

IN THE HIGH COURT OF KARNATAKA AT  
BANGALORE

DATED THIS THE 22<sup>ND</sup> DAY OF MAY 2012

BEFORE

THE HON'BLE MR. JUSTICE ANAND BYRAREDDY

REGULAR FIRST APPEAL No.843 OF 2002

BETWEEN:

B.Chinnaraju,  
Aged about 54 years,  
Resident of 23<sup>rd</sup> Cross,  
Srinagara Main Road,  
Ejipura,  
Bangalore – 560 047.

...APPELLANT

(By Shri. Praveen R.J.S., Advocate for Shri. G.Papi Reddy,  
Advocate)

AND:

1. Kaliappa,  
Son of Chinnappayan,  
Aged about 59 years,  
Residing at No.6/1,  
1<sup>st</sup> Cross, Vannarpeta Layout,  
Bangalore – 560 047.

2. Smt. Kasturi Bai,  
Wife of Sriramulu,  
Aged about 40 years,

Residing at No.19,  
Velliraman Koil Street,  
Vivekanagar Post,  
Bangalore – 560 047.

...RESPONDENTS

(By Shri. Shrishail A.Hubli, Advocate for Caveator/Respondent  
No.1 [absent]  
Respondent No.2 - served )

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This Regular First Appeal is filed under Section 96 of Code of Civil Procedure, 1908, against the judgment and decree dated 15.6.2002 passed in O.S.No.3504/1988 on the file of the XIX Additional City Civil and Sessions Judge, Bangalore City, Bangalore, decreeing the suit for specific performance and also for delivery of possession.

This Appeal coming on for Final Hearing, this day, the court delivered the following:

### **J U D G M E N T**

Heard the learned counsel for the appellant. The learned Counsel for the respondent remains absent.

2. The facts of the case are as follows:-

The present appellant was the second defendant in a suit filed by the first respondent. The suit was for specific performance of an agreement of sale said to have been executed

by the first defendant in favour of the plaintiff and for delivery of possession. The present appellant was subsequently impleaded as the second defendant as he was the subsequent purchaser of the very same property from the first defendant during the pendency of the suit. The first defendant was said to be the absolute owner of the suit property measuring about 40' x 20' and this was culled out of land in Survey No.1/7 of Ejipura village. The agreement was entered into on 15.7.1981, whereby it was agreed that the suit property would be sold for a total consideration of ₹2,500/- and that an advance amount of ₹600/- was received under the agreement. The balance of the price was payable at the time of registration of the sale deed. Further, an additional sum of Rs.500/- was paid. It was the case of the plaintiff that though he had approached the first defendant on several occasions to complete the sale transaction, it was not completed. It was further claimed that the first defendant had put the plaintiff in possession of the suit property. Pursuant to which, the plaintiff had put the

foundation to construct the proposed house on the said property. Since the first defendant had evaded the completion of the transaction, a legal notice dated 30.5.1988 was issued calling upon the first defendant to complete the sale transaction. Though the defendant had issued a reply dated 14.6.1988, denying the receipt of a further sale consideration of Rs.500/- and further contending that the sale agreement was barred by time and since the plaintiff had failed to show his readiness and willingness to complete the transaction, the contract stood rescinded and accordingly, denied the claim of the plaintiff to have the sale transaction completed. It is in this background that the suit was filed by the plaintiff alleging that he was ready and willing to complete the sale transaction and that there was default on the part of the first defendant.

The first defendant had entered appearance, but did not choose to file written statement. The suit came to be decreed for the relief of specific performance of contract by a judgment dated 17.6.1992, which was challenged in appeal by the first

defendant before this court in RFA 556/1994 and by a judgment dated 17.12.1999, this court had set aside the judgment and decree of the trial court and had remanded the matter for a fresh disposal and the first defendant was also granted the liberty to file written statement and to tender evidence within a time frame set by this court. Accordingly, on remand, an application was filed by the plaintiff seeking to implead the present appellant as the second defendant, since he had purchased the suit property by then and accordingly, the second defendant had been impleaded.

It is not in dispute that the appellant had purchased the property under a sale deed dated 22.8.1992. That was subsequent to the judgment of the trial court dated 17.6.1992 and before the judgment of this court in RFA 556/1994. However, the plaintiff contended that the appellant herein did not acquire any independent right by virtue of such sale deed, since he was claiming through the first defendant and would be bound by any decree passed against the first defendant. The

first defendant in his written statement had contended that the execution of the sale agreement was admitted as also receipt of advance sale consideration. The balance was to be paid within three months from the date of the agreement. Since the plaintiff failed to do so and since the time was of essence of the contract, the suit filed eight years after the execution of the agreement, by itself, would indicate on the face of it that the plaintiff was never ready and willing to complete the sale transaction. The postponement of the contract contrary to the terms of the agreement is not for any reason attributable to the defendant and the first defendant sought for dismissal of the suit while denying that any subsequent advances were also paid as claimed by the plaintiff.

Incidentally, the plaintiff had filed yet another civil suit in O.S.No.7450/1993 seeking a decree of injunction against the defendants, including the present appellant, from putting up any construction in the suit property. The same was however dismissed for default. The present appellant had filed his

written statement denying the plaint averments and further denying that the plaintiff had been put in possession of the suit property as a *bona fide* purchaser for value. And having paid a huge price for the suit property, the agreement of the year 1981, which was sought to be enforced in the year 1988, would have no bearing as to the actual value of the suit property and therefore, the plaintiff was not before the court with clean hands as his agreement had spent itself out by sheer efflux of time, as the plaintiff did not choose to enforce his right, if any, under the agreement over a long period of time.

On the basis of the pleadings, the court below has framed the following issues:-

- “ 1. Whether the plaintiff proves that he was always ready and willing to perform his part of the contract?
2. Whether the plaintiff proves the payment of ₹500/- subsequently towards part payment of sale consideration?

3. Whether the defendant proves that the suit is barred by law of limitation since time is the essence of the contract?
4. Whether the plaintiff proves that he was put in possession of the suit schedule site by defendant as part performance of the Sale Agreement?
5. Whether the plaintiff is entitled for the relief of specific performance of the contract?
6. What decree and what Order?"

ADDITIONAL ISSUES:-

1. Whether the second defendant proves that he is innocent and bonafide purchaser for highest consideration without the notice of the sale agreement in favour of the plaintiff and the pendency of the suit?
2. Whether the second defendant further proves that he has improved this property by investing more than ₹5.00 lakhs?"



The court has answered issues 1 and 5 in the affirmative and all other issues in the negative. It is that which is under challenge in the present appeal by the second defendant.

The learned counsel for the appellant would primarily canvass two contentions. Firstly, that the court below having framed an issue as to whether the plaintiff was ready and willing to perform his part of the contract, has not addressed the same in the true perspective. Though the Counsel for the respondent has entered caveat, since the same was not contested, a pointed question was posed to the Counsel for the appellant as to whether the present appellant could raise a contention as to readiness and willingness of the plaintiff, when he was not the vendor of the suit property, who had executed the agreement of sale in favour of the plaintiff. Therefore, the two questions that were addressed in the appeal are, whether the appellant was in a position to raise a contention as to the readiness and willingness of the plaintiff and whether the plaintiff ought to have been denied the relief in the absence

of such readiness and willingness being established and secondly, whether the court below was justified in holding that the plaintiff had proved his readiness and willingness to perform his part of the contract.

Insofar as the first question is concerned, the same has been answered by the apex court in the case of *Ram Awadh vs. Achhaibar Dubey*, AIR 2000 SC 360. The said judgment is a three-judge bench judgment on a reference made by the two learned judges of the apex court, who found difficulty in following the judgment in *Jugraj Singh vs. Labh Singh*, (1995)2 SCC 31. The appellants before the apex court were the legal representatives of a subsequent purchaser of certain property. They were defendants to a suit for specific performance of an earlier agreement to sell that property. The plaintiff had not pleaded that she was ready and willing to perform her part of the agreement, but that plea was later introduced by way of an amendment. The question was in relation to whether she or her legal representatives were, in fact,

at all material times, ready and willing to perform their part of the agreement. The first appellate court had declined to permit the appellants to plead and contend that the plaintiff and her legal representatives were never prepared to perform their part of the agreement and a judgment of the apex court in *Jugraj Singh*, which was rendered in similar circumstances, was followed. Since the decision in *Jugraj Singh's* case was doubted by the two learned Judges in *Lakhi Ram vs. Trikha Ram*, (1998)2 SCC 720, the matter was referred to a three judge bench in *Ram Awadh's* case. The three judge bench has expounded with reference to Section 16 of the Specific Relief Act and has held that the view taken in *Jugraj Singh's* case was erroneous in the following terms:-

"5. Section 16 of the Specific Relief Act reads:

"16. Personal bars to relief. – Specific performance of a contract cannot be enforced in favour of a person –

(a) x x x x x x

(b) x x x x x x

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*(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant."*

*6. The obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof. A Court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Jugraj Singh's case (1995 AIR SCW 901 : AIR 1995 SC 945) is erroneous.*

7. *In the circumstances, it becomes necessary to remand the suit to the trial Court, namely, the Court of the Munsif, Gyanpur, Varanasi, to consider whether or not it has been established that the original plaintiff Bachna and her legal representatives had proved that they had performed or were always ready and willing to perform the terms of the agreement for sale in Bachna's favour."*

Therefore, it may be said that it is open for the present appellant to raise a contention that the plaintiff was not ready and willing to perform his part of the contract notwithstanding that the agreement of sale not having been executed by the present appellant, but by the first defendant. The reasoning on issue no.1 and 5 against the present appellant is to be seen at Paragraphs - 10 to 22. Though there is no pointed finding as to how the plaintiff was found to be ready and willing to perform his part of the agreement, though the agreement was of the year 1981 and the suit for specific performance was filed in the year 1988, it is with reference to the vague finding of the court

below that at the time of the agreement of sale, the land was not developed and it was agricultural land without any infrastructural facilities such as roads, electricity supply or water supply or drainage facilities and it is only in or about the time when the notice was issued by the plaintiff seeking specific performance of the contract, that the property had been developed and therefore, no fault could be found on the part of the plaintiff. Further, the findings on other issues are to be found at Paragraph-39. The court below has cast the entire burden on the defendant, in that, it has held that it was for the first defendant to call upon the plaintiff to complete the sale transaction and since there was no material placed on record to show that defendant no.1 had taken any such steps, it has held that there was no fault on the part of the plaintiff and that therefore, he was always ready and willing to perform his part of the contract. In this regard, as rightly contended by the learned counsel for the appellant, a Division Bench of this

court in the case of *Saraswathi Ammal vs. V.C.Lingam*, ILR 1993 KAR.427, has, at Paragraph-31, expounded thus :-

“31. While exercising the discretion under Section 20 of the Specific Relief Act, Court should see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff and the Court is not bound to grant specific performance merely because it is lawful to do so. (PARAKUNNAN VEETILL JOSEPH'S SON MATHEW vs NEDUMBARA KURUVILA'S SON AND OTHERS). The burden of proving the readiness and willingness to perform his part of the contract is entirely on the plaintiff and he cannot succeed in his claim for a decree for specific performance, by establishing that the vendor-defendant was avoiding to perform the contract; defendant's failure to perform his part of the contract is the cause for the suit; but, to succeed in the suit, plaintiff has to prove his readiness and willingness. The readiness involves proof of capacity to perform, which in turn requires proof of his financial ability at the relevant point of time. The willingness to perform the contract is not a mere desire; it should be a genuine willingness, to be proved like any other fact; circumstances may justify an inference that the assertion of the plaintiff as to his willingness is a mere verbal assertion and

as a fact, his conduct may disclose that he was really interested in procrastination, because, delay was to his advantage; in many cases, a person who agreed to purchase a property of which he is already in possession, may not be anxious at all to complete the contract, either because, he had no ready cash with him, or may consider it expedient not to part with the money, so that he can have the continued benefit of the money as well as the enjoyment of the property. The respective position of the parties to the agreement, the circumstances under which the agreement was entered into, the relative advantage or disadvantages to the parties by the performance or non-performance of the contract during the relevant period, are some of the relevant circumstances to be considered by the Court, while scrutinising the evidence adduced before it. The main thrust of the analysis of the facts and circumstances, would be to scrutinise the plaintiff's conduct in relation to the property and the term of the agreement. However, even if the plaintiff makes out his case for specific performance, Court has to still consider as to whether the discretionary relief should be granted in favour of the plaintiff or it should be denied, in the light of Section 20 of the Specific Relief Act; no doubt, it is a judicial discretion, exercise of which depends upon several factors. ”



Thereafter, with relation to the facts and circumstances of that case, the Division Bench has elicited several circumstances which were present, to establish that the plaintiff had not shown his readiness and willingness to perform his part of the contract. In the present case on hand, in holding that the plaintiff had discharged the burden of establishing his readiness and willingness, the court below ought to have undertaken a similar exercise of demonstrating the various circumstances by which the plaintiff could have established his readiness and willingness. It was hence unfair to cast the burden on the defendant and to hold that since the defendant had not approached the plaintiff and called upon the plaintiff to come-forward to complete the sale transaction, the plaintiff need not have demonstrated otherwise, is contrary to the well-established principles laid down in the above decision. Therefore, there is no hesitation in reversing the judgment and decree of the trial court on that short ground. The plaintiff,

having regard to the circumstances, on the face of it, has not demonstrated his readiness and willingness to perform his part of the contract and the primary circumstance that though the agreement was of the year 1981, the suit having been filed in the year 1988, by itself, is an indication that the plaintiff was indolent and was never ready and willing to perform his part of the contract. If the plaintiff wanted to contend otherwise, the burden was heavy on the plaintiff to establish the same with reference to material evidence. This is not forthcoming and the manner in which the court below has proceeded to hold to the disadvantage of the present appellant, who is said to have purchased the suit property at a considerable cost, would cause injustice to the present appellant.

Accordingly, the appeal is allowed. The judgment and decree of the trial court is set aside.

Sd/-  
JUDGE