

(2022) 09 GUJ CK 0193
In the Gujarat High Court
Case No : R/First Appeal No. 2876 Of 1996

Hasmukhlal V Shah Decd.Through The Lrs	APPELLANT
Vs	
Pruithavishinh S Champavat & 1 Other(S)	RESPONDENT

Date of Decision : 30-09-2022

Acts Referred:

Limitation Act, 1963 — Article 54
Code Of Civil Procedure, 1908 — Section 96, Order 41 Rule 1
Specific Relief Act, 1963 — Section 20

Citation : (2022) 09 GUJ CK 0193

Hon'ble Judges : Dr. A. P. Thaker, J

Bench : Single Bench

Advocate : B C Thakkar, Jayant P Bhatt, Noopur K Dalal, Jenil M Shah

Final Decision : Allowed

Judgement

Dr. A. P. Thaker, J

1. The present First Appeal under Section 96 of the Civil Procedure Code read with Order-41 Rule -1 has been preferred by the original defendant against the judgment and decree dated 28.6.1996 passed by the learned City Civil Court No.4, Ahmedabad in Civil Suit No. 3458/1986 whereby the decree of specific performance of the contract is passed in favour of the original plaintiffs - respondent herein.

2. The Appellant is the original defendant and respondents are the original plaintiffs before the trial Court. For brevity and convenience the parties are referred to in this judgment as per the status assigned to them before the trial Court i.e. plaintiffs and defendant.

3. It appears from the record that the plaintiffs have filed the Suit for specific performance of contract for sale of a house in a Cooperative Housing Society standing in the name of the defendant. It is the case of the plaintiffs that the defendant is a member of Shantivan Cooperative Housing Society Ltd.,

Narayannagar Road, Paldi, Ahmedabad. As per the bye-laws of the Society, the Society was "tenant ownership society" and the defendant was one of the original promoters of the Society. Bungalow No.7 was allotted to the defendant in the said Society. The area of the Plot is 220 sq. yds and built-up area is 75 sq. yds. Initially, the defendant had let the said bungalow to the plaintiff No.1 in the year 1970 and since then he is in occupation thereof.

3.1 In the year 1979, the defendant filed a suit for eviction against the plaintiff No.1 in the Small Causes Court, Ahmedabad. During the pendency of the said Suit, settlement was arrived at between the parties and the defendant entered into an agreement to sell the bungalow to the plaintiff No.1 and his wife Plaintiff No.2. The said agreement to sell came to be registered on 24.10.1983 and the price was fixed for Rs.1,60,000/-. As per the recital in the said agreement to sell, Rs. 5000/- was paid as earnest money, which would be adjusted towards the said transaction. It is contended that the period of the agreement to sell was fixed upto 30.11.1984 and during the said period, the plaintiffs were to pay Rs.55,000/- to the defendant on or before 30.4.1984 and the balance amount of Rs. 1,00,000/- was to be paid on or before 30.11.1984 and the defendant was to execute the sale-deed on receiving the entire amount. There was also stipulation that in case the plaintiffs failed to pay the amount within the stipulated period, the defendant was entitled to forfeit the earnest money. There was also a stipulation that if the plaintiffs failed to pay Rs.50,000/- on or before 30.4.1984, they were liable to pay interest at the rate of 12% on the said amount till the sale deed is executed. There was also stipulation that the defendant was to satisfy the plaintiffs that he had a clear and marketable title and if the defendant failed to execute the sale-deed inspite of the plaintiff's readiness to pay the amount during the period of the Banakhat the plaintiffs were entitled to sue for specific performance of the agreement. The Clause-5 of the said agreement casts an obligation on the defendant to obtain Income-Tax clearance certificate and permission under Urban Land Ceiling Act and the expense for the same were to be shared equally by the parties. According to Clause-6 thereof, it was the responsibility of the defendant to have his Membership shares and the property transferred in the names of the Plaintiffs in the books of the Society and he undertook to give his signatures and statements wherever necessary and to get the property transferred to the plaintiffs. It is contended by the plaintiffs that as per Clause-7, the parties were to pay in equal share, whatever transfer fee or premium is payable to the Society.

3.2 It is contended that the Society had borrowed loan from the Gujarat Cooperative Society Finance Limited for the construction of houses and the defendant was liable to pay all installments of the loan and other taxes and liabilities payable to the society till the sale-deed was executed. There was Clause-9 in the Agreement to the effect that the period as specified in the Agreement was the essence of the Contract. In Clause-11 thereof, it was noted that the H.R.P Suit was being withdrawn on the same day but liberty was reserved to the defendant to bring a fresh suit in case the agreement could not

be carried out because of the plaintiff's default.

3.3 It is alleged by the plaintiffs that at the time of execution of agreement to sell, they have paid Rs.5000/- as earnest money and in addition to that, they have paid Rs.15,000/- on 28.1.1985 to the plaintiff by way of Draft and, therefore, the period of execution of agreement to sell came to be extended upto 31.7.1985. It is the stand of the plaintiffs that they are still ready and willing to perform their part of agreement to sell and ready to get executed the sale-deed in their favour. It is also averred that on 29.4.1986 they have served the defendant, legal notice for execution of sale-deed in their favour. It is also averred that defendant has not informed them till 31.7.1985 as to the issuance of title clearance certificate under the Urban Land Ceiling Act as well as regarding Income Tax permission and the consent from the Society. It is also contended that even the defendant has not informed them as to repayment of the dues of the Society. It is also contended by the plaintiffs that though defendant has been served with the Notice for specific performance of the contract and for execution of the sale-deed in favour of the plaintiff, the defendant has not complied with the same. On this basis, the plaintiff has filed the aforesaid Suit for the decree of specific performance of the contract and alternatively it is prayed that if in the opinion of the Court, the plaintiffs are not entitled to get executed the sale-deed, then the defendant be directed to repay the amount of Rs.1,60,000/- along with interest at the rate of 12% along with cost of the Suit.

4. The defendant has resisted the Suit by filing written statement at Exh-30, inter alia, contending that the suit is barred by delay, laches, acquiescence and estoppel. The defendant has admitted the factum of his ownership over the bungalow in question as well as the execution of the agreement to sell between the parties and the stipulation made therein. It is the specific case of the defendant that regarding title and marketability of the property, he has already satisfied the plaintiffs. It is also contended that for obtaining Income Tax Clearance Certificate necessary proposal has been sent to the Income-Tax Department. The defendant has contended that the plaintiffs himself have committed the breach of the condition as they have not paid Rs.55,000/- within stipulated period i.e. 30.4.1984. According to the defendant, therefore, there was no question of any further action on his part for title clearance. It is also contended that plaintiffs have not fulfilled their part of obligation under the agreement to sell. It is also contended that the defendant is paying regular installment and the dues of the Society. It is contended that it is the responsibility of the plaintiffs to pay municipal tax and education cess and other taxes to the municipality.

4.1 The defendant has denied the contention of the plaintiffs that in addition to Rs.5000/- as earnest money, the plaintiff has paid Rs.15000/- and thereby period of agreement has been extended upto 31.7.1985. It is contended that as per the terms of the agreement, the plaintiff has not paid stipulated amount in stipulated period and, therefore, breach has been committed by the plaintiffs

and, therefore, the averment made on behalf of plaintiffs that they were ready and willing to perform their part of contract, is false. It is also contended that the Notice dated 29.4.1986, issued by the plaintiff to him, has been already been replied by him vide reply dated 21.5.1986. It is specifically stated by the defendant that by Notice dated 19.9.1985 defendant has already cancelled the agreement to sell and, therefore, now there is no question of execution of any sale-deed on the basis of the alleged agreement to sell executed between them.

4.2 It is contended by the defendant that as the plaintiffs could not arrange for making of the payment as stipulated in the agreement to sell, the defendant vide its Notice dated 2.11.1984, informed the plaintiff for execution of agreement to sell. Thereupon, the plaintiffs informed the defendant to come to Ahmedabad on 29.1.1985 and receive the amount and, therefore, the defendant came from Bombay on the said date to Ahmedabad and at that time the plaintiffs could arrange only for Rs.15000/-, and requested the defendant to extend the period of agreement upto 31.7.1985 and gave assurance that within that period they will arrange for the remaining amount and will get the sale-deed executed in their favour. It is also contended that thereafter since no amount was paid by the plaintiffs, the defendant issued notice dated 19.9.1985 regarding the breach of agreement to sell and informing that now there is no question of performance of the agreement to sell and plaintiffs were also informed that the earnest money has been forfeited by the defendant. On all these grounds, it is prayed by the defendant to dismiss the Suit of the plaintiffs.

5. On the basis of the pleadings of the parties and the material placed on record, the trial Court has framed the following issues at Exh-18:

1. Whether the suit is barred by delay, laches, acquiescence and estoppel?
2. Whether the plaintiffs prove that plaintiffs were ready and willing to perform their part of the contract contained vide the suit Banakhat dated 24.10.83 at all material time?
3. Whether the plaintiffs prove that defendant has committed breach of the suit banakhat dated 24.10.83. If yes, whether the plaintiffs are entitled to specific performance of the said Banakhat?
4. Is it proved that the banakhat dated 24.10.83 stood cancelled and the earnest money paid by the plaintiffs stood forfeited on account of breach committed by the plaintiffs?
5. Whether the plaintiffs are entitled to claim Rs.1,60,000/- by way of damages as an alternative relief?
6. To what relief, if any, the plaintiffs are entitled to claim?
7. What order and decree?

6. It appears from the record that the defendant No.2 Vimlaben Pruthvising Champavat has been examined at Exh-21 and plaintiffs have also examined one

Mr. K.D.Acharya as witness at Exh-63. Whereas the defendant has examined himself at Exh-82. It appears that the parties have also produced documentary evidence which consist of original Banakhat and the Notice correspondence exchanged between them.

7. On the basis of the evidence on record, the learned trial Court has ultimately decided Issue Nos. 1 and 4 in Negative and Issue Nos. 2 and 3 in Affirmative and Issue No.5 came to be answered as does not survive and ultimately the Suit of the plaintiffs for specific performance has been decreed with cost with the direction to the plaintiff to deposit Rs.1,40,000/- in the Court within 3 months and thus further directed that from the amount being deposited, the defendant shall take necessary steps for obtaining necessary permission from Shantivan Cooperative Housing Society to sell the house. It is also directed that the plaintiff shall pay half of the transferred fee or premium payable to the Society and on such permission being granted, the defendant is directed to execute registered sale-deed in favour of the plaintiffs. Liberty has been reserved to the defendant to withdraw the amount of deposited after the sale deed is executed.

8. Being aggrieved by the aforesaid decree and judgment of the trial Court, the original defendant has preferred this First Appeal under Section 96 assailing the same on the grounds stated in the memo of Appeal. The main grievance raised by the defendant is that as there was a clear breach of agreement to sell by the plaintiff and time being essence of the contract and prior to the issuance of the Notice by the plaintiffs to the defendant for execution of the sale-deed, he has already informed the plaintiffs regarding the cancellation of the sale-deed as plaintiffs failed to pay the amount as stipulated in stipulated period, there was no ground available to the plaintiff to file the Suit and the trial Court has materially erred in appreciating the entire facts and circumstances and the evidence on record. It is also contended that considering the peculiar facts of this case, no decree for specific performance ought to have been passed. It is also contended that the trial Court has not properly appreciated the evidence on record and erred in facts and law and has materially erred in passing the decree of specific performance in favour of the plaintiffs.

9. Heard Mr. Bhargav Thakkar, learned advocate for the defendant- Appellant and Mr. Jenil Shah, learned advocate for respondent No.2- original plaintiff at length. Perused the material placed on record and the decisions cited at bar.

10. Mr. Bhargav Thakkar, learned advocate for the defendant- appellant has submitted that the Bungalow in question belongs to the defendant and it was rented to the plaintiffs. Thereafter, a suit for eviction was filed against the plaintiffs. He has submitted that during the pendency of the Suit, there was a compromise arrived at between the parties and it was agreed to sell the Bungalow in question to the plaintiffs for consideration of Rs.1,60,000/- and Banakhat to that effect was executed. Mr. Thakkar has submitted that there were specific stipulation regarding the mode of payment in a stipulated time period. He has submitted that agreement was to be executed till 30.11.1998. While

referring to the Banakhat, he has submitted that Rs.5000/- was paid towards earnest money and the Plaintiffs were to pay Rs.55,000/- on 30.4.1984 and remaining amount of Rs.1,00,000/- was to be paid on 30.11.1984. He has also submitted that there was stipulation in the Banakhat that if the amount is not paid during the stipulated time, then, the defendant has every right to cancel the same and forfeit the earnest money. According to his submission, the plaintiffs did not pay the amount within the stipulated period and had requested for extension of time by paying Rs.15,000/-. He has submitted that even thereafter, the plaintiffs did not pay the amount to the defendant and hence, the defendant, by communication cancelled Banakhat and informed the plaintiff regarding forfeiture of the earnest money. He has submitted that the plaintiffs have committed breach of terms of the Banakhat and, therefore, plaintiffs cannot insist for the specific performance of the contract. He has submitted that the defendant is residing at Bombay. He has submitted that even the Notice issued by the plaintiff was duly replied by the defendant and further submitted that when there was a clear cut Notice issued by the defendant regarding termination of agreement to sell way back in the year 1985, now there is no question of any obligation on the part of defendant to execute the agreement to sell in question. He has submitted that the Suit has been filed in the year 1986. While referring to the evidence on record, he has submitted that the trial Court has committed error of facts and law by passing the impugned decree in favour of the plaintiffs and against the defendant. He has submitted that the once there was clear cut breach committed by the plaintiffs in not paying the agreed amount as per the stipulated period and the termination of agreement by the defendant prior in point in time, the trial Court ought not to have passed the impugned decree against the defendant. He has prayed to set-aside the judgment and decree and dismiss the Suit of the plaintiff. He has relief upon the following decisions in support of his submissions:

10.1 In the case of Coromandel Indag Products Private Limited v. Garuda Chit and Trading Company Private Limited and Another, reported in (2011) 8 SCC 601, wherein Para-20 reads as under:

"20) It is also relevant to point out the stand of the parties as reflected in their pleadings and evidence. In terms of 16(c) the Specific Relief Act, 1963, it is incumbent on the party, who wants to enforce the specific performance of a contract, to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract.

Explanation appended to this sub-section (c) makes it clear that if a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court. However, the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. It is seen from the pleadings that necessary averments have been made in terms of sub-section (c) of 16."

10.2 In the case of *Vimalleshwar Nagappa Shet v. Noor Ahmed Shariff and Others*, reported in (2011) 12 SCC 658, wherein it is observed in Para-11, as under:

"11) It is settled law that Section 20 of the Specific Relief Act, 1963 confers discretionary powers. [vide: *M. Meenakshi & Ors. vs. Metadin Agarwal*, *Nirmala Anand vs. Advent Corporation (P) Ltd. & Ors.*, *Parakunnnan Veetill Joseph's Son Mathrew vs. Nedumbara Karuvila's Son & Ors.* It is also well settled that the value of property escalates in urban areas very fast and it would not be equitable to grant specific performance after a lapse of long period of time".

10.3 In case of *Shankarlal Bijreja v. Ashok B. Ahuja*, reported in 2010 SCC OnLine Chh 287, wherein it is observed in Para- 13 as under:

"13. By applying the aforesaid legal proposition laid down by the Supreme Court in teh dicta of above referred cases in the facts and circumstances of the present case, it is crystal clear that the appellant utterly failed to prove his readiness and willingness to perform his part of the contract. It cannot be overlooked that the appellant never came forward with the entire amount of consideration for getting the sale ded executed in his favour. Every time, he insisted on delivery of possession before such payment, also insisted for execution of sale deed in part in proportion to the amount paid by him which was not justified. Such an insistence could only be regarded as trying to vary the terms of the agreement. On the whole, the transaction failed primarily on account of non-payment of entire amount of consideration either wihint the time stipulated in the agreement or within the extended time i.e. till 31.12.2003. If on this account, it was treated as a breach it was understabdable and could not be said to be unjustified. If we analyse the amount paid by the appellant in part on various occasions, it appears that the said amount was also arranged by Shrichand Wadhwa i.e. brother-in-law of the appellant. It appears, the appellant was not completely aware about the fact, how and in what manner the amount was paid to the respondent. This fact also shows lack of readiness on the part of the appellant. This an be analyzed in another way also. The appellant who was insisting upon regularly on demarcation and prior possession of the suit property, has suddenly come forward with the suit claiming specific performance of contract without insisting upon prior possessio and without disputing title, area description and identity of the suit property. Had there been a case in which the appellant would have come forward with the entire amount with the entire amount of consideration and would have requested the respondent: "please take the entire amount of consideratin and execute the sale deed and hand over its vacant possession to him" and if in that circumstances, the respondent was unable to hand over possession of the suit property, it could have been said that the respondent was at the fault. This is not a case here. In the above circumstances, it cannot be said that equity lies in appellant's favour and in our considered opinon, the suit has rightly been dismissed".

10.4 In case of *K.S. Vidyanadam and Others v. Vairavan*, reported in (1997) 3

SCC 1, wherein it is observed in Para-14, as under:

"14. Sri Sivasubramaniam then relied upon the decision in *Jiwan Lai (Dr) v. Brij Mohan Mehra* to show that the delay of two years is not a ground to deny specific performance. But a perusal of the judgment shows that there were good reasons for the plaintiff to wait in that case because of the pendency of an appeal against the order of requisition of the suit property. We may reiterate that the true principle is the one stated by the Constitution Bench in *ChandRani* Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property".

10.5 In case of *His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar*, reported in (1996) 4 SCC 526, wherein it is observed in Para-2, as under:

"2. There is a distinction between deadness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27.2.1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's part of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was no ready no capacity to perform his part of the contract as he had no financial capacity to payt the consideration in cash as contracted and intended to bit for the time which disentitles him as time is the essence of the contract".

10.6 In case of *Chand Rani(Smt) (Dead) by LRs. v. Kamal Rani (Smt) (Dead) by Lrs*, reported in (1993) 1 SCC 519, wherein Para-9, reads as under:

"9. Aggrieved by the same, the matter was taken up in appeal under R.F.A. (O.S) No. 15/75. The Division Bench of the High Court on an elaborate consideration of the oral and documentary evidence held that the non-payment of Rs. 98,000 by the plaintiffs on or before 6.9.71 would entitle the defendant to treat it as a breach of contract. The insistence of the plaintiffs to obtain the income-tax clearance certificate and redemption of the property before the payment of Rs. 98,000 was unjustified. Such an insistence could only be regarded as trying to vary the terms of the agreement. On the whole, the transaction failed primarily on account of non-payment of Rs. 98,000 by 6th of September, 1971. If on this

account it was treated as a breach it was understandable and could not be said to be unjustified. In the result, the decree for specific performance was set aside. The plaintiffs were held entitled to the refund of the sum of Rs. 30,000. To this effect, a decree was granted in their favour. Challenging the same, special leave to appeal was preferred. This Court while granting special leave ordered as under:

"We grant leave in the light of the observations brought to our notice in an earlier decision of this Court referred to by the High Court. Nevertheless, we feel the position of law so decided deserves reconsideration by this Court. And therefore we direct that this appeal be placed before the learned C.J. for directions that it be heard by a larger Bench. Stay appln. allowed to be withdrawn".

10.7 In case of *Fatehji and Company and Another v. L.M. Nagpal and Others*, reported in (2015) 8 SCC 390, wherein it is observed in Para-5 as under:

"5.....Article 54 of the Limitation Act stipulates that the limitation for filing the suit for specific performance of the contract is three years from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused."

10.8 In case of *Kanshi Ram v. Om Prakash Jawal and Others*, reported in (1996) 4 SCC 593 , wherein Para-

3 reads as under:

"3.The learned counsel for the appellant has fairly contended that specific performance of the contract is within the discretion of the Court and is not a matter of course. The courts in granting the decree for specific performance should exercise the discretion on sound principles of law. In the event of working out the equities, the courts would in an appropriate case, grant alternative relief, instead of granting the decree for specific performance. In support thereof, he sought to place reliance on the judgment of this Court in *S.Rangaraju Nidu v. S. Thiruvarakkarasu*. He contended that the appellant is prepared to pay a sum Rs.10 lakhs as alternative relief; though the respondent claimed Rs.12,000/- instead of granting specific performance at this distance of time which would be unjust, inequitable and unfair".

11. Per contra, learned advocate Mr. Jenil Shah for the plaintiffs has vehemently submitted that the trial Court has not committed any error of facts as, as per Clause-4 of the Banakhat duty was casted upon the seller to get title clearance. He has also referred to the various Clauses of Banakhat and has submitted that the title of the defendant was not cleared by the defendant. He has submitted that there are notice transactions between the parties since the defendant did not execute the sale-deed in favour of the plaintiffs, the plaintiffs were constrained to file suit in the year 1986 for specific performance of contract. He has submitted that when the execution of agreement to sell is admitted by the defendant, in view of the amended Section 20 of the Specific Relief\ Act, no

discretion is available to the Court and the Court has to pass decree of specific performance in case of breach of terms of agreement to sell by the seller. He has also submitted that in view of the decree passed by the trial Court, the plaintiffs have already deposited the amount before the trial Court. He has also submitted that the original decree is of the year 1996 and considering the time lapsed, it is unjust to set-aside such decree at this point of time. He has submitted that there was no fault on the part of the plaintiff and time was not the essence of the contract and the contract being related to immovable property as well as considering the fact once time was extended by the defendant, by accepting Rs.15,000/-, passing of the decree by the trial Court in favour of the plaintiff for specific performance of the contract is legal and valid. He has submitted that when it is the stand taken by the defendant that there was breach committed by the plaintiff, then it was for the defendant to prove such breach and as the defendant failed to do so, the impugned decree of the trial Court does not require any interference of this Court. He has prayed to dismiss the present Appeal and confirm the decree passed by the trial Court. Mr. Shah, learned advocate has relied upon the following decision in support of the submission:

11.1. In the case of R.C. Chandiok v. Chuni Lal Sabharwal, reported in 1970 (3) SCC 140, wherein it is observed in Paras- 6 and 7, as under:

"6. We are unable to concur with the reasoning or the conclusions of the High Court on the above main points. It is significant that the lease deed was not executed in favour of the respondents by the Government until April 21, 1956. So long as their own title was incomplete there was no question of the sale being completed. It is also undisputed that according to the conditions of the lease the respondents were bound to obtain the sanction of the Rehabilitation Ministry transferring the plot to any one else. The respondents were fully aware and conscious, of this situation much earlier and that is the reason why on August 11, 1955 it was agreed while extending the period for execution of the sale deed that the same shall be got executed after receipt of the sanction. The statement contained in Exhibit P-7 that the execution of the sale deed "by us cannot be complete without the said sanction" was unqualified and unequivocal. The respondents further undertook to inform the appellants as soon as sanction was received and thereafter the sale deed had to be executed within a week and got registered on payment of the balance amount of consideration. We are wholly unable to understand how in the presence of Exhibit P-7 it was possible to hold that the appellants were bound to get the sale completed even before any information was received from the respondents about the sanction having been obtained. It is quite obvious from the letter Exhibit P-8 dated June 15, 1956 that the respondents were having second thoughts and wanted to wriggle out of the agreement because presumably they wanted to transfer it for better consideration to some one else or to transfer it in favour of their own relation as is stated to have been done later. The respondents never applied for any sanction after August 11, 1955 and took up the position that they were not prepared to wait indefinitely in the matter and were therefore cancelling the agreement "for

want of certainty". We are completely at a loss to understand this attitude nor has any light been thrown on the uncertainty contemplated in the aforesaid letter. It does not appear that there would have been any difficulty in obtaining the sanction if the respondents had made any attempt to obtain it. This is obvious from the fact that when they actually applied for sanction on November 11, 1956 it was granted after a week. The statement contained in Exhibit P-10 dated July 4, 1956 that the sanction was not forthcoming has not been substantiated by any cogent evidence as no document was placed on the record to show that any attempt was made to obtain sanction prior to November 11, 1956. Be that as it may the respondents could not call upon the appellants to complete the sale and pay the balance money until the undertaking given in Exhibit P-7 dated August 11, 1955 had been fulfilled by them. The sanction was given in November, 1956 and even then the respondents did not inform the appellants about it so as to enable them to perform their part of the agreement of safe. There was no question of time having ever been made the essence of the contract by the letters sent by the respondents nor could it be said that the appellants had failed to perform their part of the agreement within a reasonable time.

7. On behalf of the respondents it has been urged that in spite of the letters of the respondent by which the agreement had been cancelled the appellants did not treat the agreement of sale as having come to an end and kept it alive. They were therefore bound to send a draft of the conveyance and call upon the respondents to execute the sale deed and get it registered on payment of the balance of the sale price as soon as they came to know directly from the Housing and Rent Officer that sanction had been granted. This they failed to do and it must be inferred that they were not ready and willing to perform their part of the agreement. Our attention has been invited to a statement in Halsbury's Laws of England, Vol. 34, Third Edn. at page 338 that in the absence of agreement to the contrary it is the purchaser who has to prepare the draft conveyance and submit it to the vendor for approval. No such point was raised at any prior stage and in any case we do not consider that after the cancellation of the agreement by the respondents it was necessary or incumbent on the appellants to send any draft conveyance. The very fact that they promptly filed the suit shows their keenness and readiness in the matter of acquiring the plot by purchase. It must be remembered that the appellants had not only put in an advertisement in newspapers about the existence of the agreement but had also sent a letter Exhibit P-13 on September 12, 1956 declaring their readiness and willingness to pay the balance of the purchase price on the respondents procuring the sanction. The appellants further made enquiries directly from the authorities concerned about the sanction. 'Readiness and willingness cannot be treated as a straight jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. In our judgment there was nothing to indicate that the appellants at any stage were not ready and willing to perform their part of the contract. The High Court had

taken another aspect of readiness and willingness into consideration, namely, the possession of sufficient funds by the appellants at the material time for payment of the balance of the sale price. Romesh Chand P.W.6 had stated that his father was a Head Master since 1922 in a High School and he was also doing import business. He gave up service in 1934. The son joined the father in his business in the year 1928 and his other brother appellant No. 2 also joined that business some years ago. The bank account was produced which showed that between July 18, 1955 and December 31, 1955 the appellants' father had in his account a credit of over Rs. 15,000/- but thereafter between January, 1956 and March, 1956 an amount of Rs. 15,000/- odd had been withdrawn. According to the High Court after these dates there was nothing to show that the appellants had any funds. The evidence of Romesh Chand P.W. 6 that the family had an amount of Rs. 40,000/- lying at their house was not believed. Now in the first place the relevant period for determining whether the appellants were in a position to pay the balance of the sale price was after November, 1956 when sanction had obtained by the respondents for transfer of the plot from the Rehabilitation Ministry. The appellants had admittedly paid without any difficult Rs. 7,500/- as earnest money and the bank account of the father showed various credit and debit entries from time to time. On March 5, 1956 an amount of Rs. 12,720/- had been withdrawn by a cheque in favour of Romesh Chand P.W. 6. According to his statement this amount was withdrawn because his father was very ill and it was decided to withdraw the amount at that time. It was deposited with his mother and remained with her throughout. There is no material or evidence to show that this amount had been expended or spent and that the statement of Romesh Chand was false on the point. Even if the version that Rs. 40,000/- in cash were lying at the house of the appellant is discarded at least an amount of Rs. 12,720/- must have been available at the material and relevant time. The appellants were carrying on business and there is nothing to indicate that they were not in a position to arrange for the remaining sum to make up the total of Rs. 15,000/-. We are, therefore, unable to accept that the appellants, who had all along been trying their utmost to purchase the plot, did not have the necessary funds or could not arrange for them when the sale deed had to be executed and registered after the sanction had been obtained".

12. In rejoinder, Mr. Thakkar has submitted that the Plaintiffs were tenants in the Bungalow and that they were knowing that the title of the defendant is clear. He has also submitted that since it is a Bungalow there is no applicability of the provisions of the Urban Land Ceiling Act. He has also submitted that there is no evidence produced on record regarding readiness of the plaintiffs to make payment. He has also submitted that as per Exh-71 and 72 dues of the Society were already paid by the defendant and title was already cleared, however, the plaintiffs did not pay the amount in stipulated period. He has also submitted that as per the stipulation in the agreement to sell, unless and until defendant receives the entire sale consideration, he cannot apply to Society for permission to sell the Bungalow in question to the plaintiffs. He has submitted that

considering the overall facts and circumstances of the case, it is a case wherein there is a breach committed by the plaintiffs and as per the stipulation in the agreement itself, the defendant has already exercised its right of cancellation of the agreement to sell and forfeiture of the earnest money prior to the issuance of the notice by the plaintiff. Therefore, according to him, there was no question of granting any relief of specific performance of the contract by the defendant. He has submitted that the trial Court has committed serious error of facts and law in passing the impugned decree. Regarding the decision cited by learned advocate for the plaintiffs-respondents herein, Mr. Thakkar has submitted that the facts of that case was different from the present one and, therefore, the cited decision is not applicable in the present facts situation.

13. Admittedly, this First Appeal is filed under Section 96 of the CPC. Being the First Appellate Court, as a last Court of findings of fact, it is necessary for this Court to re-appreciate the entire oral and documentary evidence and to find out as to whether the impugned judgment and decree is sustainable in the eyes of law or not.

14. Now, admittedly, in present case, considering the pleadings of the parties, there is not dispute as to the factum that defendant is owner of the property and the plaintiffs were residing as tenant in the premises and there was rent Suit filed between the parties and it was agreed by way of agreement to sell (Banakhat) that the suit property Bungalow would be sold by the defendant to the tenant in consideration of Rs.1,60,000/-. It is not disputed that the agreement to sell was executed between the parties, which is having various stipulations regarding payment of earnest money as well as the time period for making the payment of entire sale transaction. There is also stipulation in the agreement that in case of failure on the part of the purchaser in making payment in stipulated period, the vendor i.e. seller is entitled to cancel the agreement and to forfeit the earnest money. Now, there is no dispute regarding the execution of such agreement to sell between the parties. The main question is as to who is at fault for non-fulfillment for agreement to sell. The defendant has accepted that there was agreement to sell and it is specific stand that plaintiffs have committed breach of agreement to sell and thus burden is shifted on the defendant to prove the breach of condition of agreement to sell on behalf of plaintiffs. Therefore, considering pleadings of the parties and the documentary evidence, the following points arise for determination of the present Appeal:

1. Whether the defendant proves that the plaintiff has committed breach of terms of the agreement to sell?
2. Whether the defendant proves that time was the essence of the contract and within stipulated period the plaintiffs have not paid the consideration price to him?
3. Which party is at fault for the breach of agreement to sell?
4. Whether the impugned judgment and decree of the trial Court is sustainable in

the eyes of law?

5. Whether the plaintiffs are entitled to claim damages as an alternative relief?

6. What order and decree?

15. My findings on the above points, for the reasons given below, are as under:

1. In the affirmative.

2. In the affirmative.

3. Plaintiffs are at fault.

4. In the Negative.

5. In the Negative.

6. As per final order.

16. REASONS:

POINT NOS. 1 TO 5: Since the evidence and facts on record, pertaining to all these issues are interwoven, to avoid repetition, the same are discussed together. Plaintiff No.2 Vimlaben Pruthvisinh Champavat in her evidence at Exh-21; has narrated the relation between the parties of the execution of the agreement to sell with stipulations and has deposed that once the agreement to sell was executed, the outer limit was fixed as 30.11.1984. It is stated by her that during that period, defendant has to get title clearance from the Cooperative Housing Society. According to her, the defendant did not comply the said procedure within stipulated period. She has stated that as per the terms of agreement, they have to pay Rs. 55,000/- before 30.4.1984 to the defendant but since defendant was residing at Bombay, he never met the plaintiff. She has stated that as defendant was not available, the plaintiffs had met Mr. Thakkar, learned advocate for the defendant and told that the outer limit of Banakhat has come to an end. It is her version that Mr. Thakkar told that the defendant will come within one or two months and the sale-deed will be executed and, therefore, they have waited for more than one month and thereafter the defendant came to Ahmedabad and met the Plaintiffs. She has deposed that at that time, the defendant had demanded Rs.1,30,000/- from the plaintiffs and told them that he will get it registered after completion of proceedings regarding the Society. She has deposed that at that time she had told the defendant that the defendant should accept the entire sale consideration and execute the sale-deed. It is her version that at that time the defendant told them to pay some amount so that time for execution of agreement to sale be extended. She has deposed that, therefore, on 28.1.1985, they have paid Rs.15,000/- by Draft to defendant and on that basis, the defendant had extended the time to execute the said agreement to sell upto 31.7.1985 and he has also put his signature to that effect in the agreement to sell at Exh-22.

16.1 She has also deposed that thereafter, after one month the defendant came

to Ahmedabad and demanded further Rs.15,000/- and at that time the plaintiff paid Rs.12,500/- and at that time the defendant told them that the receipt will be issued by his advocate on the next date . It is her version, thereafter, the defendant left for Bombay and his advocate did not give any receipt for this amount. She has also stated the defendant did not come to Ahmedabad on 31.7.1985 nor has he initiated any proceedings for getting necessary permission from the Society.

16.2 She has also stated that thereafter the plaintiffs have issued Notice dated 29.4.1986, which has been received by the defendant. She has stated that the plaintiffs are ready and willing to perform their part of agreement to sell and they have already deposited the entire amount of consideration in the Bank in Fixed Deposit. She has stated that now the price of the Bungalow is raised and it would be more than Rs.2,50,000/-.

16.3 During her cross-examination, she has accepted that her husband Plaintiff-1 is tenant in the said premises since last 25 years and they are knowing since very beginning that the defendant is residing at Bungalow and they also know his address of Bombay. She has admitted that suit was filed by the defendant for eviction against her husband. She has admitted that they have received the Notice dated 26.11.1985 at Exh-37 sent by the defendant. The Registered A.D. thereby is at Exh-38. She has also stated that they have issued public notice in Gujarat Samachar Daily on 27.1.1984. She has stated that the defendant has not informed them regarding the clearance from Income Tax as well as title clearance from the Society. She has denied that no objection was raised by the Society against the public notice issued by them. She has admitted that the residents of Bungalow Nos. 9 and 10 have raised objection against the public notice issued by them. She has admitted that she knows the factum of correspondence in relation to that objection. She has shown her ignorance as to what correspondence has been exchanged between the defendant and the Society. She has admitted that when they received the letter dated 7.2.1984, there was no elected body of the Society and Registrar was appointed as Administrator. She has admitted that the residents of Bungalow Nos. 9 and 10 have no objection if the defendant transfers the Bungalow in question in favour of the plaintiff.

16.4 She has also admitted that the Suit between her husband and the defendant regarding eviction from the Bungalow is pending. She has stated that her husband has also filed Application for fixation of standard rent against the defendant. She has admitted that she knows various Clauses of the agreement to sell at Exh-22. She has admitted that they have received the notice at Exh-36 dated 26.11.1985. She has stated that necessary reply has been sent by their advocate. She has denied the suggestion that no reply to the aforesaid notice was given by their advocate or by them. She has admitted that as per Clause-3 of the agreement to sell, the plaintiffs have to pay Rs.55,000/- to the defendant before 30.4.1984. She has admitted that the plaintiffs had to pay Rs. 1 lakh before 30.11.1984 to the defendant. She has denied the suggestion that during

the period from 30.4.1984 to 30.11.1984 the plaintiffs have not paid the requisite amount as stipulated in the agreement to sell to the defendant. She has voluntarily stated that as defendant was not residing at Ahmedabad, his advocate has told them that they should not worry. She has stated that this fact has been known to them when the legal suit notice was issued as well as at the time of filing the Suit. She has admitted that on the payment of Rs.15,000, the defendant has extended period of agreement to sell upto 31.7.1985. She has also admitted that Bungalow No.7 has been allotted to the defendant and it is also mutated in the government record in the name of the defendant. She has admitted that the defendant has informed them vide Exh-42 that the objection is raised by residents of Bungalow Nos. 9 and 10 and even withdrawn by them. She has admitted that she has not verified the record of the Society as to the outstanding installment against the defendant. She has admitted that there was a stipulation in the agreement that if the plaintiffs failed to pay Rs.55,000/-, on or before 30.4.1984, then the defendant will be entitled to get interest at the rate of 12% p.a. thereof and the entire amount was to be paid before 30.11.84. She has stated that there were correspondence regarding agreement to sell and the same are produced in the matter. She has denied that the agreement to sell has already been cancelled by the defendant vide Notice dated 30.9.85 and yet they have filed a false suit.

17. On perusal of the evidence of Plaintiff's witness Kantilal Devshankar Acharya at Exh-63, it is revealed that he is a witness who, at the relevant point of time, was member of the Society and the factum of administration of the Society by the Registrar and regarding the ownership of the Bungalow No.7 by the defendant and regarding payment by defendant to the Society. He has produced bye-laws of the Society and the correspondence entered into between the parties. However, from his evidence, it is revealed that Bungalow No.7 was allotted to the defendant and the plaintiffs are residing in the same.

18. On perusal of the evidence of the defendant Hasmukhlal Shah at Exh-82, it reveals that he has narrated the factum of his ownership of the Bungalow and regarding the agreement to sell being executed between the parties. He has narrated that the time was essence of the Contract and as plaintiffs were not in a position to pay the entire amount, they have paid Rs.15,000/- and the execution of the agreement to sell was extended upto 31.7.1985 and he has made endorsement thereof below Exh-22 i.e. agreement to sell to that effect. He has deposed that thereafter the plaintiffs have not paid any amount. He has denied that the plaintiffs have paid further amount of Rs.12,500/-. He was ready and willing to execute the sale-deed if the entire amount is paid on or before 31.7.1985. He has stated that as the plaintiffs have failed to fulfill their obligation, he has issued legal notice vide Exh-50 and has forfeited the earnest money. He has also stated that he has deposited the requisite amount of the Society in the Account of the Society, which was in the Ahmedabad District Cooperative Bank. He has produced the receipt thereof at Exh-72. He has stated that the residents of Bungalow Nos. 9 and 10 have raised objection as per

Exh-47 and, therefore, he has given reply to them and on that basis, they have withdrawn their objection. He has stated that there was no need of any permission of Urban Land Ceiling. He has stated that as per the agreement to sell, he had to pay the installment of the Society for the period upto 30.11.1984, which he has already deposited. He has also stated that as agreed between the parties, when the entire amount is paid and Draft of sale-deed is prepared then at that time he had to get Income Tax Clearance Certificate. He has stated that the plaintiffs have issued Notice dated 31.4.1986, which he has replied at Exh-85 and 86. He has stated that the plaintiffs have never written any letter to him at his Bombay address showing that they are willing to pay the entire amount on or before 31.7.1985. He has stated that he has filed eviction suit against the plaintiff being No. 1675/86, which is pending, wherein the plaintiff is not depositing the rent regularly. He has also stated that defendant No.2 has his own Bungalow No.4 in the Hatkesh Society, which has five rooms. He has specifically stated that he has never told the plaintiff that he has no time to execute the sale-deed. He has stated that the plaintiffs have never tendered the entire sale consideration. He has stated that as the plaintiff has paid Rs.15,000/-, time to execute the sale-deed was extended by him for six months only and thereafter they have not paid any amount to him.

18.1 During his cross-examination, he has stated that when the plaintiffs called him at Ahmedabad for execution of the sale-deed, he remained present in Ahmedabad. He has stated that he has not received any notice prior to 31.7.1985. He has stated that he was to get Rs.55,000/- before 30.4.84 and the remaining amount was to be paid before 30.11.84 by the plaintiffs. He has stated that since the amount was not paid, he had no occasion to ask for permission from the Society. He has stated that as the plaintiffs have no money to pay to him, he has not asked for any permission from the Society. He has denied the suggestion that as he could not get the permission from the Society for sale of the Bungalow, the plaintiffs did not pay any amount to him. He has denied the suggestion of the plaintiffs that he has not fulfilled his obligation under the agreement to sell. He has stated that the plaintiffs did not pay Rs.55,000/- within time. He has denied the suggestion that he has told the plaintiff to extend the period of agreement on receipt of Rs.15000/-. He has denied the suggestion that as he could not complete the necessary formalities, he himself has extended the period of execution of sale-deed. He has denied the suggestion that the plaintiffs have sufficient amount for payment to him and they have put it in Fixed Deposit. He has stated that unless and until the plaintiffs pay the entire consideration amount, there was no question of asking any title clearance certificate from the Income Tax Department.

19. On appreciation of oral evidence, it clearly transpires that the plaintiffs has admitted that prior to issuance of the legal notice in the year 1986, they have received the notice regarding the forfeiture of the earnest money and intimation from the seller that he is not willing to sell the property to him as per Exh-50 dated 19.9.1985. The intimation at Exh-50 clearly reveals that by narrating the

factum of non-payment of entire sale transaction within stipulated period and regarding extension of period of agreement to sell at the instance of the plaintiffs, the defendant has informed the plaintiffs that earnest money is forfeited and now he is not willing to sell his bungalow to the plaintiffs. Thus, in the year 1985 itself, the plaintiffs were knowing that the agreement to sell has already been cancelled by the defendant for non-receipt of the sale transaction within a stipulated period and regarding forfeiture of the earnest money. It also reveals from the Notice dated 26.11.1985, issued by the defendant to plaintiff at Exh-37, regarding intimating the plaintiff to pay the rent of the premises and on failure of which, he would be constrained to file Suit for possession against them. It reveals from the said Notice that the defendant has clearly averred regarding the cancellation of the agreement to sell for non-payment of the consideration amount within stipulated period. Thus, even in November, 1985, the plaintiffs were knowing that agreement to sell has already been terminated by the defendant.

20. The plaintiffs are relying upon the communication made by the defendant to Mr. K.D. Acharya and Mr. H.B.Shah for withdrawal of their objection as due to their objection there is some problems in execution of sale-deed in favour of the plaintiff. However, both these letters at Exh-71 and 72 is prior to the issuance of Notice at Exh-37.

21. Now, considering the overall facts coupled with the oral and documentary evidence, it clearly transpires that even before the issuance of the legal notice in the year 1986, by the plaintiffs to the defendant for execution of the agreement to sell, the plaintiffs were within the knowledge that agreement to sell at Exh-22 has already been terminated by the defendant and their earnest money is already been forfeited. It also reveals that at the relevant time, the time period for execution of the agreement to sell was extended upto 31.7.1985 at the instance of the plaintiffs and on payment of Rs.15,000/- to the defendant. Thus, considering the overall facts and circumstances of the case, it clearly transpires that the defendant was not ready and willing to extend the period thereof as the plaintiffs could not manage to pay the entire consideration amount to be paid as stipulated in the agreement to sell. Of course, it is the stand of the plaintiffs that they had sufficient amount to pay to the defendant for execution of the sale-deed and have put the amount in Fixed Deposit, however, no documentary evidence whatsoever has been produced by the plaintiffs in this regard. Considering the facts of this case, especially when the defendant has already informed in September, 1985 to the plaintiffs regarding the forfeiture of their earnest money, the plaintiff as a prudent man, ought to have immediately replied to the defendant, whose address they were knowing, as to having sufficient amount being kept in Fixed Deposit in a particular bank. Considering the overall facts and circumstances of the case, therefore, it clearly appears that the plaintiffs were at the fault for non-execution of the agreement to sell by the defendant. It is clearly established by the defendant that plaintiffs have not fulfilled their part of agreement to sell and have not paid stipulated amount of consideration in a

stipulated period. It clearly establishes from the evidence on record that prior to issuance of the suit Notice for execution of sale-deed and specific performance of agreement to sell, the defendant has already cancelled the agreement to sell in the year 1985 itself and has forfeited the earnest money.

22. The plaintiff has also sought for alternative relief of damages. However, considering the entire facts on record, it clearly transpires that as per the stipulation made in agreement to sell, in case of failure on the part of the plaintiffs in making payment in stipulated manner, right was reserved to the defendant seller to forfeit the earnest money. Now, considering the evidence on record, when the plaintiffs were at fault and they were already informed by the defendant way back in the year 1985 regarding the cancellation of the agreement to sell and forfeiture of the earnest money, no fault can be found on the part of the defendant. Therefore, the alternative relief sought for by the defendant for recovery of the entire consideration amount along with interest is not tenable in the eyes of law. Considering the facts of the case, the alternative relief sought for by the plaintiffs, is not available to the plaintiffs.

23. Considering all the facts of the case and the evidence as produced in the matter and on re-appreciation thereof, it clearly appears that the trial Court has committed serious error of facts and law in passing the impugned judgment and decree in favour of the plaintiffs. On re-appreciation of entire evidence, it is clearly found that the Suit of the plaintiffs is liable to be dismissed. Considering the facts and circumstances of the case, therefore, I have answered the Points raised hereinabove accordingly.

24. POINT NO.6: In view of the above discussion, the present Appeal is liable to be allowed and hence in the interest of justice, I pass the following final order.

ORDER

The present appeal is hereby allowed. The impugned judgment and decree dated 28.6.1996 passed by the learned City Civil Court No.4, Ahmedabad in Civil Suit No. 3458/1986, are hereby quashed and set-aside. The Suit of the plaintiffs stands dismissed.

Considering the facts of the case, the parties to bear respective cost of the Appeal.

The amount, if any, deposited by the Plaintiffs in trial Court, be refunded to the plaintiffs.

Decree to be drawn accordingly in this Appeal.

Along with copy of this judgment and decree, the R&P of the Suit be sent back to the trial Court forthwith.