REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7208 OF 2009
(Arising out of SLP© No. 17630 OF 2005)

A.K. Lakshmipathy (Dead) & Ors. ..Appellants

Versus

Rai Saheb Pannalal H. Lahoti
CharitableTrust & Ors. …Respondents

J U D G M E N T

TARUN CHATTERJEE,J.

1. Leave granted.

2. This appeal by way of a Special Leave Petition has been filed by the appellants to challenge the judgment and decree dated 23rd of February 2002 of the High Court of Andhra Pradesh at Hyderabad in C. C. C. A. no. 88/1993 and A.S no. 673 of 1995, which was filed by the defendants/respondents in so far as the direction given by the trial Court to refund a sum of Rs.1,00,000/- to the plaintiffs/appellants, which they had paid to the defendants/respondents as an advance, was concerned.

3. The relevant facts leading to the filing of this appeal are:-

The dispute in this appeal involves a property marked no. 1-11-251 in Begumpet, Hyderabad (hereinafter referred to as the 'property in question') which was owned by one Rai Bahadur Saheb Pannalal Lahoti. By a Will, he bequeathed all his properties including the property in question and appointed Respondent no. 2 B.M. Bhandari and one Bhima Bai as joint executors of his Will. According to the Will of Rai Bahadur Saheb Pannalal Lahoti, one-fourth of the fund of his estate was to be used for hospitals and educational institutions in equal shares as the executors would deem fit. After the death of Bhima Bai, who was one of the joint executors of the Will, her heirs Govind Bai Vinani and Suresh Chandra Lahoti (Respondents no. 2 and 5 respectively) came into the picture. By a trust deed as per the wishes of the Late Rai Bahadur Saheb Pannalal Hiralal Lahoti, a Charitable Trust by the same name was set up. The trust owned properties in Hyderabad, Andhra Pradesh and Hingoli in Maharashtra. The registered office was in Kolkata, West Bengal. Respondent no. 2 on behalf of the trust entered into a written contract for sale with appellant no. 1 on 6th of December 1978 agreeing to sell the property in question measuring 9400 sq. yards along with constructions thereon. The contract contained certain terms and

conditions. The first of such condition was that Appellant no. 1 would advance a sum of Rs.1 lakh and the rest of the balance amount, i.e., Rs.5 lakhs would be paid by the appellants on or before 5th of June 1979. Under the contract, the appellants also agreed to obtain the necessary permission or exemption from the competent authorities under the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as "the ULC Act"). It was also alleged that the respondents shall cooperate with the appellants in getting all such necessary permissions from the competent authority under the ULC Act. Clause 10 of the Contract emphatically mentioned that time was the essence of the contract. It reads as under:

"*"Time will be of essence of the contract."*

4. The said contract also mentioned that in case of failure of the appellants to pay the balance amount within the stipulated time, the respondents would forfeit the balance amount.

5. Thereafter, the competent authority under the ULC Act informed the appellants of being granted exemption provided that the land was continued to be used for the purposes of the trust. Due to such intimation, the Appellants sought clarifications from Respondent no. 2 regarding procurement of permissions from the Endowment

Department in a telegraphic notice on 29th of May 1979. This was followed by a registered notice on 31st of May 1979. Respondent no.2 sent a reply to the appellants on 4th of June 1979 without clarifying the doubts raised on procurement of permission from the Endowment Department. In response, the appellants sent a detailed communication to the respondent enquiring about the state of affairs on 5th of June 1979. The respondent no. 2 sent a reply on 6th of June 1979 informing the appellants that there was no requirement of obtaining permission from the Endowment Department as the laws of West Bengal, which were applicable in this case, did not require any particular procedure for alienation of the trust property.

6. Thereafter, the appellants sent a communication enclosing a Photostat copy of a cheque of Rs. 5 lakhs, certified by the banker as "good for payment", thus showing their readiness and willingness to complete the contract with the balance consideration but with the condition that the respondent had to obtain a certificate from, the Endowment Department. In reply, on 7th of June 1979 the respondents sent a Photostat copy of a cheque of Rs. 1 lakh towards return of the advance amount simply terminating the agreement and threatening to forfeit the advance amount. The written communication

mentioned that Respondent no. 2 was kind enough to offer the earnest amount back to the appellants on the condition that the latter would not agitate the matter further. The appellants were directed to collect the amount within three days of the receipt of the letter; otherwise the earnest money would be forfeited. The said letter mentioned that by this communication the respondents would not be waiving any of their rights to pursue the matter further.

7. The appellants then filed a suit being O.S. No. 317/1985 in the Court of The Principal Subordinate Judge, R.R. District, Hyderabad for specific performance of the said contract for sale by the seller-respondents. The trial court framed no less than 17 issues in all. After examining witnesses, hearing arguments of both the parties and deliberating upon the issues, the Trial Court, inter alia, held that the appellants by insisting upon the trustees to perform additional conditions were not ready and willing to perform their part of the contract and also holding that time was not the essence of the contract. Accordingly, the Trial Court on 25th of August 1993 dismissed the suit for specific performance but passed a decree directing refund of Rs 1 Lakh of earnest money to the appellants.

8. Thereafter, the appellants, aggrieved by the decree, filed an appeal before the High Court of Andhra Pradesh at Hyderabad being C. C. C. A. no. 88/1993 and the respondents had filed another appeal A.S. No. 673 of 1995 against the said decree, to the extent that the Trial Court had directed the respondents to refund the advance amount of Rs. 1 lakh. On 23rd of February 2003, the High Court by its judgment and decree affirmed the decree of the Trial Court and held that time was the essence of the contract. Feeling aggrieved, the appellants filed a Special Leave Petition which, on grant of leave, was heard in presence of the learned counsel for the parties.

9. Having heard the learned counsel for the parties and after examining the materials on record including the judgment of the courts below, the following questions need to be decided for proper disposal of this appeal which are as follows :-

(i) Whether the insistence of the appellants to get the clearance of the Endowment department of the State of Andhra Pradesh at Hyderabad was the condition to be incorporated in the agreement itself for the purpose of a decree for specific performance of the contract for sale ?

(ii) Whether in the facts and circumstances of the present case the appellant could be found to be not ready and willing to perform their part of the contract ?

(iii) Whether in the facts and circumstances of the present case, the High Court was in error in holding that time was the essence of the contract for sale?

(iv) Whether in the facts and circumstances of the present case, the respondents are entitled to forfeit the advance amount paid by the appellants-purchasers?

10. Let us now turn to the questions at hand. The learned counsel for the appellants argued that the appellants had shown their willingness and readiness to perform their part of the contract by sending a photostat copy of a cheque within the stipulated time. Mr. P.S. Patwalia, the learned senior counsel for the respondents, argued that the appellants were on one hand supposedly ready with the balance amount and on the other hand were imposing additional conditions, which is not permissible and which is beyond the terms of the contract. To address this question, a look at the contract for sale is pertinent. From a bare perusal of clauses 4, 7, 8 and 9 of the Contract for sale, it would be evident that the onus is on the

appellants to obtain clearance from the competent authorities under the ULC Act. The respondents were nevertheless bound to extend their full cooperation to the vendees and to sign all necessary papers and documents. In clauses 7 to 9 of the said contract, the respondents agreed to obtain non-encumbrance and clearance certificates from the Income Tax Department and also to settle all payments to be made towards Municipal taxes, water tax, non-agricultural land assessment tax, etc. In the Contract, there is no such clause where the certificate from the Endowment Department was also to be taken for specific performance of the contract. The first appellant who was one of the executors of the said contract had admitted in his evidence that the transaction was finalized in the presence of a real estate broker and neither he nor any of the other appellants had asked the respondent to get permissions from the Endowment Department at that juncture. The first appellant had further deposed that he started entertaining doubts about the motives of the sellers from 28th of May, 1970 because there were allegedly other brokers approaching the respondent. Further P. Ws. 1 and 3 had affirmed at the Trial Court level that they had entered into the agreement only after having satisfied themselves of the title of the

sellers. The important admission that was made was that they were ready to go ahead to complete the contract.

11. Nevertheless, it must be recognized that it is generally the prerogative of the buyer to find out the defects in a property before buying it and also to make the seller rectify such defects. The rights of the buyer to seek reasonable clarifications and raise reasonable doubts have been statutorily recognized by Section 55 of the Transfer of Property Act, 1882 (hereinafter referred to as the T.P. Act). Section 55 runs as under :-

> "***Rights and liabilities of buyer and seller***- *In the* ***absence of a contract to the contrary****, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:*
> *(1) The seller is bound—*
> *(a) To disclose to the buyer any material defect in the property [or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;*
> *(b) To produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;*
> *(c)* ***To answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto***"

12. In this case, sub-section (c) of Section 55 of the T.P. Act is pertinent. According to the appellants and keeping in view of sub-section (b) and (c) of Section 55 of the T.P. Act, it was open to the appellants to seek clarifications regarding the procurement of clearance or exemption from the Endowment Department which should be a reasonable clarification. A reading of the provisions under Section 55 of the T.P. Act which starts with "In the absence of a contract to the contrary' would clearly mean that Section 55 (1) (b) and (c) of the T.P. Act would become applicable only in the absence of these words 'contract to the contrary'.

13. Mr.K.K.Venugopal, learned senior counsel for the appellants relying on sub-section (b) and (c) of Section 55 (1) of the T.P.Act sought to contend that it was open to the appellants to seek clarifications regarding the procurement of clearance or exemption from the Endowment Department and in view of the fact that such exemption was not taken by the respondents from the Endowment Department, the terms and conditions of the contract entered into by the parties were not satisfied and, therefore, the question of refusing a decree for specific performance of the contract for sale could not arise at all on this ground alone. This submission of the learned

senior counsel appearing for the appellants was, however, contested by Mr.P.S.Patwalia, learned senior counsel appearing for the respondents. According to the learned senior counsel for the respondents, since the clearance or exemption of the Endowment Department was not a condition to be fulfilled by the parties to execute the agreement for sale, it was not open to the appellants to say that before such clearance or exemption from the Endowment Department was not taken, the question of executing the deed of sale in respect of the property in question could not arise at all. We have carefully examined the rival submissions of the learned senior counsel appearing for the parties on this question. Before we go into this question, whether sub-section (b) & (c) of Section 55(1) of the T.P. Act would be applicable in the facts and circumstances of the case, it would be appropriate to refer to sub-section (b) & (c) of Section 55(1) of the T.P. Act, as noted herein earlier. Section 55 of the T.P. Act deals with rights and liabilities of buyer and seller. Sub-section (b) of Section 55(1) clearly says that it would be open to the buyer to ask the seller to produce for examination all documents of title relating to the property which are in the possession of the seller or buyer. A plain reading of this provision would amply show that

documents of title relating to the property in respect of which agreement for sale was entered into must be in the possession or power of the seller which should be produced to the buyer for examination. So far as the present case is concerned, the condition regarding the clearance or exemption from the Endowment Department is not a document of title relating to the property which would benefit the buyer for examination for the purpose of completing the agreement for sale. Sub-section (c) of Section 55(1) of the T.P. Act also equally cannot be applicable in the facts and circumstances of the present case. That apart, it is evident from a plain reading of Section 55 that this section becomes applicable only in the absence of the contract to the contrary. In this case, there is admittedly a contract for sale which clearly lays down the terms and conditions to govern the sale transaction. We are in agreement with the views expressed by the High Court in the impugned judgment holding that since the Head Office of the Trust is registered at Kolkata which would be enough to show that the relevant law applicable to a charitable trust would be that of the state in which the Head Office of the Trust is registered. **[See: State of Bihar & Ors. Vs. Smt. Charusila Dasi, AIR 1959 SC 1002** and **Anant Prasad vs. State of**

Andhra Pradesh [AIR 1963 SC 853]. In addition to this, the respondents had fulfilled their part of the obligation when respondent No.2 sent a reply dated 6th of June, 1979 intimating the appellants that there was no need to obtain any permission from the Endowment Department for the purpose of transferring the title in respect of the property in question as the laws of the West Bengal applicable in this case, were not required to take such permission for alienation of trust property. In view of the above, we are, therefore, of the view that there was no obligation on the part of the respondents to get clearance of permission or exemption from the Endowment Department of the State for the purpose of transferring the title of the property in question.

14. It was next contended by Mr Venugopal, learned senior counsel appearing for the appellants, that the High Court was in error in not giving any due regard to all the clauses of the contract for sale especially Clause 11 of the agreement for sale. We do not find any merit in this contention of the learned senior counsel for the appellants. From a mere glance through the judgment of the High Court, it would be evident that the entire agreement was reproduced verbatim and the High Court in the impugned order truly went in

depth into the discussion of the terms and conditions embodied in the contract for sale. We are in agreement with the High Court that its analysis was impregnable. This submission of Mr.Venugopal, learned senior counsel for the appellants, cannot be said to have any merit and is accordingly rejected.

15. It was next contended by Mr. Venugopal that although there is a specific clause in the agreement, namely, clause 10 where one of the conditions has been embodied that "time is the essence of the contract" even then it is well settled that in many instances, a mere clause in the agreement to be insufficient as a sole reason to lead one to the conclusion that "time was to be of essence of the contract". This submission of Mr.Venugopal was hotly contested by Mr.P.S.Patwalia, learned senior counsel appearing for the respondents. In order to decide this question, it would be relevant for us to look into the clauses in the agreement entered into by the parties because they are of utmost importance. In our view, the High Court has rightly pointed out that there are many instances in the said contract where the fact that time is to be of essence of the contract has been specifically mentioned. Clause 10 of the Agreement of Sale which reads : *"Time will be of essence of the contract",* therefore, has

been clearly mentioned in the agreement for sale. However, it is well settled proposition of law by now that time is not to be of essence in case of sale of immoveable property. In **Chand Rani vs. Kamal Rani [AIR 1993 SC 1742]**, this Court clearly held that in the case of sale of immoveable property, there is no presumption as to time being the essence of the contract.

16. Keeping this principle in mind, we now turn to the clauses of the contract for sale entered into by the parties. Clause 3 and 5, in our view, of the contract for sale are of no inconsiderable importance. So far as clause 10 of the agreement for sale is concerned, we have already referred to the same earlier. At this juncture, we now reproduce clause 3 of the agreement for sale which reads :-

> *"**Payment of the balance amount of Rs. 5, 00,000/- (Rupees 5 lacs only) on or before 6-6-1979 is the essence of the agreement.** If the vendees fail to pay the balance amount in time as aforesaid for whatsoever reason, the advance earnest amount paid today shall stand forfeited and the vendees shall have no right whatsoever in the scheduled property and they shall not in any case be entitled to ask for refund of the earnest money which by his non payment of the balance amount as afore-said shall irrevocably stand forfeited."*

17. A reading of this clause, namely, clause 3 of the agreement for sale would clearly show that what was the intention of the parties

to make time to be the essence of the contract. If we read clause 3 and clause 10 of the agreement for sale conjointly, it would not be unsafe for us to conclude that the intention of the parties to enter into the agreement for sale incorporating clauses 3 and 10 in the same for the purpose of making the time being the essence of the contract. Mr.Venugopal, however, in support of his contention that "time was not the essence of the contract" strongly relied on a decision of this Court in the case of ***Swarnam Ramachandram (Smt) & Anr.. v. Aravacode Chakungal Jayapalan*** **[(2004) 8 SCC 689**] and argued that even if clause 10 clearly stipulates that time was the essence of the contract, then also, in the surrounding circumstances, it can always be held that the agreement must be performed within a reasonable time and time was not the essence of the contract. In our view, this decision of this Court would not be applicable in the facts and circumstances of the present case. It is true that it was conclusively held in the aforesaid decision of this Court on facts that time was not to be of the essence of the contract except in a re-conveyance or renewal of lease, the facts and circumstances of that case were totally different from the one at hand. In the said case, there was a specific proviso to one of the clauses in the contract for

sale which clearly stipulates that if payment was not made in time, the appellants who were the vendors could extend such date. Hence, in that decision, this Court in the facts of that case held that time was not to be of essence of the contract which was determined by this Court in the said decision on the intention of the parties as well as the written terms of the agreement. Clauses 3 and 10 of the contract for sale in this case clearly indicate that time was always meant to be of prime importance in the contract. In fact P.W. 1, V.A. Gupta who was examined as a witness for the appellants admitted in his deposition (**Annexure P9**) that time was always the essence of the contract and the appellants were aware of this even before entering into the contract. From the contract for sale also, we can very well see that time was repeatedly mentioned to be of prime importance and it was stated quite clearly that under all circumstances, the appellants would have to definitely deposit the balance amount of Rs.5 lakhs by the date stipulated in the contract for sale. Hence, this submission advanced by Mr.Venugopal, that time was not the essence of the contract cannot at all be accepted and, therefore, we reject the same.

18. Next is the question whether the appellants were ready and willing to complete their part of the agreement. It is well settled that in a suit for specific performance of a contract for sale, it has to be proved that the plaintiff who is seeking for a decree for specific performance of the contract for sale must always be ready and willing to complete the terms of the agreement for sale and that he has not abandoned the contract and his intention is to keep the contract subsisting till it is executed. This readiness and willingness on the part of the appellants in the facts and circumstances of the case, in our view, cannot be found in favour of the appellants. In this case, not only the trial court as well as the High Court on concurrent findings of fact and on consideration of the evidence on record came to the conclusion that the appellants were not ready and willing to perform the terms and conditions of the agreement for sale. In view of our discussions made herein above and in order not to execute the agreement for sale on the part of the appellants, it is evident from Exts.P3, P5 and P7 which would show that the appellants sought clarifications regarding the joining of all trustees in execution of the sale deed, asking the second respondent to enter into another agreement by way of indemnifying the appellants for any loss due to

defect in the title, etc. We do not find any justification to say in the facts and circumstances of the case that the demands of the appellants were justified and reasonable. On the other hand, this demand on the part of the appellants, in our view, was not only unjustified and unreasonable but it was in fact imaginary as rightly pointed out by the trial court in its judgment. In order to show that the appellants were all ready and willing to perform their part of their obligation to complete the agreement was to bear the remaining amount of the contract and then agitate the matter for specific performance before the court. This was also the view expressed by this Court in **Chand Rani vs. Kamal Rani (supra)** wherein this Court held that if the final ultimatum by the seller has been given for payment of balance amount then the best thing for the purchasers is to pay the amount and then take appropriate steps. Therefore, in our view, the appellants having failed to do so, they cannot be allowed to take advantage of their own mistake and conveniently pass the blame to the respondents. In the case of ***K.S. Vidyanam and Ors v. Vairavan*** **[(1997) 3 SCC 1],** it has been held that in an agreement for sale of immoveable properties, the readiness and willingness of the parties to perform their part of the contract is essential. Hence, we

are of the view that the concurrent findings of fact arrived at by the High Court and the trial court on the question of readiness and willingness to perform their part of obligation, so far as the appellants are concerned, cannot at all be interfered with. Accordingly, we are of the view that the High Court has rightly confirmed the concurrent findings of fact arrived at by the courts below on the question of readiness and willingness on the part of the appellants to complete the agreement for sale.

19. For the reasons aforesaid, we affirm the judgment of the High Court so far as the suit for specific performance of the contract for sale is concerned. Since no appeal has been filed by the respondent against the order regarding the forfeiture of the amount in question, we need not go into the question whether such forfeiture was proper or not.

22. For the reasons aforesaid, the appeal is allowed to the extent indicated above. There will be no order as to costs.

…….J.
[Tarun Chatterjee]

New Delhi;
October 28, 2009.

…….J.
[Aftab Alam]