that time is the essence of the contract and that inasmuch as the plaintiff has not furnished the Fixed Deposit Receipt, as indicated in the order, it must be held that she has committed breach of the terms of the agreement. We are unable to accept this contention. It is onething to say that the plaintiff has violated the conditions imposed in the order of the Court and another thing to say that the plaintiff has committed breach of the conditions of the agreement.

13. A plain reading of the order shows that nowhere time is fixed as the essence of the contract, in the sense that 31-3-1979 was shown as the cut off date for performance of the respective obligations of the parties. A plain reading of the directions cumulatively mean that the sale deed shall be executed mentioning the mode of receipt of consideration by way of Fixed Deposit Receipt and registration will have to be effected by the Sub-Registrar on the production of the Fixed Deposit Receipt in the name of the minor for a period of three years from a Nationalised Bank. This is the simple meaning of the cumulative effect of the several conditions imposed in the order.

14. Sri J.V. Suryanarayana Rao, learned Counsel for the appellant, has submitted that in order to satisfy the above requirement, the plaintiff ought to have called upon the appellant to execute the document, send a draft sale deed for approval, fix up the time for registration, purchase stamp papers and before doing all this, she must obtain the Fixed Deposit Receipt in the name of the minor as suggested above before 31-3-1979 and since she has not done this exercise, but has only taken a Fixed Deposit Receipt in her name on 15-9-1981 i.e., long after the due date, it must be held that it is not compliance of the terms of the agreement and that she has committed breach of the terms of the contract. We are unable to agree with the submission of the learned Counsel.

15. Sri J.V. Suryanarayana Rao, learned Counsel, relied upon a decision reported in [Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar](#), and contends that though there is no express stipulation as the time is the essence of the contract, it can be inferred from the nature of the property; surrounding circumstances, at or before the con tract; and

the conduct of the parties. In the aforesaid decision, the Supreme Court has observed as follows:-

"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.....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".

16. The learned Counsel has also placed reliance upon a decision reported in [Smt. Chand Rani \(dead\) by LRs. Vs. Smt. Kamal Rani \(dead\) by LRs.](#), for the proposition that even if time is not the essence of the contract in case of sale of immovable property, Court may infer that it should 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".

As already observed, we do not find that any such inference can be drawn from the nature of the property, or circumstances in the case.

17. The learned Counsel again relied upon a decision reported in *Ardeshir v. Flora Sassoon* 1928 P.C. 208 wherein, it was observed as follows:-

"In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit".

18. As already noticed, there is no time fixed under the agreement for payment of balance of consideration before 31-3-1979 or producing the Fixed Deposit Receipt in the name of the minor before that date. A reading of the plaint among other things, shows that the plaintiff was ready for payment of the balance amount of consideration. The telegraphic notice, Ex. A-3 preceding the plaint, also shows that the plaintiff was always ready with the consideration amount and demanded the execution of the sale deed. Even in the counter filed in O.P.202/78, the plaintiff has stated that she is ready and willing to purchase the above mentioned property and in fact she has also deposited the balance of sale consideration into the Bank and obtained a Fixed Deposit Receipt on 15-9-1981.

Therefore, it cannot be said that there are no sufficient averments in the plaint that the plaintiff was ready and willing to perform her part of the contract.

19. The plaintiff's husband was examined as P.W.1. He has stated that the plaintiff was always ready and willing to perform her part of the contract. He further stated that soon after permission was granted, he approached the minor's father to receive the balance of consideration and execute the sale deed but he was asked to wait till his turn comes as other registrations in favour of the other purchasers were going on, and that the plaintiff's sale deed would be executed subsequently. Even then, in March, 1979, he approached the appellant's father and finally, in August, 1979 and as he refused to execute the sale deed demanding more money, a telegraphic notice was issued, followed by the suit. The appellant's father did not go into the box to deny these allegations or to substantiate the allegations in the written statement. Non-examination of appellant's father certainly raises an adverse inference in this regard. Therefore, in our view, the evidence of P.W. 1 that he was asked to wait by the appellant's father till the other registrations are over, is more probable in the circumstances of the case.

20. D.W. 1 is a cashier in the Hotel of the appellant's father who said that he does not know the name of P.W. 1, though he says that he was collecting rents from the tenants. He also admitted that he has not instructed the advocate at the time of preparation of the written statement. He was also not present at the time when the oral agreement of sale was entered into. He was not aware of the details of the terms of the agreement. Therefore, his evidence does not help the appellant, since it does not throw any light on the real dispute between the parties. The evidence of D.W.2 also has no bearing on the question, whether the plaintiff was ready and willing to perform her part of the contract and whether time was essence of the contract. His evidence was only to the effect that he purchased the portion bearing No. 3-3-36. He says in his evidence that he does not know anything about the premises bearing No. 3-3-38. He denies that the plaintiff's husband was the tenant of the premises bearing No. 3-3-38. Therefore, his evidence is also not relevant on the dispute in question. Therefore, nobody was examined on the side of the appellant to prove the contents of the written statement.

21. P.W.1 who holds General Power of Attorney for the plaintiff has spoken to the allegations of the plaint and his evidence goes unchallenged, since nobody connected with the agreement in question was examined on behalf of the appellant to dispute the same. Since we have taken the view that time is not the essence of the contract and it was never fixed as 31-3-1979 for payment of balance of consideration, the appellant should have made the time as the essence of the contract by issuing a notice to the plaintiff and he, having not done so, is not entitled to repudiate the contract nor could be heard to complain that there was undue delay by the plaintiff in performing her part of the contract and that therefore, he can refuse to execute the registered sale deed.

22. To prove her bona fides that she was always ready and willing to perform her part of the contract, the first respondent has deposited the amount on 15-9-1981 under a Fixed

Deposit Receipt in Canara Bank, R.P. Road, Secunderabad, which was again got renewed under Ex. A-15 dated 16-9-1982. This circumstance also strengthens the contention that the plaintiff was always ready and willing to perform her part of the contract.

23. The appellant has marked Exs. B-1 to B-6 documents. Ex. B-1 is the memorandum of rent appeal; while Ex. B-2 is the Income tax Assessment Order relating to the minor appellant and while Exs. B-3 to B-6 are the certificates issued by different Banks about the fixed deposit amounts belonging to the minor and his father. These documents have no bearing on the controversy in dispute.

24. The learned Counsel for the appellant, finally argued relying upon the provisions of Section 16 of the Specific relief Act, that specific performance should be refused in favour of the party who violates any essential term of the contract and that the plaintiff who violated the essential term viz., taking out Fixed Deposit Receipt for the balance of sale consideration in a Nationalised Bank in the name of the minor before the due date, must be held to have violated the terms of the contract and as such, she is not entitled for a decree for specific performance. We have already discussed this aspect and held that the plaintiff has not violated any essential term of the contract.

25. For all these reasons, we entirely agree with the learned single Judge and hold that the plaintiff-first respondent was always ready and willing to perform her part of the contract and she has not committed any breach of terms of the contract, but the appellant alone committed breach of the terms of the agreement.

L.P.A.No. 48/86:

26. This Letters Patent Appeal was filed by the second respondent in C.C.C.A. 7/86 who claims to be subsequent purchaser. He contends that he has purchased the "Mulgi" bearing No. 3-3-36 under Ex. A-7 on 10-9-1979. This sale deed was executed by the appellant's father after receipt of the telegraphic notice under Ex. A-3 dated 28-08-1979 issued by the plaintiff.

27. Sri P. Ramachandrareddy, learned Senior Counsel for the appellant, contends that the appellant was not made a party to the suit, although the plaintiff knows that the appellant has purchased the "Mulgi" and although he gave evidence as D.W. 2 in the suit stating that he purchased the said "Mulgi", the plaintiff never cared to make him a party or sought any relief against him and in the appeal he was impleaded as a party without giving him an opportunity to file his written statement and establish the identity of the property purchased by him and so, his rights under the sale deed, Ex. A-7 may be left open. This contention cannot be acceded to, in view of our finding that the plaintiff has agreed to purchase the premises bearing No. 3-3-38 which is in the occupation of the plaintiff's husband who is running a Watch Repairing Shop under the name and style of M/s. Khan Watch Company and since the appellant herein has purchased the premises

bearing No. 3-3-36 only and inasmuch as both the premises are different and as the plaintiff is not seeking a decree in respect of the premises bearing No. 3-3-36 and since the premises bearing No. 3-3-38 was not sold out to anybody so far, in view of the encumbrance certificate marked as Ex. A-8 and that the appellant has no interest in the "Mulgi" bearing No. 3-3-38 agreed to be purchased by the plaintiff.

28. The appellant as D.W.2 also never stated that there was any mistake in his sale deed or that he has purchased 3-3-38 only and not the premises bearing No. 3-3-36.

Therefore, the appellant cannot claim any title to the premises bearing No. 3-3-38. The appellant tried to base his claim for the premises bearing No. 3-3-38 on the ground that the plaintiff's husband paid rents to him for some time during the pendency of the suit. The evidence of D.W.1 makes it clear the circumstance under which the plaintiff's husband paid the rents to him. D.W.1 has stated in his evidence that subsequent to the sale in favour of the appellant, the appellant's father had written a letter to the husband of the plaintiff to pay rents to him. Therefore, the plaintiff's husband must have paid the rents to him as the plaintiff's suit was dismissed and as the appeal was pending and if rents are not paid, he would be evicted as a tenant. This circumstance does not establish that the appellant had purchased the premises bearing No. 3-3-38.

29. Further, the appellant was impleaded as the second respondent on 4-11-1985 while C.C.C.A. 7/83 was pending. The appeal was disposed of on 6-1-1986. So, there was two months time for the appellant to file his written statement if he had any intention to do so. No attempt was made to file his written statement during that period nor any further time was sought. Even during the pendency of this Letters patent Appeal, no attempt was made nor any request was made before us to receive his written statement. The appellant examined himself as D.W.2 and his evidence is given due consideration. Therefore, we are not prepared to countenance the submission of the Counsel for the appellant that he was not given sufficient opportunity to file written statement.

30. Further, in the view we have taken that the appellant is not concerned with the premises bearing No. 3-3-38, we are of the opinion that he need not join in the execution of the sale deed along with the vendor. So, no decree is passed against him. However it is made clear that as the appellant purchased the premises bearing No. 3-3-36 under the sale deed marked as Ex. A-7 dt. 10-9-1979, it is always open to him to work out his remedies in respect of the said premises against the vendor, if he so desires, but not against the first respondent. As he has nothing to do with the premises bearing No. 3-3-38, this appeal also is liable to be dismissed. The first respondent shall deposit the balance sale consideration amount of Rs. 19,000/- kept in F.D.R. by her together with the interest that accrued thereon, within one month and the appellant shall execute the sale deed within two months thereafter.

31. For all the above reasons, we find that there are no merits in both the Letters Patent Appeals and they are accordingly, dismissed. No costs.

Order passed on 12-4-1993 on being mentioned.

32. The Fixed Deposit Receipt dated 16-9-1982 marked as Ex.A-15 shall forthwith be returned to the first respondent Umi Hani Begum so as to enable her to comply with our directions in the main Appeal.