

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO.3574 OF 2009

B. SANTOSHAMMA & ANR.

....Appellants

Versus

D. SARALA & ANR.

.....Respondents

WITH

CIVIL APPEAL NOS. 3575-3577 OF 2009

J U D G M E N T

Indira Banerjee, J.

These appeals are against a common judgment and order passed by the High Court of Judicature of Andhra Pradesh at Hyderabad dismissing the appeals being A.S. Nos.892 of 1994, 893 of 1994, 894 of 1994 and 1785 of 1994 and *inter alia* confirming the judgment and decree of the Trial Court in O.S.No.20 of 1993 and OS No. 91 of 1993 and the decree of dismissal by the Trial Court of the Suit being O.S.No.92 of 1993.

2. The Appellant No.1, in Civil Appeal No. 3574 of 2009, B. Santoshamma, hereinafter referred to as the 'Vendor', wife of the Appellant No.2 in the said appeal, B. Darshan Reddy, purchased 300 square yards of land, in survey No. 262 of Hayathnagar Village and Taluk in Ranga Reddy District, hereinafter referred to as the 'suit land', from one D. Tanesha, under a registered sale deed dated 20th August, 1982.

3. After about ten days, the Vendor allegedly entered into an oral agreement with the proforma respondent in the said appeal, P. Pratap Reddy, for sale of 100 sq. yards out of the suit land in his favour, for a total consideration of Rs.3000/-, out of which Rs.2,500/- was paid in advance. The Vendor claims to have delivered possession of the said 100 sq. yards to Pratap Reddy on the date of the oral agreement itself.

4. On or about 20th January, 1984, the alleged oral agreement between the Vendor and Pratap Reddy was allegedly reduced into writing, upon payment of the balance consideration of Rs.500/-. The Vendor and her husband allegedly agreed to execute the sale deed on an auspicious day, after consulting the family priest.

5. On 21st March, 1984, the Vendor entered into an agreement with the contesting respondent in Civil Appeal No. 3574 of 2009, Smt D. Sarala, hereinafter referred to as the Vendee, for sale of the suit

land to the Vendee, for a total consideration of Rs.75,000/-, out of which Rs.40,000/- was paid by the Vendee to the Vendor in advance. The Vendor claims to have informed the Vendee of the oral agreement with Pratap Reddy, which had been reduced to writing on 20th January, 1984. The Vendor and her husband Darshan Reddy contend that the Vendor had also specifically informed the Vendee that the Vendor had received the sale consideration for 100 sq. yards from Pratap Reddy, and had delivered possession of 100 sq. yards of land to him.

6. The Vendor has alleged that she specifically requested the Vendee to incorporate a clause with regard to the earlier agreement with Pratap Reddy in the sale agreement between the Vendor and the Vendee. However, the Vendee assured the Vendor that she would get the earlier agreement with Pratap Reddy cancelled as her husband knew Pratap Reddy well and had already spoken to Pratap Reddy. According to the Vendor, the Vendee represented to the Vendor, that there was no need for the Vendor to get any clearance from Pratap Reddy as the Vendee and her husband had been assured by Pratap Reddy that no difficulty would be created by him.

7. On or about 25 May, 1984, that is, about two months after execution of the sale agreement with the Vendee, the Vendor executed a registered deed of conveyance transferring 100 sq. yards of the suit land in favour of Pratap Reddy. The Vendor and her

husband Darshan Reddy, as also Pratap Reddy, have alleged that the Vendee had tried to interfere with Pratap Reddy's possession of 100 sq. yards of the suit land.

8. On or about 20th June, 1984, the Vendor allegedly issued notice to the Vendee contending that the agreement of sale dated 21st March, 1984 was conditional upon clearance from Pratap Reddy in view of the earlier agreement of the Vendor with Pratap Reddy for sale of 100 sq. yards of the suit. The purported notice, if any, was issued after execution of the registered deed of conveyance, for sale of 100 sq. yards of the suit land in favour of Pratap Reddy.

9. On 22nd June, 1984, the Vendor's husband, Darshan Reddy, lodged a complaint with the Station House Officer, Hayathnagar, alleging that the original sale deed of the suit land in favour of the Vendor in respect of the suit land had been stolen from his residence, alongwith other documents.

10. By a letter dated 28th June, 1984, the Vendee replied to the notice, contending that the document had been handed over by the Vendor to the Vendee. Sometime thereafter, the Vendee filed a suit being O.S.No.222 of 1984 in the Court of the Principal Subordinate Judge, Rangareddy District, for specific performance of the agreement of sale dated 21st March, 1984. In the said suit, the Vendee, being the plaintiff, claimed delivery of possession of 300 sq.

yards of land from the Vendor. Pratap Reddy was not impleaded defendant in the said suit for specific performance of the Agreement dated 21.3.1984. Later the Vendee filed an application being I.A.No.44 of 1989 for impleading Pratap Reddy, pursuant to which an order dated 5th April, 1989 was passed whereby Pratap Reddy was added as defendant No.3 in the said suit.

11. In the meanwhile, in 1985, Pratap Reddy filed a suit being O.S.No.190 of 1985 in the court of the Principal District Munsif, Hyderabad East and North, seeking a decree of perpetual injunction restraining the Vendee from interfering with his possession over 100 sq. yards of the suit land.

12. In the suit filed by Pratap Reddy, it was alleged that he was not aware of any agreement of sale between the Vendor and the Vendee in respect of the suit land or of payment of Rs.40,000/- to the Vendee in terms thereof.

13. It is the case of Pratap Reddy, that even if the Vendee had entered into any agreement as alleged with the Vendor, there could be no question of sale of 100 sq. yards of the suit land earlier agreed to be sold to Pratap Reddy, and actually sold to Pratap Reddy by a registered deed of conveyance dated 25.5.1984.

14. The Vendee also filed a suit being O.S.No.401 of 1985 against Pratap Reddy in the Court of Principal District Munsif, Hyderabad for a declaration that the agreement between the Vendor and Pratap Reddy with regard to 100 sq. yards was null and void. The Vendor was not impleaded as party to the said suit.

15. On or about 19th July, 1989, the Vendor and her husband Darshan Reddy filed their Written Statement in O.S.No.222 of 1984 subsequently renumbered as O.S.No.20 of 1993 being the suit for specific performance of the sale agreement between the vendor and the Vendee, which is hereinafter referred to as the suit for specific performance. Pratap Reddy also filed his written statement in the suit for specific performance. The three suits have, from time to time, been renumbered.

16. The suit for specific performance, which had been transferred to the Additional District Court of Rangareddy District and renumbered O.S.No.20 of 1993, was clubbed for hearing along with Suit No.190 of 1985, renumbered as O.S.No.91 of 1993 and O.S.No.702 of 1991 renumbered as O.S.No.92 of 1993.

17. The Trial Court framed the following issues in the suit being O.S No.20/1993, that is the suit for specific performance:

“1. Whether the plaintiff (sic the Vendee) was put in possession of the suit plot admeasuring 300 sq. yards?”

2. *Whether the suit agreement of sale was subject to the clearance of any agreement of sale of 100 sq. yards out of the suit plot in favour of one Sri. P. Pratap Reddy?*
3. *Whether the sale of 100 sq. yards out of the suit plot to Sri. P. Pratap Reddy is true and binding on the plaintiff.(sic the Vendee)*
4. *Whether the suit is bad for non-joinder of necessary parties?*
5. *Whether the defendants (Sic the Vendor) committed breach of contract of sale?*
6. *Whether plaintiff is entitled to the specific performance of the suit agreement of sale?*
7. *To what relief?"*

An additional issue was framed as to whether 3rd defendant, that is Pratap Reddy, was a bona fide purchaser of 100 square yards of the suit land.

18. In O.S.No.91/1993, being the suit for injunction filed by Pratap Reddy, the Trial Court framed the following issues:

- "1. Whether the plaintiff (sic Pratap Reddy) is entitled to perpetual injunction as prayed for?*
- 2. To what relief?"*

The following additional issue was also framed:

- "Whether the plaintiff (sic Pratap Reddy) is entitled to the declaration and possession sought?"*

19. In Original Suit No.92 of 1993, being the suit for declaration, filed by the Vendee against Pratap Reddy, the following issues were

framed:

- “1. Whether the suit is bad for non-joinder of parties?*
- 2. Whether the plaintiff (sic Vendee) is entitled to declaration as prayed for?*
- 3. Whether the defendants are entitled to exemplary costs of Rs.3,000/-?*
- 4. To what relief?”*

20. By a common judgment and decree dated 30th March, 1994, the learned District Judge, Rangareddy disposed of all the three suits. The suit for specific performance was allowed, in part, holding that the Vendee, was not entitled to seek specific performance of the agreement in respect of 100 sq. yards covered by the sale deed dated 25th May, 1984, but entitled to relief of specific performance in respect of the remaining 200 sq. yards of the suit land. The Vendee's suit for declaration against Pratap Reddy was dismissed for non-joinder of the Vendor.

21. Since Exhibit A-1, being the sale agreement dated 21st March, 1984 between the Vendor and the Vendee showed that the sale consideration for 300 sq. yards land was fixed at Rs.75,000, which meant that the price fixed per sq. yard was Rs.250/-, the Court held that the Vendee had to pay Rs.50,000/- to the Vendor, towards sale consideration. As the Vendee was found to have paid Rs.40,000/- under Ex.A1 and a further Rs.5,000/- under the receipt being Ex.A3, the Trial Court effectively held that the Vendee was liable to pay a further sum of Rs.5,000/- to the Vendor. The Vendee was directed to

deposit Rs.5,000/- in Court towards the balance sale consideration payable by her, on or before 15th April, 1994, whereupon the Vendee would have to execute a sale deed in respect of 200 sq. yards from out of the suit land, in favour of the Vendee. In case of failure to deposit Rs.5,000/- in Court within the time stipulated, the suit would stand dismissed.

22. Being aggrieved, by the judgment and order referred to above, the Vendor filed an appeal in the High Court, against the judgment and decree in the suit for specific performance being O.S. of 1993 which was numbered as A.S. 1785 of 1994. The Vendee also filed three appeals being A.S. No.892 of 1994 against the judgment and decree in O.S.No.91 of 1993, an appeal being A.S.No.893 of 1994 against the judgment and decree in O.S.No.20 of 1993 and an appeal being A. S. No.894 of 1994 against the judgment and decree in O.S.No.92 of 1993.

23. By a common judgment and order dated 7th September 2006, which is under appeal in this Court, the High Court *inter alia* dismissed all the appeals that is A.S. Nos.892, 893, 894 filed by the Vendee and A.S. No.1785 of 1994 filed by the Vendor and confirmed the judgment passed by the Trial Court. While the appeal being C.A. No.3574 of 2009 has been filed by the Vendor, the three appeals being C.A. Nos. 3575-3577, have been filed by the Vendee.

24. Mr. Gowtham appearing on behalf of the appellant in C.A. 3574 of 2009 being the Vendor submitted that the agreement dated 21st March, 1984 between the Vendor and Vendee was liable to be cancelled as the Vendee had defaulted in making payment of the balance amount within the time stipulated in the said agreement.

25. Mr. Gowtham argued that there was a clause in the agreement dated 21.3.1984 executed by and between the Vendor and the Vendee, in terms whereof the Vendor agreed to register the sale deed in favour of the Vendee, within 45 days from the date of the said agreement, subject to receipt of the full consideration amount within 4.5.1984. Mr. Gowtham submitted that full payment was not made within the aforesaid date. The appellants after waiting for 20 more days, executed and registered a sale deed in favour of Pratap Reddy in respect of 100 square yards of land.

26. Mr. Gowtham argued that the sale agreement was conditional upon cancellation of the prior agreement with Pratap Reddy. It was argued that the Vendee, who knew of the pre-existing agreement between the Vendor and Pratap Reddy, had assured the Vendor that she and/or her husband had already spoken to Pratap Reddy, to get the agreement between the Vendee and Pratap Reddy cancelled.

27. Mr. Gowtham emphatically argued that the agreement dated 21.3.1984 was a composite agreement for sale of 300 sq. yards of land for a lump sum consideration of Rs.75,000/-. Since it was not

possible to sell 300 sq. yards to the Vendee as per the sale agreement, the sale agreement became infructuous and incapable of specific performance. There was no scope for sale of 200 sq. yards of land at a reduced consideration.

28. Mr. Gowtham argued that there could be no question of any decree of specific performance of the agreement dated 21.3.1984 in favour of the Vendee, in the absence of readiness and willingness on the part of the Vendee to perform her obligations under the agreement.

29. The Vendor and her husband Darshan Reddy contended that they had not refused to execute the registered sale deed as alleged. It was the contesting respondent who had failed to bring about a settlement with Pratap Reddy as agreed, and had also failed to pay the balance consideration within the time stipulated in the agreement. Time being of essence to the agreement, it could not be specifically enforced.

30. The Vendor and her husband Darshan Reddy also asserted that the Vendee was also not ready to pay the balance sale consideration and had sought further time for payment on the ground that he did not have the money. The suit for specific performance was thus, not maintainable. In any case, the agreement for sale of 300 sq. yards of land to the Vendee was incapable of performance, since the appellant

did not have 300 sq. yards of land.

31. The Vendor and her husband Darshan Reddy have categorically denied that they had delivered possession of 300 sq. yards of land to the Vendee. They have asserted that the Vendee had taken possession of 200 sq. yards of land, 100 sq. yards having been transferred to Pratap Reddy.

32. Mr. Radhakrishnan appearing on behalf of the Vendee argued that the Vendee should have been granted specific performance of the agreement dated 21.3.1984 in its entirety. The Court should have set aside the purported sale deed in respect of 100 sq. yards of land in favour of Pratap Reddy and directed the Vendor to sell the entire suit property comprising 300 sq. yards to the Vendee.

33. Mr. Radhakrishnan argued that the purported sale agreement of the Vendor with Pratap Reddy was not genuine. It is difficult to believe that the Vendor would, within 11 days from purchase of 300 sq. yards of land (the suit land), enter into an agreement for sale of 100 sq. yards out of the suit land.

34. Mr. Radhakrishnan further argued that the execution and registration of the sale deed in favour of Pratap Reddy in respect of 100 sq. yards of land, was in any case, subsequent to the Agreement dated 21.3.1984 between the Vendor and the Vendee.

35. Mr. Radhakrishnan emphatically argued that the agreement dated 21.3.1984 was for sale by the Vendor, to the Vendee of 300 sq. yards for a consideration of Rs.75,000/-, pursuant to which possession of the entire 300 sq. yards of land was delivered to the Vendee. This has, of course, been denied by the Vendor.

36. Refuting the contention advanced by the Vendee, of want of readiness and willingness on the part of the Vendee, to perform her obligations under the Agreement dated 21.3.1984, Mr. Radhakrishnan further argued that, the fact that the Vendee had paid Rs.40,000/- to the Vendor on the date of execution of the sale agreement itself, apart from Rs.5,000/- which the Vendee had admittedly paid to Darshan Reddy (husband of the Vendor), demolishes the contention of the Vendor. These payments towards part consideration were duly acknowledged.

37. Mr. Radhakrishnan pointed out that on 30.4.1984 the Vendee approached the Vendor and her husband with the balance amount of Rs.30,000/- and requested them to register the sale deed, but the Vendor and her husband refused to receive the amount and instead requested the Vendee to make the payment by Demand Draft.

38. According to the Vendee, the Vendee obtained a Demand Draft No.463961 dated 4.5.1984 for Rs.30,000/- from Canara Bank,

but the Vendor did not accept the same. On 25.5.1984 the Vendee issued a legal notice. Receipt of the legal notice was duly acknowledged by the Vendor and her husband. A further legal notice was issued by the Vendee on 12.8.1984. In the meanwhile, by a letter dated 20.6.1984 in reply to the legal notice of 25.5.1984, the Vendor admitted receipt of Rs.45,000/-, but claimed that the agreement was subject to the Vendee securing the approval of Pratap Reddy, to end the earlier agreement between the Vendor and Pratap Reddy, for transfer of 100 sq. yards of land to Pratap Reddy.

39. Mr. Radhakrishnan concluded his arguments with the submission that the Vendee had not delayed performance of her obligations under the agreement dated 21.3.1984. Within 30.4.1984 the entire consideration was tendered but unfortunately not accepted by the Vendor with ulterior intent of resiling from her obligations under the said argument to transfer the suit property to the Vendee. By 4th May, 1984, that is within 47 days from the date of the agreement dated 21.3.1984 the Vendee was ready with a Demand Draft for the balance Rs.30,000.

40. Mr. Navare appearing on behalf of Pratap Reddy submitted that the Appeals are all liable to be dismissed. First of all, on the date on which the Vendee filed the suit for specific performance of the agreement against the Vendor and her husband, she was aware of the registered sale deed executed by the Vendor in favour of Pratap

Reddy, in respect of 100 sq. yards of land. Yet the Vendee filed a suit against the Vendor and her husband, for specific performance of the agreement in which Pratap Reddy was not impleaded defendant. There was no challenge to the sale deed in favour of Pratap Reddy.

41. Mr. Navare argued that the Vendee filed a second suit against Pratap Reddy for a declaration that the sale deed executed by the Vendor in his favour was void, without impleading the Vendor.

42. Mr. Navare pointed out that as late as on 5.4.1989, the Vendee filed an application for impleading Pratap Reddy as defendant in her suit for specific performance filed in 1984. The Vendee only added Pratap Reddy. There was no amendment either in the pleadings or in the prayers. The reliefs claimed by the Vendor in the suit for specific performance were thus barred by limitation, as against Pratap Reddy in the absence of any clarification by the Trial Court, as required under Section 21 of the Limitation Act, 1963.

43. Mr. Navare further submitted that, there being no prayer against Pratap Reddy in the suit for specific performance, Pratap Reddy would not be bound to join the original owner, in execution of the deed of conveyance in favour of the Vendee. In support of his submission Mr. Navare cited ***Durga Prasad and Anr. v. Deep Chand and Ors.***¹.

1. AIR 1954 SC 75

44. Mr. Navare submitted that the Vendee chose not to challenge the registered sale deed in favour of Pratap Reddy or to seek any relief against Pratap Reddy in the Suit for Specific Performance. Failure to make any such prayer amounted to relinquishment of the claim to such relief, in view of Order II Rule 2 of the Code of Civil Procedure (CPC).

45. Mr. Navare submitted that the second suit filed by the Vendee is bad for non-joinder of the Vendor. A registered sale deed executed by the Vendor cannot be declared void in her absence.

46. Mr. Navare concluded that the second suit was also hit by Order II Rule 2, and was thus barred under the law. In any case, the second suit filed by the Vendor was only for a declaration and there was no prayer for any consequential relief. The second suit was thus hit by Section 34 of the Specific Relief Act, 1963.

47. Mr. Navare finally referred to Section 50(1) of the Registration Act, 1908 set out hereinbelow for convenience:

“(1) Every document of the kinds mentioned in clauses (a), (b), (c), and (d) of section 17, sub-section (1), and clauses (a) and (b) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.”

48. Referring to Section 50, Mr. Navare argued that a registered sale deed with respect to a property will take effect over any unregistered document, with respect to the same property.

49. Mr. Navare submitted that Pratap Reddy had also filed a suit for declaration and possession being O.S. No.190/1985. All 3 suits were clubbed together and heard together. However,

- (i) consolidation of 3 suits does not convert 3 suits into one action.
- (ii) Consolidation of suits is for practical reasons such as, saving costs, time and efforts of the parties, convenience of the parties, avoiding repetitive exercises in 3 suits and avoiding conflict of judgment in the 3 suits. However, the 3 suits consolidated/clubbed together retain their separate identity. In support of his argument Mr. Navare cited ***Mahalaxmi Coop. Housing Society Ltd. and Ors. v. Ashabhai Atmaram Patel (D) thr. Lrs. and Ors.***².

50. Mr. Navare emphatically argued that the right which have accrued to Pratap Reddy, as a result of defective suits filed by the Vendee, cannot stand abrogated by consolidation of the suits. There is no provision in the CPC which permits a party to be deprived of such accrued, right because of defects in the suit.

51. Mr. Navare submitted that the bar of the second suit under Order II Rule 2 of the CPC is not a defect of a technical nature. The

2. (2013) 4 SCC 404 [41]

mandate of Order II Rule 2 requiring the Vendor to claim all reliefs in respect of the same cause of action arising out of one suit, is a provision of a substantive nature, and not of a technical nature. It is based on legislative policy.

52. Mr. Navare argued that although, no objection of bar under Order 2 Rule 2 of CPC was raised in the suit, by Pratap Reddy, that does not make any difference for the following reasons:

- (i) Order II Rule 7 requires only objection as to mis-joinder of causes of action, to be taken at the earliest opportunity, before issues are settled, and otherwise such objection is deemed to be waived.
- (ii) Similarly, Section 21 of the CPC specifically provides that, any objection as to the place of suing must be raised at the earliest opportunity, before issues are settled and the same cannot be raised in Appellate or Original Court for the first time.
- (iii) Legislature has specifically clarified the cases where the raising of an objection is necessary. There is no provision in the CPC with respect to objection under Order II Rule 2. The maxim “Expressum facit cessare tacitum” (Express mention of one thing excludes the other) squarely applies here.
- (iv) There is a bar of Law prescribed by Order II Rule 2 against the second suit. It is a kind of bar contemplated

under Order VII Rule 11 (d). The power of the Court under Order VII Rule 11(d) is in the following words “the Plaint shall be rejected...” Thus, it casts an obligation on the Court to reject the same. Irrespective of whether an objection is raised by the defendant in the suit or not, the consequence must follow.

53. Mr. Navare concluded that this Court might decline to invoke jurisdiction under Article 136 of the Constitution, even if an impugned order is illegal. This Court should certainly not invoke its jurisdiction under Article 136 to reverse the judgment, thereby effectively validating the second suit, although it is barred by Order II Rule 2 of CPC. The Appeal should therefore be dismissed.

54. It is not in dispute that the Vendor agreed to sell the entire suit land comprising 300 square yards to the Vendee for a consideration of Rs.75,000/-. The agreement dated 21.3.1984 is admitted by the Vendor.

55. It is also not in dispute that the Vendee paid Rs.40,000/- to the Vendor on the date of the agreement itself and also paid a sum of Rs.5,000/- to the Vendor's husband, which was duly acknowledged.

56. The defence of the Vendor that the Vendee was unable and/or unwilling to perform her obligations under the agreement dated

21.3.1984 has been rejected by the Trial Court, as also the Appellate Court, that is, the High Court.

57. The finding of the Trial Court, affirmed by the High Court that the Vendee was ready and willing to perform her obligations under the agreement dated 21.3.1984, which is based on evidence and supported by cogent reasons, is unexceptionable as discussed hereinafter.

58. The contention of the Vendor, that the agreement dated 21.3.1984 was subject to the condition that the Vendee would get the earlier agreement between the Vendor and Pratap Reddy cancelled, cannot be accepted for the following reasons:

- (i) The agreement dated 21.3.1984, which is in writing does not incorporate any such condition.
- (ii) It is incredible that the Vendor, who knew Pratap Reddy, to whom she had, as per her own assertion, agreed to sell 100 square yards of land, should proceed on the basis of an alleged assurance of the Vendee, that Pratap Reddy would relinquish his rights under the earlier agreement between the Vendor and Pratap Reddy, without ascertaining from Pratap Reddy, whether Pratap Reddy was actually ready to relinquish his rights under the said earlier agreement with her.
- (iii) Pratap Reddy has denied knowledge of the agreement

between the Vendor and the Vendee.

- (iv) Within a month and a few days from the date of execution of the agreement between the Vendor and the Vendee, after the Vendee tendered full consideration, the Vendor executed a registered deed of conveyance in favour of Pratap Reddy, without any prior intimation to the Vendee, and without giving the Vendee any opportunity to persuade Pratap Reddy to abrogate his earlier agreement with the Vendor.

59. It is well settled that the onus of proof lies on the party who makes an allegation. It was for the Vendor to establish that the agreement dated 21.3.1984 was subject to the condition as alleged by the Vendor, that the Vendee and/or her husband would negotiate with Pratap Reddy to get his earlier agreement with the Vendor cancelled. The Vendor failed to discharge her onus of proving that there was such a condition in the agreement dated 21.3.1984. The Trial Court and the High Court rightly did not believe the Vendor.

60. The effective concurrent finding of the High Court and the Trial Court, that the Vendee had been ready and willing to perform and had in fact performed her obligations under the Agreement dated 21.3.1984, is also unexceptionable for the following reasons:

- (i) As observed above, the Vendee paid Rs.40,000/- out of the total consideration of Rs.75,000/- on the date of execution

of the Agreement dated 21.3.1984 itself.

- (ii) It is not disputed that the Vendee paid a further Rs.5,000/- to the Vendor's husband against a receipt.
- (iii) It is the Vendor's own case that in terms of the Agreement dated 21.3.1984, the full consideration was to be paid within 45 days. The Vendee's claim that she tendered Rs.30,000/- on 30.4.1984 was not disputed by the Vendor in her legal notice/letter dated 20.6.1984.
- (iv) In any case the Vendee obtained Demand Draft No.463961 dated 4.5.1984 for Rs.30,000/- in favour of the Vendor towards balance consideration, within 47 days from the execution of the Agreement dated 21.3.1984.
- (v) It is well settled that time is not of essence to agreements for sale of immovable property, unless the agreement specifically and expressly incorporates the consequence of cancellation of the agreement, upon failure to comply with a term within the stipulated date.

61. The concurrent findings of the High Court and the Trial Court that the Vendee was ready and willing to perform and had performed her obligations under the Agreement dated 21.3.1984, which as observed above, are based on evidence and sound reasons, do not call for interference of this Court.

62. It is true that the Trial Court had directed the Vendor to pay the balance of Rs.5,000/- on or before 15.4.1994, failing which the

suit for specific performance would stand dismissed. However, any time granted by the Court at its discretion, can always be extended by the Court.

63. In any case, the Vendor had filed an appeal against the decree in the suit for specific performance. The Vendee, who had been litigating for about 10 years by April, 1994 and had already paid Rs.45,000/- over 10 years ago, but not got the suit land, could not be expected to put in more money, until the decree assumed finality, upon disposal of the appeal.

64. Since there was an appeal of the Vendor pending, the failure of the Vendor to put in Rs.5,000/- within the time stipulated by Court, would not, in itself, disentitle the Vendor to the relief of specific performance. It was for the Court to decide whether or not to extend the time for payment of Rs.5,000/-. The Appellate Court rightly expressed its discretion in favour of the Vendee.

65. The question is, whether as argued by Mr. Gowtham, the High Court erred in affirming the common judgment of the Trial Court under appeal before the High Court, whereby the Trial Court allowed the suit for specific performance in part, holding that the Vendee was entitled to relief of specific performance in respect of 200 square yards of land covered by the Agreement dated 21.3.1984 (that is, less 100 sq. yards sold to Pratap Reddy by a registered deed of conveyance dated 25.4.1984), at a reduced consideration of Rs.50,000/-, since the agreement dated 21.3.1984 was a composite

agreement for sale of 300 sq. yards of land at a lump sum consideration of Rs.75,000/-.

66. While Mr. Gowtham has argued that the Courts should not at all have allowed specific performance of the Agreement dated 21.3.1984, Mr. Radhakrishnan has argued that the conveyance in favour of Pratap Reddy should have been adjudged and declared a nullity, and the suit for specific performance allowed in full, by directing the execution and registration of a Deed of Conveyance, in respect of the entire suit land.

67. The relief of specific performance of an agreement, was at all material times, equitable, discretionary relief, governed by the provisions of the Specific Relief Act 1963, hereinafter referred to as S.R.A. Even though the power of the Court to direct specific performance of an agreement may have been discretionary, such power could not be arbitrary. The discretion had necessarily to be exercised in accordance with sound and reasonable judicial principles.

68. Section 10 of the S.R.A. as it stood prior to its amendment with effect from 1.10.2018 provided:-

"10. Cases in which specific performance of contract enforceable.- Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

- (b) *when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.*

Explanation.- Unless and until the contrary is proved, the court shall presume-

- (i) *that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and*
- (ii) *that the breach of a contract to transfer movable property can be so relieved except in the following cases:-*
 - (a) *where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;*
 - (b) *where the property is held by the defendant as the agent or trustee of the plaintiff."*

69. After amendment with affect from 1.10.2018, Section 10 of the S.R.A. provides:

10. Specific performance in respect of contracts.-
The Specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16.

70. After the amendment of Section 10 of the S.R.A., the words "specific performance of any contract may, in the discretion of the Court, be enforced" have been substituted with the words "specific performance of a contract shall be enforced subject to ...". The Court is, now obliged to enforce the specific performance of a contract, subject to the provisions of sub-section (2) of Section 11, Section 14 and Section 16 of the S.R.A. Relief of specific performance of a contract is no longer discretionary, after the amendment.

71. An agreement to sell immovable property, generally creates a right in personam in favour of the Vendee. The Vendee acquires a legitimate right to enforce specific performance of the agreement.

72. It is well settled that the Court ordinarily enforces a contract in its entirety by passing a decree for its specific performance. However, Section 12 of the Specific Relief Act carves out exceptions, where the Court might direct specific performance of a contract in part. Section 12 of the Specific Relief Act, 1963 is set out hereinbelow for convenience.

12. Specific performance of part of contract.-(1)
Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money,

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the

contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.- For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.

73. Where a party to the contract is unable to perform the whole of his part of the contract, the Court may, in the circumstances mentioned in Section 12 of the S.R.A., direct the specific performance of so much of the contract, as can be performed, particularly where the value of the part of the contract left unperformed would be small in proportion to the total value of the contract and admits of compensation.

74. The Court may, under Section 12 of the S.R.A. direct the party in default to perform specifically, so much of his part of the contract, as he can perform, provided the other party pays or has paid the consideration for the whole of the contract, reduced by the

consideration for the part which must be left unperformed. In this case the Vendee had apparently tendered the full consideration within the time stipulated in the Agreement dated 21.3.1984, that is, within 45 days or if not 45, within 47/48 days from the date of its execution.

75. As observed above, the Vendee admittedly paid Rs.40,000/- from out of the total consideration of Rs.75,000/- on the date of execution of the agreement, a further sum, of Rs.5,000/- sometime thereafter, which was duly acknowledged and also offered to pay the balance Rs.30,000/- within 30.4.1984 that is, within 45 days from the date of execution of the contract, which the Vendor did not accept. A Demand Draft for equivalent amount of Rs.30,000/- was obtained from Canara Bank on 4.5.1984, that is the 47th day of the execution of the agreement.

76. Admittedly, a major portion of the full consideration, that is, Rs.45,000/- had already been paid by the Vendor to the Vendee and the Vendor had been ready to and had offered to pay the entire balance consideration to the Vendor. However, the Vendor purported to sell 100 square yards of the suit land to Pratap Reddy by executing a registered deed of conveyance in his favour.

77. As argued by Mr. Navare, a registered deed of conveyance takes effect, as regards the property comprised therein, against every unregistered deed relating to the same property as provided in

Section 50 of the Registration Act.

78. The Vendee claimed specific performance of the agreement dated 21.3.1984 in its entirety, and sought execution and registration of a deed of conveyance in respect of the entire suit land comprising 300 square yards, but without impleading Pratap Reddy to whom ownership of 100 square yards of land had been transferred by a registered deed of conveyance.

79. A transferee to whom the subject matter of a sale agreement or part thereof is transferred, is a necessary party to a suit for specific performance. Unfortunately, the Vendee omitted to implead Pratap Reddy. By the time she filed an application to implead Pratap Reddy, in 1989, the suit for specific performance of the agreement dated 21.3.1984 had become barred by limitation as against Pratap Reddy.

80. Under the Limitation Act 1963 the period of limitation for filing a suit for specific performance is three years from the date fixed for performance of the contract, or if no date is fixed, then three years from the date on which the Vendee is put to notice of refusal to perform the agreement (Item No.54 in Part II of the Schedule to the Limitation Act 1963).

81. Section 21 of the Limitation Act provides:

21. Effect of substituting or adding new plaintiff or defendant.- (1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he

was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

82. The Vendee was put to notice of the refusal of the Vendor to execute the agreement dated 21.3.1984, by the Vendor's letter/legal notice dated 20.6.1984. Any suit for specific performance would be time barred by June/July 1987. Moreover, it is a matter of record that the Vendee knew of the registered deed of conveyance in favour of Pratap Reddy, when she instituted the suit in 1984.

83. The Vendee neither amended her pleadings in the plaint nor amended the prayers. Pratap Reddy was simply added defendant. The Court adding Pratap Reddy as defendant in the suit for specific performance, did not make any direction in terms of the proviso to Section 21(1) of the Limitation Act, that the suit against Pratap Reddy be deemed to be instituted at any earlier date. There could therefore be no question of any relief against Pratap Reddy in the suit for specific performance.

84. The Vendee did not implead the Vendor as defendant in her later suit (Original Suit No.401 of 1985, renumbered Original Suit

No.92 of 1993) inter alia for a declaration that the Deed of conveyance executed by the Vendor in favour of Pratap Reddy was null and void. The suit has rightly been dismissed for non joinder of the Vendor as defendant. There could be no question of a document being adjudged null and void without impleading the executant of the document, as defendant.

85. The suit for specific performance being time barred against Pratap Reddy, and the suit against Pratap Reddy also having been dismissed for non joinder of the Vendor, there could be no question of nullifying the rights that had accrued to Pratap Reddy, pursuant to the Deed of Conveyance dated 25.4.1984 executed by the Vendor transferring 100 sq. yards of the suit land to Pratap Reddy. Moreover, there was apparently an agreement in writing executed between the Vendor and Pratap Reddy on or about 25.01.1984 before execution of the agreement between the Vendor and the Vendee.

86. Since title in respect of 100 square yards had passed to Pratap Reddy and the suit for specific performance was barred by limitation, the Trial Court was constrained to decree the suit for specific performance in part, and direct that a Deed of Conveyance be executed in respect of the balance 200 square yards of the suit land, under the ownership and control of the Vendor.

87. Section 12 of the SRA is to be construed and interpreted in a purposive and meaningful manner to empower the Court to direct

specific performance by the defaulting party, of so much of the contract, as can be performed, in a case like this. To hold otherwise would permit a party to a contract for sale of land, to deliberately frustrate the entire contract by transferring a part of the suit property and creating third party interests over the same.

88. Section 12 has to be construed in a liberal, purposive manner that is fair and promotes justice. A contractee who frustrates a contract deliberately by his own wrongful acts cannot be permitted to escape scot free.

89. After having entered into an agreement for sale of 300 Sq. yards of land, with her eyes open, and accepted a major part of the consideration (Rs.45,000/- out of Rs.75,000/-) it does not lie in the mouth of the Vendor to contend that the contract should not have specifically been enforced in part, in respect of the balance 200 sq. yards meters of the suit land which the Vendor still owned. It is patently obvious that the Vendor did not disclose any earlier agreement to the Vendee, as discussed above. The agreement in writing dated 21.3.1984, does not bear reference to any earlier agreement, as noted above.

90. Instead of awarding damages in respect of the part of the contract which could not be enforced and/or in other words damages for breach of agreement to sell the entire suit land, the Trial Court reduced the total consideration by $\frac{1}{3}$ rd of the agreed amount, in lieu

of damages, as one third of the area agreed to be sold to the Vendee could not be sold to her. The total price agreed upon being Rs.75,000/- for the entire suit land, comprising 300 square yards, the agreed price works out to Rs.25,000/- for 100 square yards and/or Rs.2,500/- per square yard. The Trial Court very fairly reduced the consideration by Rs.25,000/-, being the price of 100 square yards of land computed proportionally, in lieu of damages. The Vendor can have no legitimate reason to complain.

91. Since we have upheld the dismissal of Suit No.92/1993 filed by the Appellant against Pratap Reddy, it is not really necessary to go into the question of whether the said suit was barred under Order II Rule 2 of the Civil Procedure Code as contended by Mr. Navare. It is true that, the clubbing of suits for hearing them together and disposal thereof by a common judgment and order is for practical reasons. Such clubbing together of the suits do not convert the suits into one action as argued by Mr. Navare. The suits retain their separate identity as held in ***Mahalaxmi Coop. Housing Society Ltd. and Ors. v. Ashabhai Atmaram Patel (supra)***. The clubbing together is done for convenience, *inter alia*, to save time, costs, repetition of procedures and to avoid conflicting judgments.

92. We are, however, unable to agree with Mr. Navare's argument that the Court is under an obligation to reject the subsequent suit, irrespective of whether objection of bar under Order II Rule 2 of the CPC was raised or not.

93. The plea of bar under Order II Rule 2 of the CPC is a technical plea which has to be pleaded and satisfactorily established. In ***R. A. Oswal v. Deepak Jewellers and Ors.***³, this Court held that if the plea of bar under Order II Rule 2 is not taken, the Court should not suo moto decide the plea. Moreover, in ***Dalip Singh v. Mehar Singh Rathee and Ors.***⁴, this Court held that the plea cannot be raised before this Court if not raised in the High Court.

94. We find no such infirmity in the judgment and order of the High Court under appeal, confirming the judgment and order of the Trial Court, that calls for interference of this Court. The High Court has rightly dismissed the appeals from the judgment of the Trial Court.

95. These appeals are, therefore, dismissed.

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[UDAY UMESH LALIT]

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[INDIRA BANERJEE]

NEW DELHI
SEPTEMBER 18, 2020

3. (1999) 6 SCC 40 [42]

4. (2004) 7 SCC 650