**IN THE COURT OF SPECIAL SESSIONS JUDGE FOR FAST TRACKING THE CASE RELATING TO ATROCITIES AGAINST WOMEN-CUM-VIII ADDITIONAL DISTRICT JUDGE AT: KHAMMAM**

TUESDAY THIS THE THIRTIETH DAY OF JUNE, 2020

Present: **P.Chandra Sekhara Prasad,**
Special Sessions Judge for fast tracking the case relating to atrocities against women-cum-VIII Additional District Judge, Khammam.

**<u>OS No.126 of 2013</u>**

Between:

**M/s Mohammadiya Education Society**,
Represented by its Chairman-Dr. S. A. Pasha,
S/o Abdul Rahman, aged about 54 years,
Barugudem Village, Arempula Khammam
Rural Mandal, Khammam District,

… Plaintiff

**And**

**M/s Sagar Exim Limited,**
6th Floor, Midtown Complex, Road No.1,
Banjara Hills, Hyderabad, represented by its
CEO and authorized signatory C.Sanjay Reddy
@ C.Sanjay, S/o C.C. Reddy, R/o Road No.3,
Banjara Hills, Hyderabad,

…Defendant

This petition coming before me on 22.06.2020 for final hearing, in the presence of Sri.**B.Kalyan Rao,** Advocate for the plaintiff; and of Sri.**G.Satya Prasad,** Advocate for defendant; and upon perusing the record having stood over for consideration, till this day, the court made the following:

**<u>::J U D G M E N T::</u>**

1. This is a suit filed by the plaintiff-society for Specific Performance of agreement of sale dated 09.10.2011 against the defendant-company, to direct defendant-company to execute

registered sale deed, in respect of suit schedule property in favour of plaintiff-society.

The averments of the plaint in brief are, as follows;

(i) The plaintiff is a registered society having its registered office at Barugudem Village, Arempula Gram Panchayath, Khammam Rural Mandal and District and it established educational institutions and imparting postgraduate and technical education. The defendant is an incorporate-company and is owner of suit schedule land to an extent of Ac.5-26 guntas in Sy.No.92 and 93 of Barugudem Village, Khammam Rural Mandal, Khammam District and the same is abutting to the institutions of plaintiff-society.

(ii) The plaintiff-society agreed to purchase suit schedule land for a total sale consideration of Rs.79,10,000/- i.e., Rs.14,00,000/- per acre through one Thummala Venkateswarlu and T. Ganesh Babu of Barugudem Village and on 01.10.2011, on behalf of the defendant-Company, one C.Sanjay Reddy @ Sanjay was authorized to negotiate and finalize sale transaction of said land to receive advance and to sign on agreement of sale.

(iii) On 09.10.2011, the defendant-company entered into an agreement of sale in favour of plaintiff-society and the plaintiff-society issued cheque No.320600, dated 09.10.2011 for Rs.20,00,000/- as advance and it was agreed to conclude the sale transaction within five months from the date of agreement of sale. It was assured to ascertain the extent and boundaries of Ac.5-26 guntas of land within two days. On 14.10.2011, i.e., 5 days after the agreement of sale, the plaintiff-society deferred to pay Rs.5,00,000/-. It was agreed to pay Rs.25,00,000/- within two months and balance sale consideration of Rs.29,10,000/- to be paid by the end of five months period.

(iv) On 12.10.2011, defendant-company engaged a private surveyor-Raju, Khammam, but he was unable to determine and fix boundary on western side with Government land and extent of Ac.5-26 guntas of land could not ascertained, due to encroachments by third parties. It was agreed to get land officially measured by Government surveyor and to clear the encroachments.

(v) At request of defendant-company, the plaintiff-society issued Cheques bearing No.083983 and No.083984, dated 19.10.2011 for Rs.10,00,000/- each in exchange of cheque No.320600, dated 09.10.2011 for Rs.20,00,000/- and again cheque No.083983 was exchanged with another cheque No.083986, dated 21.10.2011 for Rs.10,00,000/- drawn in favour of M/s Epsilon Pharmaceuticals, Hyderabad and was issued as desired by the defendant-company and it was acknowledged by the chairman of the defendant-company.

(vi) The plaintiff-society has been ready to pay balance sale consideration in terms of agreement of sale and to perform obligations in its part and the plaintiff-society made several requests but measurement of land was postponed by the defendant-company on different pretexts. In the month of May 2013, the defendant-company represented that arrangements were made to get the land surveyed by Mandal Surveyor. The defendant-company was silent, in respect of Rs.5,00,000/- due to be paid by 14.10.2011, because of lapse on its part to determine the boundaries and extent of Ac.5-26 guntas of land. The Cheques issued for Rs.20,00,000/- got realized by the defendant-company till 02.11.2011, much later than 14.10.2011 i.e., date of second time payment .

(vii) On 25.06.2013, the Mandal Surveyor, Khammam Rural issued notices to the plaintiff-society and to seven other persons, in encroachment inter alia proposing to measure the land in Sy.No.92 and 93 on 30.06.2013 and on 01.07.2013. The plaintiff-society represented to postpone proposed survey after 08.07.2013, as its chairman was required to be at New Delhi, through a letter, dated 27.06.2013. The plaintiff-society made to believe that above survey was contemplated as per its persuasions by one Srinivasulu Naidu person concerned with defendant-company. The survey could not be conducted on the said prosed dates or on other later date, so far.

(viii) On 29.07.2013, the plaintiff-society got issued legal notice through Sri K.Ravindranadh, Advocate to the defendant. The plaintiff-society received caveat notices got filed by defendant-company, with incorrect allegations, contending that the plaintiff-society has no right, claim or interest over the property. The defendant-company was unable to mention the boundaries of schedule property in said caveat petitions.

(ix) On 23.08.2013, the defendant-company gave a belated reply dated 16.07.2013, which was served on 23.08.2013 stating that the defendant-company reminded through phones and personal visits. The alleged letters/reminders referred in para No.4, 5, 7 and 10, dated 16.02.2012, 05.03.2012, 10.03.2012, 09.04.2012, 03.05.2012 and 04.06.2012 are not within the knowledge of the plaintiff-society or to the person concerned to it namely Dr. S. A. Pasha. The said letters are made believe affair at the instance of the defendant-company, to overcome the above lapses. The defendant-company refused to perform the agreement of sale and deliberately committed breach of statutory obligations on its part as vendor and in the spirit of terms of sale agreement. The defendant-company mala-fidely intended to have wrongful gain and did not come forward to fulfill its obligations. The defendant-company cannot unilaterally cancel the agreement of sale dated 09.10.2011 and the alleged forfeiture of Rs.20,00,000/- paid by the plaintiff-society, as advance and part payment is not tenable. The defendant-company evading to perform its part of its obligation of agreement of sale to usurp amount of Rs.20,00,000/-. The defendant-company alleging to have executed agreement of sale to another person in respect of suit schedule land is fraudulent and alleged sale transaction is illegal.

(x) C. Sanjay Reddy @ C. Sanjay on behalf of the defendant-company was authorized to negotiate and finalize sale transaction of land to receive advance by himself and to sign an agreement of sale and do all such acts by resolution dated 01.10.2011, by defendant company and the defendant-company, so far did not extend the authority to further conclude performance of agreement of sale dated 09.10.2011.

(xi) The plaintiff-society got issued rejoinder dated 24.08.2013, reiterating readiness and willingness to purchase and demanded the defendant-company to get the extent available by fixing boundaries for suit schedule property by next day i.e., 25.08.2013. None of the persons concerned the defendant-company were available at suit schedule property on 25.08.2013 nor they responded, even the plaintiff-society waited at suit schedule property. Hence, this suit.

2. On receipt of summons, the defendant-company has appeared and filed written statement by denying the averments made by the plaintiff-society in its plaint.

(i) It is stated that the plaintiff being Chairman of the Educational Society has signed the agreement of sale dated 09.10.2011, with full knowledge that it was executed at Hyderabad and that after understanding the contents and that he has agreed to clause-6, which states that in the event of any dispute in respect of this transaction, the same shall be subject to Hyderabad jurisdiction. Therefore, this Court has no jurisdiction to entertain this case and the same is liable to be dismissed.

(ii) It is denied that the transaction took place through one Thummala Venkateswarlu and T.Ganesh Babu. They are strangers to the defendant. The defendant wanted money and the plaintiff has expressed his desire to purchase the suit schedule land for a total sale consideration of Rs.79,10,000/- (Rupees Seventy Nine Lakhs Ten Thousand only), as he had no doubt about the property including the boundaries and that the transaction took place at Hyderabad on 09.10.2011. Tummala Venkateswarlu and T.Ganesh Babu were not part of the transaction and they never came to the agreement of sale meeting in Hyderabad. It is admitted that Sanjay Reddy was authorized to execute the agreement of sale by virtue of resolution passed by the Board on 01.10.2011 to receive advance on behalf of the defendant.

(iii) It is denied that the defendant has assured to ascertain the extent of land and boundaries of Ac.5.26 guntas within two days from the date of agreement of sale. The plaintiff never sought for measurement of land nor for the engaging the services of Government surveyor for fixing boundaries as the plaintiff was fully convinced with the land and its boundaries as the land was next to the plaintiff's college. In the agreement of sale dated 09.10.2011 and in legal notice dated 09.07.2013, got issued by defendant, there is no mention that the plaintiff wanted the boundaries of the suit schedule property to be surveyed and fixed.

(iv) It is denied that payment of Rs.5,00,000/- was deferred to 14.10.2011. The agreement of sale did not say that the payment of Rs.5,00,000/- will be paid by the plaintiff only on completion of measurement of land. The plaintiff is making this with intent to cover up his latches. It is denied that on

12.10.2011, the defendant has engaged the services of one Raju, a private surveyor to measure the land and fix the boundary and that it was assured that the land would be measured by government surveyor to clear the encroachment. It is admitted that initially, the plaintiff gave a cheque No.320600, dated 09.10.2011 for Rs.20,00,000/-. Later it was requested not to present the cheque due to administrative reasons and later the plaintiff issued two Cheques Nos.083983 and 083984 dated 19.10.2011 for Rs.10,00,000/- each. It is denied that at the request of the defendant, the cheque for Rs.20,00,000/- was exchanged with two cheques for Rs.10,00,000/- each.

(v) It is denied that the plaintiff was ready to pay the balance consideration and the defendant did not perform its obligations. The plaintiff never made/sent a singly communication to the defendant-company that they were ready to make the payment and that the defendant has failed to complete the obligation and receive the money. On one hand, the plaintiff is claiming that the balance payment was not made, as the defendant had not fixed the boundaries and on the other hand it is claiming that he was ready with the payment but the defendant is not ready to receive the payment. The defendant requested the plaintiff to pay the balance consideration periodically over phones and SMS and got issued registered letters on 13.02.2012, 05.03.2012, 09.04.2012, 03.05.2012 and 04.06.2012 and that despite service of said registered letters, plaintiff did not chose to give reply, for the reasons beat known to the plaintiff. Whenever the plaintiff picked up the calls, he stated that funds were held up and that he was trying to secure the money and that he never gave any commitment when the payment would be paid. There was no communication from the plaintiff after the execution of the sale agreement. The plaintiff never came forward to complete the transaction which is evident from the various registered reminder letters sent by the defendant.

(vi) Vexed with the attitude of the plaintiff and as there was response even after sending 4 registered reminders, finally the defendant forfeited the amounts paid by the plaintiff in pursuance of clause-4 of the agreement of sale dated 09.10.2011 under letter RL No.115683771 dated 04.06.2012, which was received by the plaintiff on 11.06.2012. It is denied that in the month of May, 2013, the defendant represented to the plaintiff that the arrangements were made to get the land surveyed by Mandal Surveyor. There was no reason for the defendant to communicate to the plaintiff that survey arrangements are being made by the plaintiff in May, 2013 as the defendant under its registered letter RL No.115683771 dated 04.06.2012 clearly stated that the plaintiff did not comply the conditions of the agreement of sale dated 09.10.2011 and that the defendant was free to deal with the suit schedule property to any person or persons as it may deem fit and no further communication from the plaintiff would be entertained in future. The plaintiff having slept over the matter for nearly 18 months suddenly woke up from slumber and making false and baseless statement.

(vii) The defendant sought for an advance of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) to be paid at the time of agreement of sale and Rs.25,00,000/- within 2 months from the date of agreement of sale and the balance Rs.29,10,000/- within five months. The plaintiff expressed his inability to pay Rs.25,00,000/- and has paid Rs.20,00,000/- at the time of agreement of sale and agreed to pay Rs.5,00,000/- on or before 14.10.2011, Rs.25,00,000/- within 2 months from the date of agreement of sale and the remaining balance within 5 months from the date of agreement of sale. Due to paucity of funds or lack of it, the plaintiff did not pay the amounts on the stipulated dates and ended up paying the initial advance of Rs.20,00,000/- by 02.11.2011 instead of 09.10.2011, which is gross violation of agreed terms.

(viii) After terminating the agreement of sale with the plaintiff, under letter dated 04.06.2012, the defendant entered into a memorandum of understanding dated 24.05.2013 with one K.Narsaiah and on 11.06.2013 and later entered into a fresh agreement of sale with K.Narsaiah and the defendant is taking steps for the getting the suit schedule property registered in his name. The defendant-company authorized said Narsaiah to approach the Mandal Revenue officer to conduct the survey and gave a letter to Mandal Revenue Officer. On that, on the request of the defendant, the Mandal Revenue Officer issued notice to the plaintiff and others for survey. The survey could not be conducted as the plaintiff deliberately avoided the survey and expressed its inability to be present on the specified date.

(ix) The defendant received legal notice on 12.07.2013, got issued by the plaintiff through Sri.K.Ravindranath, advocate, on 09.07.2013 after a long silence of 18 months from the date entering into agreement of sale. But the plaintiff is claiming that it has sent legal notice on 29.07.2013. On 29.07.2013, the plaintiff sent another legal notice through Sri.K.Ravindranath, advocate, with the same contents except the date without giving any reference to the earlier notice and by ignoring the reply sent by the defendant. It is denied that the defendant has back dated the reply as 16.07.2013 in response to the plaintiff legal notice got issued on 29.07.2013 and which is alleged to be received by the plaintiff only on 23.08.2013.

(x) The plaintiff, thereafter got issued another rejoinder notice dated 24.08.2013 by making baseless claims and served it on the defendant advocate on 26.08.2013 and hurriedly filed the suit on the same day i.e., on 26.08.2013. The defendant denied the claims of the plaintiff in rejoinder notice. In the said rejoinder notice, dated 24.08.2012 the plaintiff has perversely claimed that the defendant should get the land measured on 25.08.2013 itself and execute the registered sale deed on any day by receiving the balance said consideration of Rs.14,00,000/- per acre and that the plaintiff was waiting at the plaint schedule property on 25.08.2013 and the defendant or any other on its behalf was available at the plaint schedule property, which is behind the plaintiff's college to measure the land and the plaintiff has no option, but to file this suit. The said letter was delivered to the defendant counsel, at Khammam on 26.08.2013 and as such there was no chance to the defendant to present on 25.08.2013.

(xi) The plaintiff on being aware of the subsequent agreement of sale dated 11.06.2013, threatened the defendant-company and the new buyer by bringing antisocial elements and disrupt the survey. The plaintiff demanded money from the defendant to get out of the way of the transaction and resorted to blackmailing the defendant company and as such the defendant-company filed caveat before the Court. The plaintiff has approached the Court with unclean hands to get an interim order and filed the suit to cover up its laxity and deliberate violation of the terms of the agreement of sale dated 09.10.2011 Hence, prayed to dismiss the suit with costs.

3. On 13.06.2017, the plaintiff-society filed rejoinder stating that the clause-6 of agreement of sale dated 09.10.2011 conferring the jurisdiction at Hyderabad is against public policy and is not tenable under law as per Section 23 of Contract Act, 1872 and as such this Court is having jurisdiction to entertain the suit.

4. Basing on the above pleadings the following issues have been framed for trial:

1. **Whether the plaintiff is entitled for specific performance as prayed for?**
2. **Whether the Court has no jurisdiction to try the case, as pleaded by the defendant?**
3. **To what relief?**

5. During course of trial, on behalf of the plaintiff-society, P.W-1 was examined and A-1 to A-15 were exhibited. On behalf of the defendant-company, D.W-1 was examined and B-1 to B-21 were exhibited. The counsel for the plaintiff-society as well as the counsel for the defendant-company, have filed written arguments.

6. **ISSUE No.1**: The suit schedule land is a vacant land to an extent of Ac.5-26 guntas in Sy.No.92 and 93 situated at Barugudem village, Arempula Grama Panchayath, Khammam Rural Mandal and District. It is not in dispute that on 09.10.2011, the plaintiff-society and the defendant-company entered into an agreement of sale in respect of the suit schedule property and that the plaintiff agreed to purchase the same for a total sale consideration of Rs.79,10,000/- at the rate of Rs.14,00,000/- per acre. Ex.A-2 is the agreement of sale.

7. It is also not in dispute that the plaintiff has issued a cheque (Ex.A-9) bearing No.320600 for Rs.20,00,000/- as advance and that it was agreed to pay Rs.5,00,000/- on 14.10.2011, Rs.25,00,000/- within two months (i.e., 09.12.2011) and the balance of sale consideration of Rs.29,10,000/- by the end of five months (i.e., 08.03.2012) and that it was agreed to conclude the sale transaction within five months from the date of agreement of sale (Ex.A-2).

8. The main contention of the plaintiff-society is that the defendant-company assured to measure the suit land and for that purpose, on 12.10.2011, the defendant-company engaged a surveyor and he was unable to determine extent and fix the boundaries of the suit schedule land and that the plaintiff-Society is always ready and willing to perform its part of

contract and that the defendant-company has failed to perform its part of contract despite issuance legal notices (Ex.B-14 and B-15) dated 09.07.2013 and 29.07.2013.

9. On behalf of the plaintiff-society, its Chairman was examined as P.W-1. He has filed an affidavit in lieu of his chief examination affidavit as contemplated under order-XVIII, Rule-4 (1) of CPC. His evidence is nothing but replica of plaint pleadings. Ex.A-1 is the attested copy of certificate of Incorporation of the plaintiff-society.

10. At first instance, the learned counsel appearing for the defendant-company contends that the plaintiff-society has failed to prove that he has performed or was always ready and willing to perform the essential terms of the contract which were to be performed by the plaintiff-society and that the specific performance of contract cannot be enforced in favour of the plaintiff-society.

11. The learned counsel appearing for the defendant-company has placed reliance on a citation **Surinder Kaur (D) through LR Jasinderjit V. Bahadur Singh (D) through LRs**[1], wherein the Hon'ble Supreme Court that:

> "*Section 16 (c) of the Specific Relief Act, 1963, which clearly lays down that the specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or was always ready and willing to perform*

[1] (2019 SCC On Line SC 1167)

*the essential terms of contract which were to be performed by him*".

12. Section 16 (c) of the Specific Relief Act, 1963 envisages that the plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. It is pertinent to extract the provision under Section 16 of Specific Relief Act, 1963, which reads as under:

**Section 16: Personal bars to relief: Specific performance of a contract cannot be enforced in favour of a person:**

(a) *who would not be entitled to recover compensation for its breach; or*

(b) *who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or*

(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.*

*Explanation: For the purpose of clause (c) -*

(i) *where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;*

(ii) *the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."*

13. The Hon'ble Supreme Court in catena of decisions held that explanation (ii) to Section 16 (c) of the Specific Relief Act, 1963, which lays down that it is incumbent on the party, who wants to enforce the specific performance of a contract, to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. Section 51 of the Contract Act, 1872 provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor needs to perform his promise unless the promisee is ready and willing to perform his reciprocal promise. The aforesaid provisions have to be read along with Section 16 (c) of the Specific Relief Act, 1963 which clearly lays down that the specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or was always ready and willing to perform the essential terms of the contract which were to be performed by him.

14. The Hon'ble Supreme Court considered that the specific performance of contract of an immovable property is a discretionary relief in terms of Section 20 of the Specific Relief Act, 1963, as it stood at the time of filing of the suit. The Court while exercising its discretionary power is bound to exercise the same on established judicial principles and in a reasonable manner and the discretion cannot be exercised in an arbitrary or whimsical manner.

15. Therefore, the main point for consideration is whether the plaintiff was ready and willing to perform his part of agreement of sale is to be decided with reference to the conduct of the parties. Hon'ble Supreme Court, in the case of **His Holiness Acharya Swami Ganesh Dassji V. Sita Ram Thapar**[2], points out the distinction between readiness and willingness of plaintiff to perform his part of the contract as under:

> *"By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinized."*

16. In **Syed Dastagir V. T.R. Gopalakrishna Setty**[3]**,** the Hon'ble Supreme Court again reiterated that compliance of readiness and willingness has to be in spirit and substance, and not in letter and form. The Hon'ble Supreme Court after referring to Section 16(c) of the Specific Relief Act, 1963, held as under:

> *"It is significant that this explanation carves out contract which involves payment of money as a separate class from Section 16(c). Explanation (i) uses the words "it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court. This speaks in negative term what is not essential for plaintiff to do. This more in support of plaintiff that he need not tender to the defendant or deposit in Court any money but the plaintiff must (as per explanation ii) at least aver his performance or readiness and willingness to perform his part to the contract."*

17. In **Gomathinayagam Pillai and others V. Palaniswami Nadar**[4], the Hon'ble Supreme Court held that:

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[2] 1996 AIR 2095=1996 SCC (4) 526
[3] 1999 (7) Supreme 175
[4] AIR 1967 (II) SCWR 147

> *"In a suit for specific performance, plaintiff must prove readiness and willingness to perform his part of agreement"*

18. Even if for single day, plaintiff-agreement holder is not ready to take the sale deed, the equitable remedy should not be granted. Readiness and willingness must be there continuously from the date of agreement up to the date of hearing. In view of the citations referred supra.

19. In a recent citation in **C. S. Venkatesh v. A.S.C. Murthy (D) By LRs. & Ors** Hon'ble Supreme Court held that the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. Hon'ble Supreme Court said that:

> *"the words 'ready and willing' imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail".*
>
> It was held that "to *adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract."*

20. In **N.P.Thirugnanam (Dead) by LRs. V. Dr. R. Jagan Mohan Rao and Others** (AIR 1996 Supreme Court 116), it was held that:

"*continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant of the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior to and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must necessarily be proved to be available*".

21. In **Pushparani S. Sundaram and Others v. Pauline Manomani James (deceased) and Others**[5], Hon'ble Supreme Court has held that inference of readiness and willingness could be drawn from the conduct of the plaintiff and the totality of circumstances in a particular case. It was held thus:

*"So far these being a plea that they were ready and willing to perform their part of the contract is there in the pleading, we have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now examining the first of the two circumstances, how could mere filing of this suit, after exemption was granted be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16(c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved." 1995 (5) SCC 115 2002 (9) SCC 582".*

22. Similar view has been taken by the Hon'ble Supreme Court in **Manjunath Anandappa URF Shivappa Hanasi V. Tammanasa and Others**[6] and **Pukhraj D. Jain and Others V. G. Gopalakrishna**[7].

[5] (2002) 9 SCC 582
[6] (2003) 10 SCC 390
[7] (2004) 7 SCC 251

23. While explaining **Distinction between readiness to perform a contract and willingness to perform contract**, the Hon'ble Supreme Court made reference to its judgment in the case of ***His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar case [****referred supra****]***, wherein the Court drew a distinction between readiness to perform the contract and willingness to perform the contract. It was observed that by readiness it may be meant the capacity of the plaintiff to perform the contract which would include the financial position to pay the purchase price. As far as the willingness to perform the contract is concerned, conduct of the plaintiff has to be properly scrutinized along with attendant circumstances. The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances.

24. Reference was also made to the case of ***I.S. Sikandar (Dead) by LRs. V. K. Subramani &Ors.[*** (2013) 15 SCC 27***]***, wherein the Hon'ble Supreme Court noted that the plaintiff is required to prove that from the date of execution of the agreement of sale till the date of the decree, he was always ready and willing to perform his part of the contract.

25. Since it is a suit for specific performance, it is for plaintiff to establish his readiness and willingness from the date of

agreement even though did not deposit the money in court. With reference to the facts and circumstances of the present case, it is to be seen whether the plaintiff-society had no money to pay the balance sale consideration and was apparently not capable of making necessary arrangements for payment of the balance consideration. The plaintiff-society is required to prove the fact that right from the date of execution of the agreement of sale till the date of passing the decree he must prove that he is ready and has always been willing to perform his part of the contract as per the agreement.

26. In the instant case, the plaintiff-society contends that it was ready to pay balance of sale consideration to the defendant-company and called upon them to get survey the suit schedule land to determine the actual extent and boundaries of the suit schedule land.

27. The learned counsel appearing for the defendant-company contends that the plaintiff did not have money from the beginning and that the plaintiff-society, was not having credit balance to the tune of more than Rs.20,00,000/- in Indian Overseas Bank. No doubt, P.W-1 admitted in his cross-examination that on 09.10.2011 earnest money of Rs.20,00,000/- was not paid. It is not the case of the plaintiff-

society that on the date of agreement of sale (Ex.A-2) they paid cash towards advance.

28. It is not in dispute that on the date of agreement of sale (Ex.A-2), the plaintiff-society has a cheque bearing No.320600 for Rs.20,00,000/- dated 09.10.2011 towards as earnest money. According to plaintiff-society, subsequently, it has issued two cheques bearing No.083983 and No.083984, dated 19.10.2011 for Rs.10,00,000/- each in exchange of cheque No.320600 (Ex.A-9) dated 09.10.2011 for Rs.20,00,000/- and again cheque No.083983 (Ex.A-11) was exchanged with another cheque No.083986, dated 21.10.2011 for Rs.10,00,000/- drawn in favour of M/s Epsilon Pharmaceuticals, Hyderabad and it was acknowledged by the chairman of defendant-company, which is evident by the letter (Ex.A-3).

29. P.W-1 deposes that at the request of the defendant-company, they have issued two cheques The material on record established that the defendant-company encashed Rs.20 Lakhs under two cheques bearing Nos.083984 dated 19.01.2011 issued in the name of M/s Epsilon Pharmaceuticals for Rs.10,00,000/- and 083986 dated 21.10.2011 in the name of M/s SH Pharma for Rs.10,00,000/-, which were issued in lieu of earlier cheque (Ex.A-9). D.W-1 also admitted in his cross-

examination that M/s Epsilon Pharmaceuticals and M/s SH Pharma are sister concern of defendant-company.

30. The defendant-company received two above referred cheques for Rs.10,00,000/- each under Ex.A-3 dated 19.10.2011. But, there is no whisper about due of 2$^{nd}$ time payment of Rs.5,00,000/- which was payable by 14.10.2011. This aspect is strengthening the case of the plaintiff.

31. In Ex.A-3, there is a mention that on the request of the plaintiff-society, cheque (Ex.A-9) has not been presented. No details or reasons for non-presentation of said cheque are mentioned. No evidence is also adduced by the defendant-company on that aspect. But, the facts remains that the defendant-society has received Rs.20 Lakhs as earnest money. Added to it, according to the plaintiff-society, their society is having credit balance facility more than Rs.20,00,000/- in Indian Overseas Bank, Khammam branch. Having accepted two cheques in lieu of Ex.A-9 and encashed Rs.20 Lakhs by the defendant, cannot take advantage in any manner against the plaintiff-society.

32. In view of the settled legal position, this Court is of the view that the complete inaction on the part of the defendant-company, in not conducting survey and not finalizing the extent and suit schedule land and its boundaries till this date, should

be taken into account, in considering the question whether the relief of specific performance should be granted in favour of the plaintiff-society or not.

33. The learned counsel appearing for the plaintiff-society further contends that there is statuary obligation on the part of the defendant as per Section 55 (2) of Transfer of property Act, 1982 that the seller shall be deemed to contact with buyer that the interest which the seller professes to transfer to the buyer subsists and that he has no power to transfer the same.

34. The learned counsel appearing for the plaintiff-society also contends that the plaintiff-society did not pay Rs.5,00,000/- due to lapses on the part of defendant-company in not ascertaining the extent of land and not surveyed the land by Government Surveyor. It is the case of the plaintiff-society that the defendant-company orally agreed to get the suit land measured and ascertain the extent of Ac.5-26 guntas within two date from the date of agreement of sale (Ex.A-2) and as per said oral understanding payment of 2$^{nd}$ time payment of Rs.5,00,000/- was deferred for 5 days. As per terms of agreement of sale (EX.A-2) the plaintiff has to pay Rs.5,00,000/- by 14.10.2011.

35. It is in the evidence of P.W-1 that the defendant-company has agreed orally to get measured the suit land and ascertain

the extent of Ac.5-26 guntas within two days and that pursuant to said understanding payment of Rs.5,00,000/- was deferred for 5 days.

36. The evidence of P.W-1 reveals that on 12.10.2011, defendant-company engaged a private surveyor-Raju, Khammam and that he was unable to determine and fix boundary on western side with Government land and extent of Ac.5-26 guntas of land could not ascertained, due to encroachments by third parties and as such it was agreed to get land officially measured by Government Surveyor and to clear the encroachments.

37. The defendant-company denied that it was agreed to measure the land. No doubt, P.W-1 admitted that in Ex.A-2, there was no stipulation to conduct measurements of agreement schedule property, before registration of regular sale deed. No prudent purchaser would purchase without measuring land and would accept to measure the land, only after registering the sale deed. If the land is measured prior to execution of sale deed, certainly it is necessary to incorporate the actual extent and sale consideration in the sale deed. Further, it will helpful to pay the required and proper stamp duty.

38. No purchaser would purchase immovable property without measuring the property before making payment of sale consideration and execution of sale deed, more particularly huge extent of land is purchased. The purpose of such measurement is to ascertain the actual extent and to make payment of sale consideration in respect of actual extent of land available physically.

39. According to the plaintiff-society, the defendant-company got surveyed the land through one Raju, a private surveyor and later they made efforts to get measure the suit schedule land through Government Surveyor. Even though the defendant denied that it was agreed to measure land, the undisputed factum of engaging Surveyor to measure the land is strengthening the contention of the plaintiff-society.

40. It is the specific case of the plaintiff-society that Government land is abutting to the suit schedule land on its western side and that the western boundary and extent of Ac.5-26 guntas were not determined due to encroachments by third parties. As seen from photocopy of notice (Ex.A-4), the Mandal Surveyor, Khammam Rural Mandal, has issued notice to measure the land in Sy.No.92 and 93 and that the said notice was issued to seven persons (third parties) and also to the plaintiff-society.

41. It is in the evidence of P.W-1 that as Chairman of the plaintiff was required to be present at New Delhi, on the proposed dates, on 27.06.2013 and as such the plaintiff-company addressed a letter to the Mandal Revenue Officer to postpone proposed survey after 08.07.2013. Ex.A-5 is the photocopy of said letter.

42. There is no evidence as to why the defendant-company did not take steps to complete the survey of land on those dates or later dates. It is for the defendant-company to get it fix boundaries of the property in dispute. It is an admitted fact that the defendant-company filed a caveat petition No.154/2013, which was exhibited as C-1. The said petition was filed in respect of suit schedule property herein.

43. The defendant-company did not describe the boundaries in the said petition, which is evident that the defendant-company is unable to ascertain western side boundary of the suit schedule property as rightly contended by the learned counsel appearing for the plaintiff-society.

44. D.W-1 admitted that the extent of Ac.5-26 guntas could not be ascertained physically and they have not completed the survey till so far. D.W-1 voluntarily stated that except the land of the defendant-company, he does not know whether there is any Government land abutting to it.

45. No doubt, the defendant-company did not file his sale deed pertaining to suit schedule property and no details of said documents are sated in agreement of sale (Ex.A-2), or in his written statement or in chief examination affidavit of D.W-1. Even the said document did not see the light of the day, till this date. When the plaintiff-society is insisting for western side boundary, the defendant-company would have filed its sale deed so as to show the boundaries of the land in dispute. D.W-1 also admitted that the same. Suppression of said document, an adverse inference can be drawn against the defendant-company.

46. D.W-1 categorically admitted in his cross-examination that they have been demanding the plaintiff-society to pay sale consideration for entire extent of Ac.5-26 guntas. Without ascertaining the actual extent and boundaries of the suit schedule land, there is no justification in demanding the plaintiff-society to pay sale consideration for entire land of Ac.5-26 guntas.

47. The contention of the plaintiff-society is that on its demand, the defendant-company took initiative and notice dated 25.06.2013 (Ex.A-4) issued by the Mandal Surveyor, Khammam Rural was served on the plaintiff and seven others to measure the land in Sy.No.92 and 93 on 30.04.2013 and

01.07.2013. D.W-1 deposes that Ex.A-4 was got issued for the purpose of plaintiff only and that on his application for survey to Mandal Revenue Officer, notice (Ex.A-4) was issued.

48. The leaned counsel appearing for the plaintiff-society contends that to conduct survey and to ascertain the extent of Ac.5-26 guntas of the suit schedule land is a condition precedent and that the proposed survey under notice (Ex.A-4) dated 25.06.2013 has to be conducted before 2nd payment of Rs.5,00,000/- due date on 14.11.2011 and that the defendant failed to acted upon the terms of agreement of sale (Ex.A-2) at various stages.

49. The learned counsel appearing for the plaintiff-society further contends that the admission of D.W-1 regarding survey of suit schedule land, establishes, continuing of agreement of sale (Ex.A-2) further, by dispensing with time stipulated for payments from 2nd time payment onwards by waiver as envisaged under Section 63 of Contract Act, 1872, which reads as under.

> ***Promise may dispense with or remit performance of promise:*** *Every promise may dispense with or remit wholly or in part, the performance of the promise made to him or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit".*

50. On this aspect, the learned counsel appearing for the plaintiff relied upon a citation **V. Praveen V. Telangana State**

**Road Transport Corporation represented by its Managing Director, Bus Bhavan, Musheerabad, Hyderabad and another**[8], wherein it was held that:

> *"the test to determine the nature of interest, namely private or public, is whether the right which is renunciated is the right of the party alone or of the public also in the sense that the general welfare of the society in involved. The answer letter then it may be difficult to put estoppel as defence. But, if it is right of the party alone, then it is capable of being abnegated wither in writing or by conduct (Indira Bai V. Nandakishore (1990) 4 SCC 688)".*

51. Clause-2 of agreement of sale (Ex.A-2) reveals that the defendant-company agreed to sell the suit schedule land free from all encumbrances, charges, lieu and without defect in the title of the defendant. But the defendant-company has failed determine the total extent of land and failed to show that there are no encroachments. The acts of the defendant-company in not finalising the survey and in not ascertaining the exact extent of suit schedule land certainly estopped the defendant-company to say that the plaintiff-society did not make payment of balance of sale consideration in terms of agreement of sale (Ex.A-2) as submitted by the counsel for the plaintiff-society.

52. The learned counsel appearing for the plaintiff further contends that the plaintiff-society is always ready and willing to perform his part of contract and that the plaintiff-society is able to establish bits capacity to pay sale consideration producing extracts of statements of account (Ex.A-12 to Ex.A-15) that the

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[8] 2018 (5) ALD 666 (DB)

plaintiff-society is having money in its account, to pay consideration amount as per stipulated time.

53. As per agreement of sale, the final payment date was 08.03.2012. According to the plaintiff-society, the 2nd, 3rd and 4th time payments payable towards balance of sale consideration amounting to Rs.59,00,000/- due by 08.03.2012. The extracts of bank statements (Ex.A-12, Ex.A-14 and A-15) reveal that as on 08.03.2012, a sum of Rs.51,43,000/- and odd lying the account of plaintiff in IOB, a sum of Rs.20,16,288/- was lying in the bank account of Mohammadiya College of Technology and a sum of Rs.14,17,086/- in the bank account of Mohammadiya College of Pharmacy, Khammam as contended by the plaintiff-society. As on final due date, sufficient amount was available with the plaintiff-society.

54. The defendant-company contends that Ex.A-13 to A-15 are pertaining to third parties and not pertaining to plaintiff-society and that the extract of bank statement (Ex.A-12) reflects that there is no credit balance of Rs.20,00,000/- on 09.10.2011, Rs.25,00,000/- on dated 09.12.2011 and Rs.59,10,000/- on 09.03.2012 (Rs.5,00,000/- on 14.10.2011, Rs.25,00,000/- due on 09.12.2011 and Rs.29,10,000/- on dated 09.03.2012) and whatever amounts are reflected in the bank statement on the said dates has been withdrawn on the

immediate next dates and that showing of balance amounts now and then, do not amount to be continuous readiness and willingness on the part of the plaintiff-society.

55. P.W-1 denied the suggestion that bank statements (Ex.A-13 to A-15) are no way concerned to the plaintiff-society. Except vague suggestions nothing has been elicited to disbelieve that Mohammadiya College of Technology and Mohammadiya College of Pharmacy, Khammam are the institutions of the plaintiff-society.

56. Added to it, ongoing through extracts of statement of accounts (Ex.A-12 to A-15) it is reflected the transfer amounts on several times between the plaintiff society to said institutions and vice versa, as contended by the learned counsel appearing for the plaintiff. There is nothing to disbelieve that both the said institutions are maintained in the name of respective institutions of the plaintiff in the name of its principal, as claimed by the plaintiff-society.

57. To prove his capacity to pay balance of sale consideration, the plaintiff-society filed extracts of bank statements (Ex.A-12 to A-15). It is not the case of the defendant-company, even no such pleadings in the written statement that the plaintiff-society has no capacity to pay balance of sale consideration. The only plea of the defendant-company is that the plaintiff-

society is not ready and willing to perform his part of contract. Admittedly, the plaintiff-society is running educational institutions.

58. The extract of bank statements produced by the plaintiff-society clearly indicated that plaintiff-society has the necessary funds available with it, to pay the balance of consideration. Therefore, this Court held that the plaintiff-society is ready and willing to perform its part of the agreement. It is not necessary for the plaintiff-society to produce ready money, as it proved that it has sufficient means and capacity to generate the consideration amount.

59. The extracts of bank statements (Ex.A-12 to A-15) file dby the plaintiff-society are crystal clear that the plaintiff-society has sufficient source of income and running various educational institutions. Mere denial by the defendant-company that the plaintiff-society is not ready and willing to pay the consideration, without any material to substantiate its plea, cannot be accepted. Further, the material on record shows that the plaintiff-society was ready to perform his part of the obligation as per the agreement and that the defendant-company has failed to get survey the suit schedule land to ascertain its actual extent and boundaries to enable the plaintiff-society to pay balance of sale consideration.

60. It is not in dispute that on 09.07.2013 and 29.07.2013, the plaintiff got issued legal notices through Sri.K.Ravindranath, advocate by demanding the defendant-company to perform its part of contract, which is evident by legal notice (Ex.B-14 and B-15). On receipt of said notice and notice in caveat petition, the plaintiff-society got issued rejoinder notice (Ex.B-16) rejoinder by reiterating its readiness and willingness and by demanding the defendant-company to measure the extent of suit schedule land by fixing boundaries by 25.08.2013. Later, the plaintiff-society filed the present suit on 26.08.2013as the defendant-company did not turn up to perform its part of contract.

61. The contention of the defendant-company is that on 16.07.2013, the defendant-company gave reply notice (Ex.A-6) stating that they have sent letters (Ex.B-2 to B-5 and B-9) on 04.08.2012, 03.05.2012, 09.04.2012, 05.03.2012 and 13.02.2012, to the plaintiff-society stating that they have terminated the agreement of sale.

62. The plaintiff-society denied the receipt of those letters. Since the plaintiff-society specifically denied service of those letters, it is for the defendant-company to show that those letters were posted and served on the plaintiff-society. The

defendant-company contends that they send the said letter under registered post acknowledgment due on different dates.

63. The letters (Ex.B-2 to B-5 and B-9) are dated as 04.06.2012, 03.05.2012, 09.04.2012, 05.03.2012 and 13.02.2012 respectively and the postal receipts (Ex.B-6, B-7, B-10 and B-11) are dated as 05.05.2012, 10.03.2012, 16.02.2012 and 07.06.2012 respectively.

64. Ex.B-8 is the postal acknowledgment card dated 14.05.2012. Ex.B-8 is not confronted to P.W-1. There is no whisper as to who has signed on Ex.B-8. The defendant-company did not file postal acknowledgment cards for proof of service of above referred letters, said to have been sent to the plaintiff-society. None of the letters are containing registered letter numbers. Mere marking of postal receipts and letters is not sufficient, unless there is convincing evidence so as to show that a particular letter was sent under particular register post by producing postal acknowledgement cards. The person, who signed and posted the said letters, is not examined.

65. Ex.B-12 is a letter said to have been addressed to Post Master, Banjara Hills, Hyderabad, to know whether the registered letters were delivered or not. But, the defendant-company did not file any piece of paper what was the response from the Post Master. No evidence is adduced on said aspect.

66. No doubt, if a letter is posted to a correct address of the addressee, the presumption is that the letter is deemed to be served on the addressee. The plaintiff-society is not disputing the address shown on said letters. But the plaintiff-society categorically denied the service of said letters on them. The defendant-company has failed to show that those letters were posted to the addressee. When proof of postage is not established by the defendant-company, the question of presumption under Section 114 (f) of Indian Evidence Act, 1872 or under Section 27 of General Clauses Act, 1897 does not arise.

67. The contention of the defendant-company is that the defendant-company informed the plaintiff-society to pay the balance sale consideration and complete the registration of the sale deed and if the payment is not made within the stipulated date, para-4 of agreement of sale dated 09.10.2011 would be invoked which would result in the cancellation of the agreement of sale dated 09.10.2011 and forfeiture of advance amount of Rs.20,00,000/- (Rupees Twenty Lakhs only).

68. The defendant-company contends that the plaintiff-society having received all the notices kept silent without responding to Ex.B-2, B-3, B-4, B-5 and B-9 and got issued Ex.B-14 dated 09.07.2013 without reflecting said letters.

69. The defendant-company contends that the plaintiff-society failed to pay balance of sale consideration within the stipulated time, in pursuance of clause-4 of agreement of sale (Ex.A-2), they have forfeited the amount paid by the plaintiff-society as advance sale consideration amount and that the agreement stand terminated and the same was informed to the plaintiff-society under notice (Ex.B-2) dated 04.06.2012. As sated above, the defendant-company has miserably failed to prove the posting of letters and service of the same on the plaintiff-society. As such the defendant-company cannot terminate the agreement of sale (Ex.A-2) unilaterally, as rightly contended by the learned counsel appearing for the plaintiff-society.

70. More so, the defendant-company failed to get survey the land to determine the extent and boundaries of the suit schedule property, the defendant company cannot take advantage of said clause-4 of agreement of sale (Ex.A-4). Apart from it, the defendant-company also cannot take advantage of said clause without service of notice on the plaintiff-society.

71. The defendant-company contends that there was no demand about measurement of land and no mention about plaintiff's financial capacity to pay the balance sale consideration amount, in 1st time notice (Ex.B-14) dated 09.07.2013 and as such Ex.A-6 to A-8 have no relevancy.

According to the plaintiff-society, there is no actual extent of Ac.5-26 guntas and physically there is only Ac.4-37 guntas. Ex.A-8 is the rough sketch and the same was marked subject to objection.

72. The contention of the defendant-company is that the rough sketch (Ex.A-8) is not admissible in evidence as it was not signed by any person. Even though, the defendant-company raised objection for exhibiting the rough sketch, but did not choose to cross-examine P.W-1 regarding rough sketch. Even, no suggestion was posed to P.W-1, on said document. As per Ex.A-8 the actual land available is only Ac.4-37 guntas as contended by the plaintiff-society.

73. The contention of the defendant-company is that on 11.06.2013, the defendant-company has already entered into an agreement of sale (Ex.B-17) with one Kakanaboina Narsaiah S/o Sangaiah, R/o Gollagudem in respect of the suit schedule property.

74. It is not in dispute that the plaintiff-society aggrieved by the interim order in IA No.862/2013 in OS NO.16/2013 passed by this Court, has preferred CMA No.41/2014 and the Hon'ble High Court was pleased to dismiss the same. Ex.B-21 is copy of said order dated 20.10.2016.

75. Ex.B-21 is evident that the Hon'ble High Court was pleased to observe that it would be open to the plaintiff-society to implead the alienees, if any, in relations to the suit schedule property in the present suit itself at appropriate stage, to avoid multiplicity of proceedings and the necessity of filing a separate suit. Neither the plaintiff-society nor the defendant-company, have taken steps to implead the said Kakanaboina Narsaiah, in the present suit.

76. Except exhibiting asserted agreement of sale (ExB-17), the defendant-company did not examine said Kakanaboina Narsaiah. Even the details of mode of payments of advance amount and part of sale consideration said to have been paid under Ex.B-17. D.W-1 was cross-examined on 23.10.2019. He admitted in his cross-examination that suit schedule land is still owned by the defendant-company. This admission creates a serious doubt about asserted transaction under Ex.B-17.

77. If really there is any genuineness in the contention of the defendant-company, it would have insisted or it would have taken steps to implead said Kakabonia Narsaiah in the present suit and D.W-1 would have stated that the defendant-company entered into an agreement of sale with Kakanaboina Narsaiah under Ex.B-17. Therefore, this Court is not inclined to give any significance to Ex.B-17.

78. The learned counsel appearing for the defendant-company relied upon a citation in **Ritu Saxena V. JS Grover**, decided on 17th September 2019 in Civil Appeal No.7268-7269 of 2019, the Hon'ble Supreme Court held that:

> "*self-serving statements without any proof of financial resources cannot be relied on to return to a finding that the Appellant was ready and willing to perform his part of the contract"*.

79. The learned counsel appearing for the defendant-company also relied upon another citation in **Satish Batra V. Sudhir Rewal**[9], wherein Hon'ble Supreme Court held that:

> "*the seller was justified in forfeiting the amount of Rs.7,00,000/- as per the relevant clause since advance or earnest money was primarily a security for the due performance of the agreement. Thereafter, further held the plaintiff is not for specific performance"*.

80. The learned counsel appearing for the defendant-company also relied upon another citation in **Atma Ram V. Charajit Singh** decided on 10th February 2020 in Special Leave Petition © 27598 of 2016, wherein the Hon'ble Supreme Court held that "*the conduct of the plaintiff is crucial in a suit of specific performance*".

81. Absolutely there is no dispute with regard to proposition of law laid down the citations referred supra and on which the learned counsel appearing for the defendant-company, relied

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[9] 2012 AIR 2012 SC

upon. In view of the forgoing discussion, the said citations did not render any help to the case of defendant-company.

82. Admittedly, C.Sanjay Reddy @ Sanjay, who is the authorized to negotiate and finalize sale transaction of the suit schedule land, to receive advance and signed on the agreement of sale (Ex.A-2) dated 09.10.2011, on behalf of the defendant-company, did not enter into witness box, for the reasons best known to the defendant-company.

83. Ex.B-18 is the extract of board resolution dated 12.07.2013 said to have passed by the of board of directors of defendant-company reveals that one L. B. Bhaskar (D.W-1) was authorized representative of the defendant-company and that he was authorized to sign, execute papers/petitions, affidavits, vakalathnama and to lead evidence before Civil Courts, Khammam in respect of the company's property situated at Barugudem, Khammam. But, in Ex.B-18, it is nowhere stated about his designation, in said company. Even in the written statement or in his chief-examination affidavit also, it is silent about his designation in the defendant-company.

84. More so, in chief examination affidavit of D.W-1, his occupation is shown as business and in his cross-examination, D.W-1 categorically admitted that he has not personally involved in respect of sale transaction, related to the property,

which is subject matter of the present suit. From his own admission, it is clear that D.W-1 has no personal knowledge about the transaction under dispute. Ongoing through material on record, it is also apparent that, D.W-1 nowhere stated that he has any personal knowledge about latters alleged to have been addressed by the defendant-company. Except on Ex.B-12, D.W-1 did not sign on any of other letters produced by the defendant-company. The persons, who signed on remaining letters including agreement of sale (Ex.B-17), were not examined by the defendant-company.

85. Further, the defendant-company also did not file any application under Rule-32 of Civil Rules of Practice and Circular Orders, 1990 to permit him, to represent the defendant-company. In absence of such permission, it cannot be said that D.W-1 is a proper authorized person under Ex.B-18 to represent the defendant-company.

86. The authorized person-C. Sanjay Reddy @ Sanjay, who negotiated sale consideration, received advance amount and signed, on the agreement of sale (Ex.A-2) is the proper and material witness on behalf of the defendant-company to speak on all material aspects. Even though the plaintiff-society categorically denied the letters and postal receipts (Ex.B-2 to B-

12), the defendant-company did not choose to examine said witness.

87. It is well settled law that where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct and it is to be drawn a presumption under section 114 (g) of Indian the Evidence Act against a party who did not enter into the witness box.

88. In **Vidhyadhar V. Manikrao & Another**[10], the Hon'ble Supreme Court observed that:

> *"15. It was defendant No. 1 who contended that the sale deed, executed by defendant No. 2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs.500 were paid as sale consideration to defendant No. 2. He further claimed that payment of Rs.4,500 to defendant No. 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No. 1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No. 2 and the plaintiff was a bogus transaction.*
>
> *16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh*

[10] AIR 1999 SC

> *Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.*

89. It is well settled law that where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various Hon'ble High Courts and the Privy Council beginning from the decision in **Sardar Gurbakhsh Singh V. Gurdial Singh and Another**[11]. This was followed by the Hon'ble High Court of Lahore in **Kirpa Singh V. Ajaipal Singh and Others**[12] and the Hon'ble Bombay High Court in **Martand Pandharinath Chaudhari V. Radhabai Krishnarao Deshmukh**[13], the Hon'ble Madhya Pradesh High Court in **Gulla Kharagjit Carpenter V. Narsingh Nandkishore Rawat**[14] also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra).

90. The Hon'ble High Court of Allahabad in **Arjun Singh V. Virender Nath and Another**[15] held that *if a party abstains from entering the witness box, it would give rise to an inference*

[11] (1927) 29 BOMLR 1392
[12] AIR (1930) Lahore 1
[13] AIR (1931) Bombay 97
[14] AIR 1970 MP 225
[15] AIR 1971 All 29

*adverse against him*. Similarly, a Division Bench of the Hon'ble High Court of Punjab & Haryana in **Bhagwan Dass V. Bhishan Chand and Others**[16], drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.

91. In the instant case also, the material witness-C.Sanjay Reddy @ Sanjay did not enter into witness box on behalf of the defendant-company. In view of the above legal position as stated in the citations referred supra and as material witness on behalf of the defendant-company did not enter into witness box and does not offer him to be cross-examined by the other side, the presumption would arise that the case set up by the defendant-company is not correct.

92. Even in the case of General Power of Attorney, if the power of attorney holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him as held in ***Janki Vashdeo Bhojwani V. Indusind Bank Limited***[17].

93. There is nothing to accept that D.W-1 is a properly authorized person to give evidence on behalf of the defendant-company. Therefore, there is no need to give any weight to the

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[16] AIR 1974 P H 7
[17] (2005) 2 SCC 217

testimony of D.W-1 and or significance to the documents produced on behalf of the defendant-company. Once, the evidence of D.W-1 is kept aside, there is nothing to accept any of the contentions raised by the defendant-company.

94. On scanning the evidence on record, this Court holds that there is nothing to disbelieve that the plaintiff-society is always ready and willing to perform its part of obligation to pay balance of sale consideration and to get register the registered sale deed from the defendant-company, in respect of the suit schedule property, subject to measuring the land and to determine the actual extent with boundaries.

95. In the circumstances stated supra, this Court held that the defendant-company has set up a false plea saying that the plaintiff is not ready and willing to perform its part of contract only to escape from it latches as contend by the learned counsel appearing for the plaintiff-society. There cannot be any dispute that the relief sought by the plaintiff-company is an equitable relief. On scanning, both the ocular and documentary evidence available on record and it is established that the plaintiff-society is ready and willing to perform its part of contract; this Court holds that the plaintiff-society is entitled for grant of equitable relief of specific performance. Accordingly, this issue

is answered in favour of the plaintiff-society and against the defendant-company.

96. **<u>ISSUE No.2:</u>** The learned counsel appearing for the defendant-company contends that the plaintiff being Chairman of the Educational Society has signed the agreement of sale (Ex.A-2) dated 09.10.2011, with full knowledge that it was executed at Hyderabad and that after understanding the contents and that he has agreed to clause-6 of agreement of sale (Ex.A-2), which states that in the event of any dispute in respect of this transaction, the same shall be subject to Hyderabad jurisdiction and as such this Court has no jurisdiction to entertain the suit.

97. ***Per contra***, the learned counsel appearing for the plaintiff-society contends that by an agreement parties cannot confer jurisdiction on Court which otherwise does not have jurisdiction to deal with a matter. In support of his contention he has placed reliance on a citation in **Universal Logistics, Chennai V. Dr. Reddy's Laboratories Limited, Hyderabad and another**[18]**,** in which several citations were referred.

98. In **Hakam Singh v. Gammon (India) Ltd**[19], wherein it was held that it is not open to the parties to confer by their agreement jurisdiction on a Court which it does not possess

[18] 2019 (2) ALD 144 (TS) (DB)
[19] (1971) 1 SCC 286

under the Code. But, under the Code of Civil Procedure, where two Courts or more have jurisdiction to try a suit or a proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. It was also held that such an agreement does not contravene Section 28 of the Contract Act, 1872.

99. The same question was also examined in considerable detail in **A.B.C.Laminart Pvt. Ltd. V. A.P. Agencies**[20], wherein it was held as under:

> *"When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other Courts. Where an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius' - expression of one is the exclusion of another - may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all other from its operation may in such cases be inferred. It has therefore to be properly construed."*

(The said view has been reiterated in **Angile Insulations V. Davy Ashmore India Ltd.,** (1995) 4 SCC 153).

[20] ([1989] 2 SCC 163 = AIR 1989 SC 1239)

100. In **New Moga Transport Co., through its Proprietor Krishanlal Jhanwar V. United India Insurance Co., Ltd., and others**[21], the Hon'ble Apex Court held as under:

> *"By a long series of decisions it has been held that where two Courts or more have jurisdiction under CPC to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not (2004) 4 SCC 677 VRS, J & PKR, J 9 CRP_89_2019 contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one Court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two Courts. But by an agreement parties cannot confer jurisdiction on a Court which otherwise does not have jurisdiction to deal with a matter. (See Hakam Singh v. M/s. Gammon (India) Ltd. ([1971] 1 SCC 286 and M/s. Shriram City Union Finance Corporation Ltd. v. Rama Mishra: ((2002) 9 SCC 613)."*

101. It is to be seen whether there is ouster of jurisdiction of other courts. It is not in dispute that the plaintiff and the defendant entered into an agreement of sale on 09.10.2011 in respect of the suit schedule property situated at Barugudem village, Arempula Grama Panchayath, Khammam Rural Mandal and District, which is within territorial jurisdiction of this Court.

102. A perusal of agreement of sale (Ex.A-2), it is clear that the same was executed at Hyderabad and further clause-6 reveals that in the event of any dispute in respect of this transaction, the same shall be subject to Hyderabad jurisdiction. There is no specific mention of word "**Only**". By virtue of finalization of terms and conditions and signing of agreement (Ex.A-2) in

[21] 2004 (3) ALD 143 (SC)

Hyderabad gives rise to part of cause of auction in Hyderabad. The execution clause also makes it amply clear that the parties, by mutual agreement decided to have the jurisdiction of Hyderabad Courts to resolve the disputes arising out of the contract.

103. As held in the citations referred supra, by a long series of decisions it has been held that where two Courts or more have jurisdiction under CPC to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872.

104. In the instant case, admittedly the suit schedule property is well within territorial jurisdiction of this Court. If there is specific mention in the agreement of sale (Ex.A-2) that this Court has no jurisdiction and that Hyderabad Courts **'only'** are having jurisdiction, it would have been different. Even the same is against public policy.

105. In view of the settled legal positions and since part of cause of auction at Hyderabad and part of cause of action, where the suit schedule property is having jurisdiction, certainly this Court has jurisdiction to entertain the suit. Therefore, there is no force in the contention of the learned

counsel appearing of the defendant-company that this Court has no jurisdiction. Hence, this issue is answered in favour of the plaintiff-society and against the defendant-company.

106. **ISSUE No.3:** In view of findings and conclusions, on the above issues, the plaintiff-society is entitled for the relief as prayed for. Accordingly, this issue is answered.

**IN THE RESULT:** The suit of the plaintiff-society is decreed with costs as under:

(i) The plaintiff-society is entitled for the relief of specific performance of agreement of sale (Ex.A-2) dated 09.10.2011;

(ii) That the plaintiff-society is hereby directed to deposit the balance sale consideration of Rs.**59,10,000/-** (Rupees Fifty Nine lakhs Ten Thousand only) into court within **ONE** month from the date of this judgment and after depositing the said amount it should inform the same, to the defendant-company, by way of issuing notice and within **15** days from the date of such intimation, the defendant-company shall execute the registered sale deed in favour of the plaintiff-society and deliver the vacant possession of the suit schedule property to the plaintiff-society after measuring the land;

(iii) The plaintiff-society has to bear the expenses of stamp duty and registration;

(iv) The amount so deposited by the plaintiff-society can be withdrawn by defendant-company, for the actual extent of land available, after execution of the sale deed and after delivery of possession of the suit schedule property to the plaintiff-society; and if there is any difference in the extent of land, the plaintiff-society is at liberty to take back the difference amount;

(v) Failing which the plaintiff-society is at liberty to take steps for execution of the decree by due process of law.

*Typed to my dictation, corrected and pronounced by me in the open court on this 30th day of June, 2020.*

Special Sessions Judge for
fast tracking the cases relating to
atrocities against women-cum-VIII
Additional District Judge,
Khammam

## ::APPENDIX OF EVIDENCE::

### WITNESSES EXAMINED ON BEHALF OF PLAINTIFF

| | | |
|---|---|---|
| P.W-1 | S. A. Pasha | 19.01.2016 |
| P.W-2 | Shaik Ayub Khan (*Eschewed)* | 28.02.2016 |

### WITNESSES EXAMINED ON BEHALF OF DEFENDANT

| | | |
|---|---|---|
| D.W-1 | Lanka Bala Bhaskar | 02.07.2019 |

### DOCUMENTS EXHIBITED ON BEHALF OF PLAINTIFF

| | | |
|---|---|---|
| Ex.A-1 | Certificate of Registration of Plaintiff-Society | 22.09.2001 |
| Ex.A-2 | Agreement of Sale | 09.10.2011 |
| Ex.A-3 | Letter addressed to the defendant | 19.10.2011 |
| Ex.A-4 | Photocopy of notice issued by the Mandal Surveyor | 25.06.2013 |
| Ex.A-5 | Photocopy of letter addressed to the Tahsildar, Khammam Rural | 27.06.2013 |
| Ex.A-6 | Reply Notice | 16.07.2013 |
| Ex.A-7 | Office copy of Legal Notice | 23.08.2013 |
| Ex.A-8 | Plan | - |
| Ex.A-9 | Cheque No.320600 for Rs.20,00,000/- | 09.10.2011 |
| Ex.A-10 | Cheque No.083982 for Rs.10,00,000/- | 19.10.2011 |
| Ex.A-11 | Cheque No.083983 for Rs.10,00,000/- | 19.10.2011 |
| Ex.A-12 | Extract of Bank Statement | - |
| Ex.A-13 | Extract of Bank Statement | - |
| Ex.A-14 | Extract of Bank Statement | - |
| Ex.A-15 | Extract of Bank Statement | - |

**DOCUMENTS EXHIBITED ON BEHALF OF DEFENDANT**

| | | |
|---|---|---|
| Ex.B-1 | Letter addressed to the plaintiff | 19.10.2011 |
| Ex.B-2 | Letter addressed to the plaintiff | 04.06.2012 |
| Ex.B-3 | Letter addressed to the plaintiff | 03.05.2012 |
| Ex.B-4 | Letter addressed to the plaintiff | 09.04.2012 |
| Ex.B-5 | Letter addressed to the plaintiff | 05.03.2012 |
| Ex.B-6 | Postal Receipt | 05.05.2012 |
| Ex.B-7 | Postal Receipt | 10.03.2012 |
| Ex.B-8 | Postal Acknowledgment Card addressed to the plaintiff | 14.05.2012 |
| Ex.B-9 | Letter addressed to the plaintiff | 05.03.2012 |
| Ex.B-10 | Postal Receipt | 16.02.2012 |
| Ex.B-11 | Postal Receipt | 07.06.2012 |
| Ex.B-12 | Letter addressed to the Post Master | 14.06.2012 |
| Ex.B-13 | Letter addressed to the Mandal Revenue Officer | 05.07.2013 |
| Ex.B-14 | Office copy of Legal Notice | 09.07.2013 |
| Ex.B-15 | Office copy of Legal Notice | 29.07.2013 |
| Ex.B-16 | Photocopy of rejoinder notice | 23.08.2013 |
| Ex.B-17 | Agreement of sale | 11.06.2013 |
| Ex.B-18 | Extract of board resolution authorizing P.W-1 | 12.07.2013 |
| Ex.B-19 | Postal Receipt | 10.07.2013 |
| Ex.B-20 | Postal Acknowledgment Card addressed to the Mandal Revenue Officer, Khammam | - |
| Ex.B-21 | Photocopy of Order in CMA No.41/2014 | 20.10.2016 |

Special Sessions Judge for
fast tracking the cases relating to
atrocities against women-cum-VIII
Additional District Judge,
Khammam