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G. JAYASHREE & ORS.

v.

BHAGWANDAS S. PATEL & ORS.

(Civil Appeal No. 4451 of 2008)

B

DECEMBER 19, 2008

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

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Specific Performance – Agreement of sale for development of land – Failure on the part of vendee to develop – Vendors seeking enforcement of terms of agreement – One of the vendees rescinding from the contract by way of compromise – Another vendee filing suits seeking direction for vendors to get fresh layout plan for the land and for specific performance of contract – Suits decreed – Set aside by High Court – On appeal, held: Suits not liable to be decreed – There was delay in raising the fresh demand by the vendee – Enforcement of the contract by the joint promisee is not maintainable in the facts of the case – The trial court wrongly exercised its discretionary jurisdiction for enforcing the agreement as the plaintiff/vendee had not approached the court with clean hands.

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Appellants' predecessor-in-interest ('G' and 'M') entered into an agreement for sale with respondent Nos. 1 to 3 (owners of land Survey No. 36). They had also purchased the adjacent land from other vendors. As per the terms of the agreement vendees were required to obtain permission for layout. The vendees applied for composite layout for the entire land i.e. also the land which was not the subject matter of the agreement.

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As, grant of layout could have been applied for only by the owners, the vendees paid the amount towards layout permit fees and development charges to the respondents 1 to 3 for the entire land. The layout was granted by the authority concerned subject to certain conditions. The conditions were not complied with.

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Vendors asked the vendees to develop the land in terms of the agreement. Vendees wanted to have a fresh layout only in respect of the land Survey No. 36. Differences arose between the vendees and developers of the neighbouring plots and also between the vendees interse.

Vendee 'M' filed a suit against respondents 1 to 3 alleging breach of contract. After death of vendee 'M' his legal representatives compromised the matter with respondent Nos. 1 to 3.

Vendee 'G' filed suit for mandatory injunction to obtain separate layout for the land in survey No. 36. Thereafter he filed another suit for specific performance of agreement of sale. Trial Court decreed the suits. High Court set aside the decree. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1.1 A suit for enforcement of a contract on the part of the joint promisee is maintainable. But the same is not applicable to the facts of the present case. Keeping in view the consent decree passed by a competent court of law in terms of consent entered into by and between the joint vendee and defendants 1 and 3, the agreement of sale in the same form could not have been enforced. The matter might have been different, had the compromise not been recorded. A part of the contract stood rescinded; it has been worked out. [Paras 26 and 30] [1469-E; 1472-G-H; 1473-A]

Jagdeo Singh and Ors. v. Bisambhar and Ors. AIR 1937 Nagpur 186; Jahar Roy (Dead through L.Rs.) and Anr. v. Premji Bhimji Mansata and Anr. (1978) 1 SCR 770; Jahar Roy (Dead through L.Rs.) and Anr. v. Premji Bhimji Mansata and Anr.; Ponnuswami Gounder v. Boyan and Ors. AIR 1979 MADRAS 130 and Safiur Rahman v. Maharumunnissa Bibi (1897) ILR 24 Calcutta 832, referred to.

1.2. Vendee G. not being a party to the compromise, may not be bound thereby but at least being a party to

A the suit, he keeping in view the interest he had in the matter, should have opposed recording of the said compromise. He without any further delay should have also filed a suit for specific performance of contract. He even did not file a suit for specific performance immediately thereafter. He first filed a suit for mandatory injunction. The fact that he did not choose to file a suit for specific performance of contract at the first instance speaks volumes about his conduct. It may be true that in terms of the agreement, draft layout was to be obtained in respect of Plot No. 36 but the very fact that the parties proceeded on the basis that all the lands would be developed together and steps having been taken in this behalf; it was too late for vendee 'G' to raise a fresh demand. [Paras 24 and 30] [1468-F-G; 1472-G-H; 1473-A]

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D *Nirmala Anand v. Advent Corporation (P) Ltd. and Ors.* (2002) 8 SCC 146, distinguished.

K.S. Vidyanadam and Ors. v. Vairavan (1997) 3 SCC 1 and *Mademsetty Satyanarayana v. G. Yellogi Rao* (1965) 2 SCR 221, referred to.

E 1.3. The civil courts, in the matter of enforcement of an agreement to sell, exercise a discretionary jurisdiction. Discretionary jurisdiction albeit must be exercised judiciously and not arbitrarily or capriciously. A plaintiff is expected to approach the court with clean hands. His conduct plays an important role in the matter of exercise of discretionary jurisdiction by a court of law. [Para 30] [1473-D-E]

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Mohammadia Cooperative Building Society Limited v. Lakshmi Srinivasa Cooperative Building Society Limited and Ors. (2008) 7 SCC 310, relied on.

G *Rame Gowda (dead) by LRs. v. M. Varadappa Naidu (dead) by LRs. and Anr.* (2004) 1 SCC 769, held inapplicable.

Sanjana M. Wig (Ms.) v. Hindustan Petroleum Corpn. Ltd. (2005) 8 SCC 242, referred to.

H 1.4. Trial judge applied the principle of novation of contract having regard to the subsequent conduct of the

parties. The said principle, is applicable as against the vendee 'G'. The agreement in question is not an agreement for sale simplicitor. The parties thereto were aware that only for the purpose of development of the said plot the agreement had been entered into. If that be so, the vendors were right in enforcing the terms of the said agreement/contract keeping in view the aforementioned purpose in mind. The joint promisee might not have rescinded the contract prior to the filing of the suit for damages against the defendants 1 to 3 (vendors) but when he filed the suit claiming refund of the amount of advance which he had paid by way of his share as also the damages, the contract stood rescinded so far as he was concerned. His claim might have been based on the purported breach of the terms of the contract on part of defendants No. 1 to 3, but they had arrived at a compromise. True it is that vendee 'G' filed a written statement in the suit filed by the joint vendee. He expressed his intention to pay the amount of consideration for the entire land but evidently the suit did not go to trial. He did not insist therefor. When an application for settlement arrived at between the joint vendee and the defendant Nos.1 to 3 was filed, he did not object thereto. As he had appeared even before the High Court through counsel, it was obligatory on his part to oppose the said compromise between the vendors and his co-vendee. [Para 25] [1468-G-H; 1469-A-E]

Case Law Reference:

AIR 1937 Nagpur 186	Referred to.	Para 26
(1978) 1 SCR 770	Referred to.	Para 27
AIR 1979 Madras 130	Referred to.	Para 29
(1897) ILR 24 Calcutta 832	Referred to.	Para 29
(2008) 7 SCC 310	Relied on.	Para 30
(2005) 8 SCC 242	Referred to.	Para 31
(1997) 3 SCC 1	Referred to.	Para 32
(1965) 2 SCR 221	Referred to.	Para 32
(2002) 8 SCC 146	Distinguished.	Para 33

A (2004) 1 SCC 769 Held inapplicable. Para 33
CIVIL APPELLATE JURISDICTION : Civil Appeal No.
4451 of 2008.

From the final Judgment and Order dated 13.11.2007 of
the High Court of Judicature of Andhra Pradesh at Hyderabad
B in Appeal No. 1964 of 1995.

WITH

C.A. No. 4452 of 2008

C R.F. Nariman, L. Nageshwara Rao, D. Srinivas Prasad
and D. Mahesh Babu for the Appellants.

P.P. Rao, D. Bharathi Reddy, D. Ramakrishna Reddy, P.
Niroop, Chandan Kumar, N. Rajaraman and Abdul Azeem for
the Respondents.

The Judgment of the Court was delivered by

D **S.B. SINHA, J.** 1. Plaintiffs in a suit for grant of decree
for specific performance of contract are before us aggrieved
by and dissatisfied with the judgment and decree dated
13.11.2007 passed by a Division Bench of the Andhra Pradesh
High Court reversing a judgment and decree dated 25.10.1995
E of the Additional Subordinate Judge, Ranga Reddy district at
Saroornagar, Hyderabad in Original Suit No. 191 of 1987
dismissing the said suit.

2. The basic facts of the matter are not in dispute.

F Respondents No. 1 to 3 are owners of the land measuring
11 Acres and 39 Gunthas in Survey No. 36 situated at village
Satamrai of Shamshabad Mandal in the district of Ranga
Reddy. The said land abuts National Highway No. 7 between
Hyderabad and Bangalore. The said respondents entered into
an agreement for sale with Mohammed Kasim Ali and G.
G Srinivas Reddy, whose heirs and legal representatives are the
appellants, for sale of the said property for a sum of Rs.
18,00,000/-, out of which a sum of Rs. 1,00,000/- was paid as
earnest money.

H Some of the important clauses contained in the said
agreement for sale read as under:

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- "1. The total consideration being Rs. 18 lakhs, the Vendees have paid a sum of Rs.1,00,000/- (Rupees One lakh only) to the Vendor as the earnest money. The balance sum of Rs.17 lakhs shall be paid within 6 months of release of tentative layout HUDA. A
2. The sale shall take effect within 6 months from the release of tentative layout from B.U.D.A. (Bhagyanagar Urban Development Authority). B
3. The actual physical possession of the property shall remain with the Vendors only. However, the Vendors hereby give permission to the Vendees to go over the property and divide the property into different plots. The expenses for dividing plots and leaving roads shall also be borne by the Vendees. The Vendees are entitled at their own expenses to obtain the layout permission from Competent Authority. The Vendees are also hereby permitted to use the Telephone however they shall be liable to pay Telephone bills. C
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- xxx xxx xxx E
5. The above stipulated time for sale to take effect may be extended by the Vendor. But unless the stipulated time is extended in writing by the Vendors, the Vendees shall be liable to pay Bank interest (the interest at which bank lends to its customers) to the Vendors on the unpaid purchase money after two months of stipulated time. F
- xxx xxx xxx
7. The Vendors are owners of 11 acres 39 gunthas falling in S. No. 36. However, the Vendors have fenced the property giving set back from the Road. The Vendees shall be entitled to obtain compensation for the unfenced land from the concerned Government authorities. G
8. As the Vendees are in the business of selling plots, H

A the Vendees shall be liable to pay the sale consideration of each plot proportionately on the same day to the Vendors when the Vendors effect sale of that particular plot."

B 3. Indisputably, besides the above agreement of sale, the said two vendees had also entered into an Agreement of sale with one S. Yadagiri, his sons and some others for sale of land measuring 90 Acres in Survey No. 643 to 658, which is adjacent to the land of the respondents.

C 4. Pursuant to or in furtherance of the said agreements of sale, the said vendees had applied for a joint layout for the entire land of 101.39 acres and a sum of Rs.1,54,725/- was paid by the said vendees towards layout permit fee and developmental charges vide undated receipt. The relevant portion of the said receipt reads as under:

D "It is not part of sale consideration, for any reason, the amount is refunded, the same should be returned without any delay to the PURCHASERS. The Agreement period will be 8 MONTHS after the release of TENTATIVE LAYOUT from HUDA for SURVEY No. 36 of SATMRAI Village and for SURVEY NUMBERS 645, 647, 653, 654, 655/1, 657, 658, 666/2 and PART SURVEY NUMBERS 644, 646, 651, 655 is 15 MONTHS after the release of TENTATIVE LAYOUT from HUDA. After the above period for the unpaid balance of sale consideration the Bank interest will be charged."

F 5. The period of agreement in terms of the said receipt was eight months from the date of release of the tentative layout by Hyderabad Urban Development Authority (for short, "HUDA")

G 6. Indisputably, the owners filed an application for grant of layout not only in respect of Survey No. 36 but also for grant of layout permission in respect of other plots. By a communication dated 26.4.1985, the said Shri Yadagiri was informed about the grant of layout not only in respect of the land of which he was the owner but also in respect of Survey No. 36 subject to the following conditions:

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"(i) The Road shall be formed as per the specifications (enclosed a copy of the specifications).

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(ii) No plot shall be utilized, sold, leased or otherwise disposed of for the residential purpose unless the layout is finally approved by Hyderabad Urban Development Authority.

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(iii) As regards to amenities like water, drainage, electricity, etc; your own arrangement shall be made as the public system is not available in this area."

It was furthermore directed:

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"You are therefore requested to form the roads as stated above within a period of three months from the date of receipt of the draft layout plan and to inform the same to Hyderabad Urban Development Authority. The final approval of the layout plan will be considered only if you fulfill the above said conditions."

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Admittedly, no road was constructed. Plaintiffs wanted to have a fresh layout only in respect of Survey No. 36.

7. It is at that stage the owners of the land -- defendants Nos. 1 to 3 -- by a notice dated 3.7.1985 served upon the vendees through their Advocate requested them to lay the roads as directed by HUDA by 31.7.1985 failing which the said agreement of sale would be deemed to have been terminated and the earnest money of Rs.1,00,000/- paid by the said vendees would stand forfeited. It was contended therein that after the aforementioned draft layout plan was received, the vendees developed "inter se misunderstandings and untrustworthiness resulting in serious inimical attitude amongst themselves".

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It was furthermore contended:

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"9. My clients state that unless you continue to keep up and fulfill your obligations at every stage as agreed in the Contract of sale, you will be consequently in trouble in fulfilling the time scheduled with regard to the payments of the balance sale consideration in installments to my clients

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A and ultimately you will be failing in completing the sale transaction within the time scheduled if you do not commence and complete the road formation work as per the approved draft layout plan within the time fixed by HUDA.

B 10. My Clients state that they are in no way concerned with your inter se mis-understandings and disputes. My clients are only interested in completing the sale transaction of the land covered by Contract of sale within the time fixed in the contract of sale."

C 8. The vendees responded to the said notice stating that the joint layout had resulted in much inconvenience to develop the portion of the land belonging to the owners as it was one of the conditions of the tentative layout that unless entire land was developed, the final layout would not be released. Under these circumstances, it was furthermore contended that the only alternative left was that the owners had to take a separate layout for their lands. It was stated that the vendees 'were ready and prepared to develop the said land immediately as and when the owners obtain a separate layout for the land held by them'.

E 9. Indisputably, Mohammed Kasim Ali did not want to involve himself in the matter of purchase of the said land in terms of the said agreement of purchase. Alleging breach of the terms of the said agreement on the part of the defendant nos. 1 to 3, he filed a suit bearing O.S. No. 19 of 1986 in the Court of V Addl Judge, City Civil Court at Hyderabad praying, inter alia, for the following reliefs:

F "(a) A decree for Rs.90,000/- by way of refund may be passed in favour of the plaintiff and against the persons and the properties of defendants 1 to 3.

G (b) A decree may be granted awarding future bank interest on Rs.90,000/- in favour of the plaintiff and against the persons and the properties of defendants 1 to 3.

H (c) A decree may be passed for Rs.1,50,000/- in favour of the plaintiff as against the persons and

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properties of defendants 1 to 3 as damages. A

- (d) A decree of further interest on Rs.1,50,000/- may be granted in favour of plaintiff as against the persons and properties of the defendants 1 to 3."

10. Indisputably, an interim order was passed therein. The matter was taken to the High Court. The said Mohammed Kasim Ali died on 19.4.1987 and after his death his wife, the legal representative, entered into a compromise with the owners of the land out of the court. B

11. Indisputably, G. Srinivas Reddy filed a suit bearing O.S. No. 171 of 1986 on the file of the Munsif Magistrate, West and South, Ranga Reddy, for grant of mandatory injunction. C

12. The owners also filed a suit for damages being O.S. No. 679 of 1986. G. Srinivas Reddy filed a written statement therein, stating:

"9. The defendants further submits that there is no cause of action at all to file the present suit. The suit itself as a motivated and is a counter blast to the claim made by the defendants to secure a separate layout for the land covered by agreement of sale dated 23.4.1984. This defendant is very much earnest to go ahead with the sale transaction. In that view only he filed O.S. No.171 of 1986 on the file of the Munsif Magistrate, West and South, Ranga Reddy seeking directions against the vendors herein for securing separate layout from HUDA with regard to the land covered by agreement of sale dated 23.4.1984. And also filed O.S. No. 191 of 1987 on the file of Addl. Subordinate Court, Ranga Reddy District for specific performance of the agreement. The plaintiffs herein also have made their appearance in the said suit. D
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10. Under these circumstances, it is submitted that this defendant is ready and willing to perform his obligations under the agreement of sale at all times, and for the reasons not known to this defendant the plaintiffs are avoiding purposely to secure separate layout in respect of the land and thereby causing hurdles for proceedings with G
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A the sale transaction."

The said suit was, however, dismissed for default.

B 13. Indisputably, O.S. No. 171 of 1986 filed by G. Srinivas Reddy on the file of the Munsif Magistrate, West and South, Ranga Reddy, for grant of mandatory injunction was transferred to the Court of Additional Subordinate Judge, Ranga Reddy district at Saroornagar and was renumbered as O.S. No. 21 of 1993.

C 14. G. Srinivas Reddy, thereafter filed another suit for specific performance of the agreement of sale bearing O.S. No. 191 of 1987 in the Court of Additional Subordinate Judge Ranga Reddy district at Saroornagar through his constituted attorney.

Issues were framed in both the suits separately. Issue No. 2 framed in O.S. No. 21 of 1993 reads as under:

D "Whether the Defendants 1 to 3 are liable under the suit agreement of sale to obtain a separate layout for the suit land from the Urban Development Authority concerned?

E 15. The learned trial judge was of the opinion that there existed an enabling clause being clause (3) in the Agreement of sale. According to the learned trial judge, however, as the defendant Nos. 1 to 3 had signed the requisite documents and also received the required fee and charges for the purpose of depositing the same with HUDA with a view to obtain the provisional layout plan, they have accepted their responsibility to obtain layout for the suit land from the Urban Development Authority. It was furthermore held:

G "No doubt it is for the plaintiff and D4 to pay the necessary expenses and also make efforts to obtain the sanction from HUDA being the vendees. The responsibility of D1 to D3 or their G.P.A. is to sign the necessary documents required for obtaining layout sanction and also to deposit the amounts paid by the Plaintiff and D4 required for the fee and charges as they did in the instant case. Since the

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Defendants 1 to 3 agreed to convey the suit property in favour of plaintiff and D4 or their nominees, D1 to D3 are bound to obtain a separate layout for the suit land, at the request of the Plaintiff and D4."

Opining that although the agreement was indivisible, it was held:

"Moreover it cannot be said that each bit of the suit land got equal potentiality. The suit land consists of more than 11 acres and it is revealed that the suit land is adjacent to the road. Therefore, the piece of land which is quite adjacent to the road will have more value than the land beyond the land adjacent to the road. Therefore, the Plaintiff can opt for the specific performance of the entire suit agreement and the suit filed by the 4th Defendant vide O.S. No. 19 of 1986 on the file of the 5th Additional Judge, City Civil Court will not have any adverse effect on the rights of the Plaintiff. At the most the plaintiff can be compelled to pay the balance of sale consideration which remained to be paid after the amount paid by the Plaintiff as earnest money."

16. As regards the issue as to whether the appellants were ready and willing to perform their part of the contract, it was opined that as plaintiffs could purchase the land even without layout and keeping in view the fact that the sale deed was to be executed within a period of eight months from the date of grant of approval for tentative layout plan, the learned trial judge held that there was not much delay in filing the suit for enforcement of the agreement on the part of the plaintiff and he had all along been ready and willing to perform his part of the contract. The learned judge, furthermore, opined that a suit for specific performance of contract at the instance of the plaintiff alone was maintainable although Mohammed Kasim Ali was not to be a party to the deed of sale. The High Court, on the other hand, reversed the said findings of the learned trial judge holding that: (1) in terms of clause 3 of the agreement, it was for the vendees to obtain the tentative layout plan; (2) in view of the stand taken by Mohammed Kasim Ali resulting in

A entering into a compromise between him and the owners of the
land, the contract was not kept alive and in view of the fact that
the suit was instituted by the joint purchaser, the plaintiff could
not enforce agreement of sale against the wish of the joint
purchaser; and (3) the suit for specific performance of the
B contract having been filed five days before expiry of three years
from the date of expiry of contract was a clear pointer to show
that the plaintiff was not ready and willing to perform his part of
contract.

C 17. Mr. R.F. Nariman, learned Senior Counsel appearing
on behalf of the appellants raised the following contentions:

- D i. A suit for specific performance can be instituted
even at the instance of any of the joint promisees
as a common layout work was not contemplated
under the agreement and, thus, the High Court
committed a serious error in arriving at a finding
that the appellants were not ready and willing to
perform his part of the contract.
- E ii. The suit having been filed within the prescribed
period of limitation, the High Court committed a
serious error of law in opining that time was of
essence of the contract and, thus, the suit for
specific performance was not maintainable and it
should have been filed much earlier, although in fact
the same had been filed within a period of one and
F half years from the date of refusal on the part of the
owners – defendants 1 to 3, to abide by the terms
of the contract.
- G iii. Order II Rule 2 of the Code of Civil Procedure being
not applicable in a case of this nature, the High
Court committed a serious error in applying the
principles thereof.

18. Mr. P.P. Rao, learned Senior Counsel appearing on
behalf of the respondents, on the other hand, urged:

- H i. The agreement in question being a development
agreement should be construed having regard to

the purport and object for which the same was executed. A

ii. All parties having proceeded on the basis that development agreement in respect of two different plots of land would be given effect to jointly and a layout having been obtained for both the plots together, the plaintiff could not have been insisted at a later stage for individual or separate layout in respect of the plot in Survey No. 36. B

iii. In any event, in a case of this nature, this Court should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India as the High Court has refused to pass a decree of specific performance of contract. C

19. Indisputably, Appellants' predecessor-in-interest Shri G. Srinivas Reddy and late Mohammed Kasim Ali entered into an agreement jointly. The parties proceeded on the basis that not only plot in Survey No. 36 which was the subject matter of the agreement but also other plots, notice whereof had been taken heretofore, were required to be developed together and permission for common layout should be obtained from the competent authority therefor. Applications for grant of layout could have been filed only by the owners. In terms of the agreement, however, it was for the vendees to obtain the same. Concededly, defendants 1 to 3 signed all papers in relation thereto. They had no doubt received a sum of Rs.1,54,725/- from the vendees on that account, but it has not been disputed that they deposited the amount with the competent authority of HUDA for obtaining the said layout plan. In fact, the combined proposal was placed before the said authority which was granted as would appear from its letter dated 26.4.1985 addressed to Shri S. Yadagiri. The said sanction was granted subject to certain conditions, one of them being that a road was to be formed as per the specifications. D
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20. Indisputably, at least for a period of three months no decision was taken. There is also nothing on record to show that any decision was taken prior to or immediately after the H

A receipt of the said letter dated 26.4.1985; appellants contended that a proposal for a draft layout should be filed with the authority only in respect of plot No. 36.

21. Indisputably, again not only the vendees and developers of the neighbouring plot fell apart, disputes and differences having arisen amongst the vendees inter se.

22. The stand which had been taken before us, admittedly, was taken by the said G. Srinivas Reddy only in reply to the defendant No.1's legal notice dated 3.7.1985. The said notice was responded to by the Advocate appointed by G. Srinivas Reddy alone. No such demand was, thus, raised by Mohammed Kasim Ali.

23. In the matter of performance of the said agreement, the appellants did not raise the same contentions, as has been raised before us as regards the performance of contract on the part of the vendors. At that point of time they did not say that the vendors committed any breach of the condition of the agreement for sale. Even in the said reply dated 25.7.1985, it had not been pointed out that said G. Srinivas Reddy alone was ready and willing to develop the plot being Survey No. 36, irrespective of the stand taken by the Mohammed Kasim Ali.

24. Admittedly, the agreement was entered into on 23.4.1984. The contract was to be performed within a period of eight months. A joint tentative layout plan for both the lands was granted on 26.4.1984. Nothing has been placed on record to show as to when the disputes and differences between the vendees inter se began or when the disputes and differences between the developers of two plots started. It may be true that in terms of the agreement, draft layout was to be obtained in respect of Plot No. 36 but the very fact that the parties proceeded on the basis that all the lands would be developed together and steps having been taken in this behalf; it was too late for G. Srinivas Reddy to raise a fresh demand.

25. The learned trial judge applied the principle of novation of contract having regard to the subsequent conduct of the parties. The said principle, in our opinion, is applicable as

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against the said G. Srinivas Reddy. The agreement in question is not an agreement for sale simplicitor. The parties thereto were aware that only for the purpose of development of the said plot the agreement had been entered into. If that be so, the vendors were right in enforcing the terms of the said agreement/contract keeping in view the aforementioned purpose in mind. The joint promisee might not have rescinded the contract prior to the filing of the suit for damages against the defendants 1 to 3 but then when he filed the suit claiming refund of the amount of advance which he had paid by way of his share as also the damages, the contract stood rescinded so far as he was concerned. His claim might have been based on the purported breach of the terms of the contract on part of defendants No. 1 to 3, but they had arrived at a compromise. True it is that G. Srinivas Reddy filed a written statement in the suit filed by the Mohammed Kasim Ali. He expressed his intention to pay the amount of consideration for the entire land but evidently the suit did not go to trial. He did not insist therefor. When an application for settlement arrived at between Mohammed Kasim Ali and the defendant Nos. 1 to 3 was filed, he did not object thereto. As he had appeared even before the High Court through counsel, it was obligatory on his part to oppose the said compromise between the vendors and his co-vendee.

26. Mr. Nariman may be right that a suit for enforcement of a contract on the part of the joint promisee is maintainable. Reliance has been placed by Mr. Nariman on a decision of *Jagdeo Singh & ors. v. Bisambhar & ors.* [AIR 1937 Nagpur 186], wherein the learned judge laid down the law thus:

"That would certainly appear to cover a case where one or more co-contractors want to enforce the contract against the will of the others. The wording is not 'either side thereto' or even 'either party thereto', but any party thereto'. The word 'any' indicates one out of a number of persons more than two. If only two parties are contemplated the correct adjective would be 'either' or at the most 'both'. The argument advanced was that the contract cannot be enforced piecemeal and that the Courts cannot make a

A new contract for the parties. Of course not; but the plaintiffs
are not doing that. They want the original contract enforced
just as it was made. They want to buy the property and
want the Court to compel their co-contractors Anantram to
buy it along with them just as he had promised to do, and
ask the Court to compel the defendants to sell it to all four
in exact accordance with the agreement. So long as the
plaintiffs are willing to pay the vendors the full price
bargained for and ask them to sell to the very persons with
whom they had contracted I am unable to see how there
is any variation. Any quarrel the purchasers may have
among themselves is not being introduced into this suit.
Each party is getting exactly what he bargained for and it
is no concern of the vendors how these purchasers choose
to arrange about the payment of the purchase price as
between themselves. That is not a part of the agreement.
D All that the purchasers undertook to do was to pay the
money to their vendors and that is being done. There is
no section in the Act which prohibits this. Therefore I am
clear that the plaintiffs have a right to sue for specific
performance even though one of their co-contractors now
refuses to join them. Of course, it is essential in such a
E case that all the parties to the contract should be before
the Court. If any are omitted then I can understand
difficulties arising. But when as here they have all been
joined on one side or the other I am of opinion the suit can
F proceed."

It may, however, immediately be noticed that the court
therein proceeded on the basis that the original contract was
required to be enforced just as it was made even though one
of their co-vendees refused to join them then and only on that
basis the said principle was evolved.

G 27. Reliance has also been placed by *Mr. Nariman on*
Jahar Roy (Dead through L.Rs.) & Anr. v. Premji Bhimji
Mansata & Anr. [(1978) 1 SCR 770] wherein, in terms of the
agreement, defendants were to be entitled to all box-office
H collections, but they were to contribute a sum of Rs. 5275/-

every month towards the expenses and was also to pay the same within the time prescribed. This Court, having regard to the provisions contained in Section 45 of the Indian Contract Act, held as under:

"The section thus deals with devolution of joint rights in the case of joint promises, but it does not deal with a case where, a joint promise, does not want to joint as a co-plaintiff and is arrayed as a proforma-defendant with the specific plea that no relief is claimed against him. The judgment and the decree in this case have in fact enured to his benefit also."

28. This Court, furthermore, while opining that a person cannot be compelled to be a plaintiff, for as is obvious, he cannot be compelled to bring an action at law if he does not want to do so, held:

"At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promisee and the other promisee refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant."

29. The dicta laid down in *Jahar Roy (Dead through L.Rs.) & Anr. v. Premji Bhimji Mansata & Anr.* (supra) was followed by the Madras High Court in *Ponnuswami Gounder v. Boyan & ors.* [AIR 1979 MADRAS 130]. The Madras High Court held that the decision of the Calcutta High Court in *Safiur Rahman v. Maharumunnissa Bibi* [(1897) ILR 24 Calcutta 832] was not good law opining that as both the vendees had different rights, one can purchase the right of the other, stating:

"In my opinion, the ratio of the judgment is that where the plaintiff is entitled to the relief, merely because some of them have refused to join him as plaintiffs or even where they do not want the specific performance of the agreement, his right could not be jeopardised by such refusal by the other parties. In such a case, I am of the view that if the defendants do not want to pay the money, the

A plaintiffs would have to pay the entirety of the consideration payable under the agreement to convey or reconvey, as the case may be and on such deposit of the entire money, he would be entitled to get a conveyance of the entirety of the property though it should normally be in favour of the plaintiff and the defendants in whose favour the agreement was executed. After the conveyance is executed as such, the rights of the plaintiff and the other defendants in whose favour the agreement was executed will have to be worked out. The specific performance as such therefore could not be denied to the plaintiff merely on the ground that defendants 2 and 3 have refused to join as plaintiffs or that they do not want the conveyance. It may also be pointed out that in a case of this nature, it will not be possible for one co-promisee to give up his rights so as to prejudice the rights of the other co-promisees. Therefore, the first defendant also would not be entitled to claim that he will execute only with reference to half of the suit properties on the ground that if the conveyance is executed in favour of the plaintiffs and defendants 2 and 3, defendants 2 and 3 would be entitled to half of the properties conveyed. *The rights as between the plaintiffs and the defendants would have to be worked out with reference to the agreements between them and it is not open to the first defendant to plead that the second and third defendant's right should be separated from that of the plaintiffs.*"

F (Emphasis supplied)

G 30. We would proceed on the basis that the ratio has correctly been laid down in the aforementioned decisions. The question, however is, is it applicable to the fact of the present case? The answer thereto must, in our opinion, be rendered in the negative.

H Keeping in view the consent decree passed by a competent court of law in terms of consent entered into by and between Mohd. Kasim Ali and defendants 1 and 3, the agreement of sale in the same form could not have been enforced. The matter might have been different had the

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compromise not been recorded. A part of the contract stood rescinded; it has been worked out. We, however, must place on record that the terms of the compromise are not placed before us. A

Presumably, that proportionate amount of advance taken must have been refunded; some damages also must have been paid. G. Srinivas Reddy not being a party thereto may not be bound thereby but at least being a party to the suit he, keeping in view the interest he had in the matter, should have opposed recording of the said compromise. He without any further delay should have also filed a suit for specific performance of contract. He even did not file a suit for specific performance immediately thereafter. He first filed a suit for mandatory injunction. We are not concerned with the maintainability thereof. We would assume that the said suit was maintainable. But the fact that he did not choose to file a suit for specific performance of contract at the first instance speaks volumes about his conduct. The civil courts, in the matter of enforcement of an agreement to sell, exercise a discretionary jurisdiction. Discretionary jurisdiction albeit must be exercised judiciously and not arbitrarily or capriciously. A plaintiff is expected to approach the court with clean hands. His conduct plays an important role in the matter of exercise of discretionary jurisdiction by a court of law. In *Mohammadia Cooperative Building Society Limited v. Lakshmi Srinivasa Cooperative Building Society Limited & ors.* [(2008) 7 SCC 310], this Court held: D E F

"71. Grant of a decree for specific performance of contract is a discretionary relief. There cannot be any doubt whatsoever that the discretion has to be exercised judiciously and not arbitrarily. But for the said purpose, the conduct of the plaintiff plays an important role. The courts ordinarily would not grant any relief in favour of the person who approaches the court with a pair of dirty hands." G

31. In *Sanjana M. Wig (Ms.) v. Hindustan Petroleum Corpn. Ltd.* [2005] 8 SCC 242] in regard to exercise of the discretionary jurisdiction, this Court held that the same depends H

A upon the facts and circumstances of each case wherefor no hard and fast rule can be laid down.

32. We may notice that B.P. Jeevan Reddy, J. in *K.S. Vidyanadam & ors. v. Vairavan* [(1997) 3 SCC 1] held that a new look is required to be given and the rigour of the rule is required to be relaxed by courts as regards the principle that time is not of the essence of the contract in case of immovable properties as when the said principle was evolved the prices and values were stable and inflation was unknown, stating:

C "The learned Counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as nonexistent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribes certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract [relating to immovable properties]."

G This court therein noticed the decision rendered in *Mademsetty Satyanarayana v. G. Yelloji Rao* [(1965) 2 SCR 221] where Subba Rao, J. (As His Lordship then was) made a distinction between Indian law and the English law on the subject to hold that some delay may not be a bar in granting a relief of specific performance as the limitation for filing such suit is prescribed under the Limitation Act, 1963, stating:

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"13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 1/2 years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices – according to the defendants, three times – between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff."

33. Mr. Nariman, however, would contend that somewhat different view has been taken by this Court in *Nirmala Anand v. Advent Corporation (P) Ltd. & ors.* [(2002) 8 SCC 146], wherein this Court in a situation of this nature had directed payment of a higher price. Each case is, thus, required to be considered on its own facts. No hard and fast rule, therefore, can be laid down. While determining the lis in a suit for specific performance of contract, no legal principle in absolute terms can be laid down. Relief in a matter of this nature has to be granted keeping in view a large number of facts.

Our attention has also been drawn to a decision of this Court in *Rame Gowda (dead) by LRs. v. M. Varadappa Naidu (dead) by LRs. & anr.* (2004) 1 SCC 769, which, in our opinion, has no application in this case.

34. Keeping in view the facts and circumstances of this case, we think, it is not a case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India. We refuse to interfere with the discretionary jurisdiction exercised by the High Court particularly when the learned trial court had not adverted to this aspect of the matter at all.

35. For the views we have taken, we do not think it necessary to deal with other contentions raised by Mr. Rao including the applicability of the provisions of Order II Rule 2 of the Code of Civil Procedure. The appeals are dismissed with costs. Counsel fee assessed at Rs. 25,000/-.

K.K.T.

Appeals dismissed.