(2014) 11 BOM CK 0141

In the Bombay High Court

Case No : First Appeal No. 130 of 2013

Michael Coutinho APPELLANT

Vs

Ralito Victor Pereira Vaz and Others RESPONDENT

Date of Decision : 05-11-2014

Acts Referred:
Specific Relief Act, 1963 — Section 16(c), 20, 22

Citation : (2015) 1 ABR 356

Hon'ble Judges : Z.A. Haq, J;F.M. Reis, J

Bench : Division Bench

Advocate : Nitin Sardessai, Advocates for the Appellant; J. Vaz, Advocates for the Respondent

Judgement

F.M. Reis, J.—Heard Mr. N. Sardessai, learned counsel appearing for the appellant and Mr. J. Vaz, learned counsel appearing for the respondents. The above appeal challenges the judgment and decree dated 20.09.2013 passed by the learned Civil Judge Senior Division, at Vasco in Special Civil Suit No. 13/2011 whereby a suit for declaration, specific performance and permanent injunction filed by the appellant was partly decreed and it was inter alia declared that the forfeiture by the respondents of the entire amount received by them pursuant to the MOU dated 7.9.2010 is bad.

2. Briefly, the facts of the case as stated by the appellant are that he has filed a suit for declaration, specific performance and permanent injunction on the ground that by MOU dated 7.9.2010 executed between the appellant and the respondents, it was inter alia agreed to sell to the appellant the suit property for a total consideration of Rs. 1.70 crores. It is further his case that the MOU is a concluded and complete contract as the consideration, and area fixed by the parties to the agreement were certain. It is further his case that only the schedule of payment was to be chalked out thereafter. It is also the contention of the appellant that a sum of Rs. 5 lakhs was paid at the time of the execution of MOU and that the terms of the agreement suggest that it was in fact an

agreement for sale. The appellant by a letter dated 17.3.2011 sent a cheque for Rs. 35 lakhs along with draft of agreement to be executed to the respondents. A draft of deed of surrender of lease of the respondents'' tenant and draft of power of attorney were also submitted to the respondents by the appellant. It is further the case of the appellant that the respondents requested for a sum of Rs. 40 lakhs instead of Rs. 35 lakhs and consequently a sum of Rs. 40 lakhs was directly deposited in the account of the respondents by RTGS transfer and consequently the respondents were requested not to deposit the cheque of Rs. 35 lakhs. It is also the case of the appellant that the said cheque was not taken back by the appellant and the respondents inter alia neither confirmed nor finalised the draft documents which were submitted by the said letter dated 17.3.2011. The respondents thereafter through their Advocate by notice dated 11.8.2011 terminated the MOU and forfeited the amount received towards the part payment of the consideration which totally comes to Rs. 45 lakhs. It is further the contention of the appellant that such termination was resorted as the cheque of Rs. 35 lakhs was not honoured on account of stop payment instructions by the appellant. Immediately, thereafter, the appellant filed the suit inter alia praying for a declaration that the termination of MOU dated 7-9-2010 and the forfeiture of the amount by notice dated 11-8-2011 was bad in law and also for a decree to specifically perform the obligations under the said MOU dated 7-9-2010 by accepting the balance amount of consideration.

3. The respondents filed the written statement and contended that the appellant did not take steps for almost six months from the date of the agreement to make necessary payment despite request by the respondents. It is the case of the respondents that no draft of the agreement was forwarded and that the appellant was trying to develop the suit property in partnership with Mr. Ruben Quadros of M/s. Boa Casa Builders, a Limited Liability Partnership contrary to the terms of the agreement. It is also the contention of the respondents that the appellant was not ready and willing to perform his part of the contract nor taken any measures to comply with the obligations as stipulated in the MOU. The respondents also contended that in view of the default committed by the appellant, they were entitled to forfeit the amount paid by the appellant pursuant to the said MOU and consequently prayed that the suit filed by the appellant be dismissed.

4. The learned Trial Judge has framed four issues and decided issue No. 1 partly in favour of the appellant to the extent that the forfeiture of the amount received by the respondents under the MOU was held to be not justified by the impugned judgment and decree dated 20.09.2013 and decided all the issues against the appellant. Being aggrieved by the said judgment, the appellant has preferred the above appeal. After filing the above appeal, the appellant also filed an application for amendment of the plaint inter alia seeking in the alternative for the refund of the amount paid by the appellant to the respondents. Additional written statement to the amended plaint was also filed by the respondents.

5. Mr. Sardessai, learned counsel appearing for the appellant has submitted that the issue to be considered in the above appeal is whether the alleged termination of the MOU by the respondents is valid or not. It is the contention of Mr. Sardessai that the ground for termination is that for six months after the execution of the MOU no payments were made by the appellant despite of oral request with that regard. The learned counsel has pointed out that such oral request has not been established by the respondents on the basis of any material on record and consequently, according to him the ground for the alleged termination is only an excuse to refuse the legitimate right of the appellant to specifically perform the terms of the MOU. The learned counsel further pointed out that it is not disputed that in fact Rs. 40 lakhs was paid after the initial amount of Rs. 5 lakhs was paid as on the date of the signing of the agreement which according to him itself suggest that the appellant was ready and willing to perform his part of the contract. The learned counsel has thereafter pointed out that the respondents are erroneously contending that there is no link between the payment of Rs. 40 lakhs with consideration as stipulated in the MOU and that there is a specific admission by D.W. 1 at page 116, line 11 that the payment was supposed to be made during the course of the development of the property. The learned counsel as such points out that the findings of the learned Judge that no further amounts were paid by the appellant are contrary to the material on record. The learned counsel further pointed out that it is the case of the appellant that the said sum of Rs. 40 lakhs was sought by the respondents as the appellant wanted to purchase a premises in Margao. The learned counsel further pointed out that D.W. 1 has also admitted that the amount of Rs. 40 lakhs was paid towards the sale consideration out of Rs. 1.70 crores as mentioned in the MOU. The learned counsel as such points out that the defences raised by the respondents are false and this is very much relevant while granting or refusing to exercise discretion in the suit for specific performance. The learned counsel as such points out that considering the false plea by the respondents, the question of refusing specific performance to the appellant by the learned Trial Judge is not at all justified. In support of his submissions, the learned counsel has relied upon the judgment of the Apex Court reported in Silvey and Others Vs. Arun Varghese and Another, The learned counsel as such points out that the acceptance of the said sum of Rs. 40 lakhs as being a part of the consideration as stipulated in the MOU would itself suggest that in furtherance of the said MOU the appellant has paid to the respondents a substantial sum of money. The learned counsel further pointed out that another contention of the respondents to terminate the disputed agreement is that the cheque of Rs. 35 lakhs delivered to the respondents was dishonoured by the concerned bank with instructions "stop payment". The learned counsel further pointed out that as admittedly the appellant had paid the said sum of Rs. 40 lakhs in lieu of the said cheque, it is understood between the parties that the said cheque would not be encashed and as such the conduct of the respondents to deposit the said cheque is wholly unjustified. The learned counsel further pointed out that as such ground of termination of the agreement is totally erroneous and is not at all justified.

6. Next contention of Mr. Sardessai, learned counsel appearing for the appellant is that the termination of MOU by the respondents is on the ground that the appellant was acting in variance of the terms of the MOU. The learned counsel further pointed out that though the Limited Liability Partnership called M/s. Boa Casa Builders was introduced by the appellant to develop the disputed property nevertheless, such exercise by the appellant cannot be said to be in variance with the original terms of the agreement. The learned counsel has thereafter taken us through the letter dated 17.3.2011 which inter alia sought confirmation from the respondents and approval of the draft of the documents which were submitted along with the said letter. The learned counsel further pointed out that though it is the contention of the respondents that this request by the appellant itself was in variance with the terms of the original agreement, it can be at the most be treated as a request by the appellant. The learned counsel as such submits that the alleged ground of termination of the agreement is totally misplaced and is unjustified and consequently the learned Trial Judge has erroneously accepted the termination of the MOU. The learned counsel has thereafter taken us through the impugned judgment and pointed out that though there was enough material on record to establish that the appellant was ready and willing to perform his part of the agreement nevertheless the learned Trial Judge by the impugned judgment has erroneously come to the conclusion that the appellant was not ready and willing to perform his part of the agreement. The learned counsel further pointed out the contention of the respondents that the appellant had not shown that he has necessary finance to pay the balance amount is totally misplaced as it is not borne out from the records as according to him the appellant is ready and willing to perform his part of the agreement and as such called upon the respondents to perform their part of the contract in terms of the agreement. The learned counsel further pointed out that the contention of the respondents that the appellant did not have finance to pay the balance amount is totally erroneous, as in any event according to him, it is not necessary for the appellant to show his financial capacity to pay the balance amount. The learned counsel further pointed out that as such it is not necessary to show that the appellant had necessary finance available to pay to the respondents but according to him, what is essential is that the appellant is in a position to mobilize the said amount to be paid to the respondents. In support of the said submissions, the learned counsel has relied upon the judgment reported in Nannapaneni Subayya Chowdary and Another, Vs. Garikapati Veeraya and Another, , by giving specific emphasis to paras 103 to 108. The learned counsel has also relied upon the judgment of the Apex Court reported in Smt. Swarnam Ramachandran and Another Vs. Aravacode Chakungal Jayapalan, . The learned counsel has thereafter taken us through the findings on issue No. 2 and pointed out that the said findings are patently illegal. The learned counsel has thereafter taken us through the findings on issue No. 3 and pointed out that the said issue was decided against the appellant erroneously on the ground that there was no concluded contract between the appellant and the respondents and specific performance of the development agreement cannot be directed. The learned

counsel as such points out that the findings of the learned Judge while deciding issue No. 3 against the appellant are patently illegal and deserve to be quashed and set aside. The learned counsel further pointed out that the findings of the learned Judge that there was no concluded contract are totally erroneous on the basis of the overwhelming evidence on record. The learned counsel further pointed out that the time was not an essence of contract nor the terms of the agreement would suggest the time was made the essence of the contract. The learned counsel has thereafter pointed out that merely changing the mode of payment does not affect the completeness of the contract. The learned counsel further pointed out that the respondent himself has admitted that there is a tenant in the subject property. The learned counsel further pointed out that the respondent has admitted the existence of the tenant in the subject property and as such according to him the impugned judgment stands vitiated. The learned counsel further pointed out that it is the case of the respondents that the appellant has approached the Court with unclean hands without any material on record having been produced by the appellant herein. The learned counsel further pointed out that merely because the price of the land in the vicinity has increased by itself cannot be a ground to refuse the relief of specific performance to the appellant in case he is otherwise entitled. The learned counsel further pointed out that merely because the price of the land has increased during the pendency of the proceedings would not be a ground to be considered while deciding as to whether the appellant is entitled for decree for specific performance of contract. The learned counsel thereafter has taken us through the impugned judgment of the learned Trial Judge and pointed out that the learned Judge has erroneously taken a view that the appellant is not entitled for the relief of specific performance when according to him there was enough material on record to suggest that the appellant was always ready and willing to perform his part of the agreement. The learned counsel thereafter has taken us through the issues and findings therein and pointed out that the learned Judge has erroneously taken a view that the appellant is not entitled for the decree for specific performance. In support of his said submission, the learned counsel has relied upon the judgment of the Apex Court reported in Kollipara Sriramulu Vs. T. Aswathanarayana and Others, as well as the judgment of the Andhra Pradesh High Court passed in Appeal No. 301 of 1951 in the case of Nannapaneni Subayya Chowdary and Another, Vs. Garikapati Veeraya and Another, . The learned counsel as such submits that the appellant is entitled for the decree for specific performance of agreement as according to him the appellant was always ready and willing to perform his part of the contract and consequently, the alleged termination by the respondents is totally misplaced and deserves to be quashed and set aside. The learned counsel further pointed out that in the alternative the appellant has also sought for refund of the amount admittedly paid by the appellant to the respondents and in case the appellant is not entitled for specific performance such amount is to be returned together with commercial rate of interest. The learned counsel further pointed out that the learned Judge has in fact given a finding on that count in favour of the appellant by inter alia holding that the forfeiture of the amount by the appellant is bad. The learned counsel has minutely taken us through the impugned judgment of the Trial Court and pointed out that the findings therein against the appellant are totally misplaced without scrutinizing the evidence on record and as such the impugned judgment passed by the learned Trial Court deserves to be quashed and set aside.

7. On the other hand, Mr. J. Vaz, learned counsel appearing for the respondents has supported the impugned judgment. The learned counsel has pointed out that the appellant was not ready and willing to perform his part in terms of the MOU and consequently the Trial Court has rightly exercised its discretion by refusing the decree for specific performance. The learned counsel thereafter pointed out that in terms of the agreement, the appellant was supposed to pay the balance consideration which he has defaulted to pay within a period of six months as stipulated therein. The learned counsel further submits that the appellant has deliberately not sent any draft of the agreement as provided in the MOU which suggests that the appellant was not ready and willing to perform his part of the contract. The learned counsel further pointed out that a sum of Rs. 40 lakhs was paid in addition to the sum of Rs. 35 lakhs paid by cheque which was requested to be deposited in the bank only after a specific date. The learned counsel further pointed out that the appellant without any justification and consent of the respondents was seeking to modify the terms of the MOU. The learned counsel further pointed out that no draft of the agreement was submitted to the respondents and the allegations of the appellant that such draft agreement was not confirmed nor finalised by the respondents is totally erroneous and not borne out from the records. The learned counsel further pointed out that the learned Trial Judge has rightly examined the material on record to draw an inference against the appellant about his failure in paying and/or depositing the total consideration in competent proceedings. The learned counsel further pointed out that admittedly the cheque of Rs. 35 lakhs which was given by the appellant was dishonoured and the contention of the appellant that the cheque was not to be deposited is totally false. The learned counsel further pointed out the contention of the appellant that the cheque was to be returned after the payment of Rs. 40 lakhs is patently false. The learned counsel further pointed out that admittedly the cheque for Rs. 35 lakhs was dishonoured which entitled the respondents to take necessary measures including the termination of the disputed MOU. The learned counsel further submits that the respondents have been put into grave inconvenience by the delay in the payment of consideration as the appellant in fact had no means or resources to pay the amount to the respondents. The learned counsel further pointed out that the dishonour of the said cheque by itself suggests that the appellant was not ready and willing to perform his part of the MOU. The learned counsel has relied upon a number of judgments given by different High Courts to advance his submissions and according to him the suit filed by the appellant deserves to be dismissed. The learned counsel further pointed out that as the appellant himself had breached the terms, the question of claiming any refund of the amount paid by the appellant is not at all justified.

The learned counsel further pointed out that the question of refunding the amount would not arise as according to him the appellant was a rank defaulter and was not ready and willing to perform his part of the MOU. The learned counsel further pointed out that even in the Court the copy of the alleged draft agreement alleged to have been sent by the appellant has not been produced and as such according to him on this ground also the appellant is to be held not to be ready and wiling to perform his part of the agreement. The learned counsel further pointed out that the appellant being on the wrong, the question of refunding the amount of consideration paid to the respondents is not at all justified and such relief also deserves to be rejected.

8. Upon hearing the learned counsel and on perusal of the records, the following points for determination arise in the present appeal:--

POINTS FOR DETERMINATION

"(1) Whether the learned Trial Judge was right in refusing the specific performance of the agreement?

(2) Whether the respondents were entitled to terminate the MOU dated 7.9.2010?

(3) Whether the appellant is entitled for refund of the said sum of Rs. 45 lakhs along with interest at commercial rate?"

9. With regard to the first and second point for determination, in order to examine the correctness of the findings of the learned Trial Judge in refusing specific performance to the Appellant, it would be appropriate to note the pleadings of the parties so as to ascertain what were their respective stands. On going through the plaint, we find that it is the contention of the Appellant that by a Memorandum of Understanding dated 07.09.2010, the Respondents agreed to sell the suit plot for a consideration of Rs. 1,70,00,000/- subject to the terms stipulated therein. As part of the consideration, a sum of Rs. 5,00,000/- was paid to the respondents by cheque which was duly encashed by them. It was further his case that in terms of Clause 4 of the said Memorandum of Understanding, it was agreed to execute an Agreement of Sale/Deed of Sale in respect of the suit plot in due course of time and pay the balance amount of Rs. 1,65,00,000/-. It was his case that such payment of the balance amount was to be in accordance with the schedule to be incorporated in the agreement for sale which the parties were to execute at a later date. It was further his case that there was a concluded contract between the parties and, consequently, an option was reserved to the Appellant either to go in for an Agreement of Sale and/or a Deed of Sale in due course of time on payment of the balance consideration. It is also his case that he wanted to develop the property with Mr. Ruben Quadros having a firm with the name M/s. Boa Casa Builders Limited. It is further his contention that in compliance of his obligations vide his communication dated 17.03.2011 he forwarded to the Respondent No. 1, a draft of the proposed Agreement of Sale of the suit plot between the Respondents and a designated partnership firm along with a draft of the Power of Attorney in terms of Clause 6 of the MOU as

well as draft of a Deed of Surrender of Lease of the tenant occupying the house existing in the suit property. It is also his contention that a cheque of Rs. 35,00,000/- was also forwarded along with the said documents. It is further contended that the Respondents requested for a sum of Rs. 40,00,000/- and such amount was directly transferred by said Ruben Quadros through HDFC Bank to the account of the Respondent No. 1 at Syndicate Bank, Vasco da Gama. It is further the case of the Appellant that he showed his readiness and willingness to complete the transaction by forwarding the said two drafts to the Respondents and constantly following it up with the Respondents to make them execute the said document which was sought to be delayed by the Respondents. It is further his case that the Respondents were holding the cheques given to them on 17.03.2011 and, as such, he was compelled to instruct his said partner to stop payment of the said cheques which, according to the Appellant, did not go well with the Respondents who deposited the cheques on the following day for payment. It is also his case that by notice dated 11.08.2011 of their Advocate, the Respondents arbitrarily and unjustifiably terminated the said Agreement. It is further their case that the Respondents ought to have given an opportunity to the Appellant demanding the balance payment before sending the alleged notice of termination. It is further their case that the Appellant is ready and willing to pay the balance amount of consideration and perform his part of the Agreement. Consequently, the suit was filed for a declaration that the termination of the MOU dated 07.09.2010 by the Respondents and the forfeiture of the amount paid to the Respondents is bad and for a direction to execute the Deed of Conveyance of the suit plot in favour of the Appellant by accepting the balance amount and in the alternative for the recovery of the sum of Rs. 45,00,000/- paid to the Respondents along with interest at the rate of 18 per cent per annum.

10. The defence of the Respondents, inter alia, is that the Appellant has committed a serious breach of the MOU by issuing a stop Order to the Bank in respect of the payments payable under the MOU. It is further his case that the Appellant never took any steps after executing the MOU to make the necessary payments for almost six months and only made oral promises. It is further their case that the payments were not effected in terms of the Agreement and, as such, the Appellant is not entitled to any reliefs in the suit. It was also their contention that the Respondents were never informed about the partnership firm as claimed by the Appellant. It is further their contention that an amount of Rs. 40,00,000/- was credited on their account by Ruben Quadros who had no connection with the Agreement. The allegation that the cheque was not to be encashed has been denied by the Respondents. The contention of the Respondents are as such that the question of any specific performance could not arise; that the Appellant has committed the breach of the Agreement and even claimed that there is a tenant in the property who is not a party to the MOU and further that the Appellant had no money to pay the balance consideration. It is further their case that even the alternative relief sought by the Appellant is not available to him as he has committed the breach of the contract. The

Respondents have further stated that on the contrary the Respondents have suffered substantial loss in not receiving the amount in time on account of interest on the balance amount and, as such, prayed that the suit be dismissed.

11. On going through the MOU dated 07.09.2010, we find that the amount of Rs. 5,00,000/- which was paid as on that date was advance payment of the consideration. The total consideration was fixed at Rs. 1,70,00,000/-. Clause 4 of the said MOU further provides that the Agreement of Sale/Deed of Sale in respect of the suit plot was to be executed in due course of time and the balance amount of Rs. 1,65,00,000/- was to be paid as per the schedule to be set out in the Agreement of sale which was to be executed between the parties at a later date. It is the contention of the Appellant as pointed out herein above in the pleadings that the Appellants had an option to either execute an Agreement of Sale or execute a Deed of Sale on payment of the total balance consideration. Undisputably, it is the case of the Appellant that he exercised the option of entering into an Agreement of sale and as such submitted a draft agreement for sale to be executed between the parties. In this connection, it is the case of the Appellant himself that when he submitted the draft of such Agreement, he had also forwarded the drafts of other documents such as a Power of Attorney and a Deed of Surrender of Lease. The draft of such alleged Agreement has not been produced on record by the appellant. It is also in the pleadings of the Appellant that such Agreement was sought to be got executed with one partnership firm M/s. Boa Casa Builders Ltd.

12. Shri J. Vaz, learned Counsel appearing for the Respondents, has pointed out that the said entity had no connection with the Respondents and in any event the Respondents never consented to enter into any transaction with such third party. Apart from that, it is pointed out that the said entity is a limited liability partnership firm and, as such, the question of calling upon the respondents to enter into a transaction with such entity would not arise at all. In the present case, as the Appellant had chosen to perform his part of the MOU by calling upon the Respondents to enter into the Agreement of Sale with such entity and also calling upon them to get the Deed of Surrender of Lease executed from a tenant by itself would suggest that the appellant did not act in terms of the MOU. The MOU does not contemplate execution of any such document nor was the Appellant entitled to call upon the Respondents by their said communication dated 17.03.2011 to execute the Agreement of Sale in favour of a third party without the consent of the respondents. As the Agreement for sale admittedly was not executed by the parties in terms of the MOU, we find that the question of directing any specific performance of the MOU would not at all be justified. Firstly the contention of the Appellant that in the present suit the prayer is that the Sale Deed be executed in favour of the Appellant on payment of the balance consideration and not to execute the Agreement of sale, cannot help the appellant to wriggle out from the situation that prior to the termination of the MOU there was no agreement for sale executed in favour of the Appellant as opted by the appellant himself. Considering that it is the contention of the

Appellant himself that he had an option either to execute the Agreement of Sale or Deed of Sale and as the Appellant had already exercised such option to get the Agreement of Sale executed, it is not open to the appellant to now contend that the appellant wants a sale deed executed in his favour. But, however, as pointed out hereinabove, the record reveals that the Agreement for sale was not in terms of the MOU but called upon the Respondents to execute such Agreement in favour of M/s. Boa Casa Builders Ltd. which was not in terms of the MOU. Apart from that, as the Agreement of sale was admittedly not executed prior to the termination of the MOU, the finding of the Trial Judge that there was no concluded contract as claimed by the Appellant, cannot be faulted.

13. Though Mr. Sardessai, learned Counsel appearing for the Appellant has vehemently argued that essential terms of the Agreement were already finalised in the MOU and the only thing which remained was the mode of payment which cannot be termed to be an essential term of Agreement relying upon the judgment of the Apex Court in the case of Kollipara (supra) but however in the present case, it was not the mode of payment which had to be finalised but the schedule of payment which inter alia includes the different stages and different periods within which such balance amount would be paid by the Appellant to the Respondents. The payment of consideration and the period within which such amount is to be paid is definitely an essential term of the contract especially when the outer limit within which such final sale deed had to be finalised is not spelt out in the MOU. As this schedule has not been finalised, we find that the MOU without the execution of the Agreement of sale as provided therein can at the most be considered as an agreement to enter into an Agreement of Sale, the performance of which cannot be specifically enforced. Apart from that, as pointed out herein above, the alleged assignment by the Appellant to M/s. Boa Casa Builders Ltd., to get the Agreement of Sale in their favour was not accepted by the Respondents and, as such, the conduct of the Appellant in varying the terms of the MOU disentitles the Appellant to contend that he was ready for specific performance of his terms of the MOU. The MOU at the most can be treated to be an intent of the parties to enter into an Agreement subject to finalising the schedule of payment of the balance consideration. As no such schedule is finalised by the Appellant with the Respondents and in the absence of such agreement, there cannot be any right in favour of the Appellant for specific performance of any contract. As such, as the Appellant did not finalise the schedule of the payment of the balance consideration nor had paid or offered to pay the total balance amount prior to the termination of the MOU, we find that there was no agreement of which specific performance can be directed in favour of the Appellant herein. Though it is sought to be contended by the Appellant that he had originally informed the Respondent that he would execute a Sale Deed on payment of the balance consideration, this has not been established by the appellant by any cogent evidence on record. On the contrary, the records reveal that there was no written communication between the Appellant and the Respondents after forwarding the said letter dated 17.03.2011 along with the

drafts of the documents to be executed. The Appellant also did not produce the said documents to show whether the terms therein were in consonance with the MOU. The allegation of the Appellant that such copy was generated on a computer and the same was not signed and, as such, it was not produced cannot at all be accepted as a justification for not producing such drafts. The failure to produce the drafts of the documents, would raise an adverse inference against the appellant. In such circumstances, it can be assumed that the drafts of the said documents were not in accordance with the terms of the MOU. As such we find that the finding of the learned Judge that the performance of the MOU by itself could not be specifically enforced cannot be faulted. Apart from that, it is to be noted that the MOU was signed on 07.09.2010. The letter which was addressed by the Appellant with the alleged drafts of three documents i.e. the Agreement of Sale between the Respondents and the M/s. Boa Casa Builders Ltd., Deed of Surrender of Lease and the Power of Attorney were submitted on 17.03.2011. Though it is well settled that time is not the essence of a contract of sale of immoveable properties nevertheless, in the present case, the Appellant has not explained what prevented him to take immediate steps to finalise the schedule of payment for a period of nearly six months. It is to be noted that the delay in executing such document is to the advantage of the Appellant and no benefits would accrue to the Respondents as the total consideration was already fixed. The more the Appellant delays such exercise, it would benefit the Appellant and cause inconvenience to the Respondents. In such circumstances and taking note of the fact that the requests made by the Appellant in terms of the said letter dated 17.03.2011 were contrary to the MOU, we find that the learned Judge was justified to come to the conclusion that the Appellant was not ready and willing to perform his part of the contract.

14. Apart from that, it is not in dispute that the said letter dated 17.03.2011 stipulates that a cheque of Rs. 35,00,000/- was forwarded towards purchase of the suit plot. Who agreed for such instalment and the modalities of payment of such instalment has not been established by any evidence on record. As undisputably the schedule of payment of the consideration was not finalised, the question of the Appellant now seeking to get the conveyance in his favour on the basis of the MOU when the option to enter an agreement for sale was already exercised cannot be accepted. It is also to be noted that the said cheque of Rs. 35,00,000/- forwarded along with the said letter was dishonoured by the Bank as the payment was stopped. It is revealed that an amount of Rs. 40 lakhs was transferred directly into the Bank account of the Respondents. Though it is sought to be contended by the Appellant that the Respondents requested for a sum of Rs. 40,00,000/- as they had to pay for the purchase of a bungalow in Margao city, nevertheless, the evidence on record clearly suggests that even such payment of Rs. 40,00,000/- was not in terms of the said MOU. In such circumstances, though it is contended by the Appellant that the cheque for Rs. 35 lakhs remained with the respondents and was supposed to be returned, there is no material on record to show that after 17.03.2011 upto 11.08.2011 when

the MOU was terminated, the Appellant called upon the Respondents to return the said cheque. This conduct would itself suggest that the said cheque was retained by the Respondents at the request of the Appellant towards part payment of the consideration. There is no material on record to show what steps the Appellant has taken to finalise the transaction in terms of the MOU. In such circumstances, we find that the learned Trial Judge was justified to come to the conclusion that the Appellant was not ready and willing to pay his part of the bargain and that the MOU could not be specifically performed as the Agreement of sale as provided in terms of the said MOU was admittedly not executed. On going through the impugned judgment, we find that the learned Judge has examined the pleadings of the appellant as well as the material on record to come to the conclusion that the appellant was not ready and willing to perform his part of the MOU. The learned Judge has taken note of the fact that the averments made in Exhibit 45 which is a letter of termination corroborate the contention raised by the respondents in their written statement. In fact, the learned Judge took note of the fact that P.W. 1 in his cross examination has clearly admitted that he has not paid any amount from his personal fund to the respondents besides a sum of Rs. 5 lakhs which was paid at the time of the execution of the MOU. D.W. 1 who has been examined who produced statement of accounts which disclose that there was no balance amount on the relevant date to pay the balance consideration. It cannot be disputed that in order to be entitled for the discretionary relief of specific performance, the appellant had to show that he was continuously ready and willing to perform his part of the bargain from the time such MOU was executed. This becomes relevant in the context of the provisions of Section 16(c) of the Specific Relief Act, 1963 which clearly provides that the person seeking specific performance should show that he was continuously ready and willing to perform his part of the agreement. In the present case, taking note of the letter which was issued at Exhibit 44 by the appellant as a partner of M/s. Boa Casa Builders, a Limited Liability Partnership would itself show that the appellant himself was not in a position to honour his commitment in terms of the MOU. The evidence also discloses that no agreement for sale as provided in MOU was executed between the parties as already pointed out herein above nor any steps were taken by the appellant in that direction. Apart from that the letter at Exhibit 44 is not in terms of the MOU. The contention of Mr. Sardessai, learned counsel appearing for the appellant that a cheque of Rs. 35 lakhs was to be returned in view of the payment of Rs. 40 lakhs which was directly transferred into the account of the respondents cannot be accepted. In case the intention of the parties was that the cheque was to be returned then there would be material on record to show that after the transfer of the said amount, the appellant took any steps in that direction. The learned Trial Judge has rightly appreciated the evidence on record to come to the conclusion that such contention of the appellant was not borne out from the record. Under Section 20 of the Specific Relief Act, 1963, it is settled that the jurisdiction to grant specific performance is discretionary. Though such discretion has to be exercised judiciously and not arbitrarily yet, the conduct of the plaintiff who seeks such specific performance plays an important role in exercising such discretion. Ordinarily, the Court will not grant any relief of specific performance in favour of the person who approaches the Court with unclean hands.

15. In the present case, as already pointed out hereinabove, the conduct of the appellant in sending a letter at Exhibit 44 which is in variance with the terms of the MOU and dishonour of the cheque issued by appellant, by the concerned bank though on the ground of "stop payment" advice by the party and the fact that the record reveals that the appellant did not have necessary funds in the bank account as on the date when the cheque was dishonourned, justifies the refusal to grant discretionary relief of specific performance in favour of the appellant. No doubt, a sum of Rs. 40 lakhs was transferred in the accounts of the respondent No. 1 herein but however such payment cannot be said to be in terms of the MOU as the schedule of payment was not finalised as contemplated in the MOU. Apart from that, the contention of the appellant that the said sum of Rs. 40 lakhs was paid in lieu of the cheque for a sum of Rs. 35 lakhs has been disbelieved by the Trial Court for cogent reason. In fact, we have also examined the evidence of P.W. 1 and his cross examination and we find that there is no material on record to come to the conclusion that the sum of Rs. 40 lakhs transferred in the account of the respondent No. 1 was in lieu of cheque of Rs. 35 lakhs. The contention of Mr. Sardessai, learned counsel appearing for the appellant that in case the respondents were not agreeable to the drafts of the agreement submitted along with the letter at Exhibit 44, it was always open to the respondents to inform the appellant accordingly, would not come to the rescue of the appellant to establish that he was ready and willing to perform his part of the contract. The conditions mentioned in the letter at Exhibit 44 as pointed out herein above are not in terms of the MOU and as such merely because the respondents did not inform the appellant that they were not agreeable to such exercise would not satisfy the requirement of law that the appellant was always ready and willing to perform the terms of the MOU.

16. Another aspect which also has to be examined is whether MOU can be specifically performed in the absence of the agreement for sale which was intended to be executed between the parties subsequently after finalizing the schedule of payment. In this connection, Mr. Sardessai, learned counsel appearing for the appellant has relied upon the judgment of the Apex Court in the case of Kollipara (supra) to advance his submissions that merely because the mode of payment has not been finalised, it cannot be said that there was no concluded contract. In the present case, as pointed out hereinabove, the outer limit within which the final sale deed has to be executed or payment has to be effected was not stipulated in the MOU. On the contrary, the facts of the case before the Hon''ble Apex Court were that the date within which the sale deed was to be executed was clearly stipulated and in such circumstances, it was held that merely because the mode of payment had to be settled, it would not affect the completeness of the contract. This cannot be applicable to the facts of the present case, as admittedly the time limit within which the sale deed has to be

finalised was not mentioned as the date of sale deed was not stipulated in the MOU. The ratio laid down in the said judgment of the Apex Court would as such not be applicable to the facts of the present case. The delay in executing the sale deed would benefit the appellant and as such the finalization of the schedule of the payment which was required to be finalised between the parties would be very material and an essential term of the contract. In such circumstances, without executing the agreement for sale nor taking any steps to finalise such agreement on the part of the appellant would also disentitle the appellant to seek a specific performance of the MOU. In this connection, the learned Trial Judge was justified in appreciating the evidence on record to come to the conclusion that the appellant was not entitled for the specific performance of the MOU as there was no concluded contract between the parties. Apart from that, the MOU was executed to enable the appellant to develop the property. This can clearly be seen from the terms of the MOU. In such circumstances, the appellant only had a commercial interest whereby the appellant desired to develop the property through some third party would also disentitle the appellant for specific performance of the MOU.

17. The judgment of the Apex Court reported in Nirmala Anand Vs. Advent Corporation (P) Ltd. and Others, in the case of Nirmala Anand v. Advent Corporation (P) Ltd. & Ors., is not applicable to the facts of the present case. There is no material on record to show any escalation in the price of the land in respect of the disputed property nor we have refused the specific performance of the contract on that count. So also the judgment of the Apex Court reported in Laxman Tatyaba Kankate and Another Vs. Smt. Taramati Harishchandra Dhatrak, in the case of Laxman Tatyaba Kankate and Anr. v. Taramati Harishchandra Dhatrak would not be applicable to the facts of the present case. There is no plea taken by the respondents before the Court to contend that he did not have title to the disputed property nor that the appellant is not entitled for specific performance on account of any escalation in the prices of the subject property. No doubt, the conduct of the parties is relevant for the purpose of grant of specific performance. In the present case, we have analyzed the conduct of the appellant and found that the appellant was not ready and willing to perform his part of the contract. There is no specific evidence nor pleadings by the appellant highlighting any conduct of the respondents which was patently illegal. The judgment of the Apex Court reported in P. D''Souza Vs. Shondrilo Naidu, in the case of P. D''Souza v. Shondrilo Naidu is also not applicable to the facts of the present case as it is not contended by the respondents that on account of hardship, the appellant is not entitled for a specific performance of contract. The contention of Mr. Sardessai, learned counsel appearing for the appellant that the appellant need not show that he actually has balance consideration at the time of the filing of the suit for specific performance can be accepted but in the present case, the learned Trial Judge has noted that the statement of accounts produced on record shows that sufficient funds were not available with the appellant to make such payment. Apart from that, as pointed out herein above, the appellant

himself has admitted in the cross examination that he had paid only Rs. 5 lakhs from his personal account. This would further suggest that the financial capacity of the appellant to mobilize the balance consideration was prima facie suspected.

18. Dealing with the judgments relied upon by Mr. J. Vaz, learned counsel appearing for the respondents, we find that the applicability of the judgment reported in Rangammal Vs. Kuppuswami and Another, , is not at all necessary to be examined in the present case. There is no dispute raised in connection with the burden of proof. The judgment reported in H.P. Pyarejan Vs. Dasappa (Dead) by LRs. and Others, is in connection with the provisions of Section 16(c) read with explanation to the Specific Relief Act, 1963. We have examined the material on record and found that the appellant has failed to establish that he was ready and willing to perform his part of the contract. We have also taken into consideration the conduct of the appellant to hold that the appellant is not entitled for the specific performance of contract. The judgments of the Apex Court relied upon by Mr. Vaz, learned counsel appearing for the respondents, reported in Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others, , inter alia clearly provides that a relief for specific performance can be granted only on the basis of the concluded contract. In the present case, we have found that even agreement to sell was not executed in terms of the MOU, it cannot be said that there was concluded contract as claimed by the appellant. The judgment of the Apex Court reported in United Bank of India Vs. Ramdas Mahadeo Prashad and Others, , would also assist the respondents to contend that as the appellant was found to be in breach of the terms of the MOU and the agreement for sale as provided in MOU has not been executed, there was no concluded contract as the appellant had not acted in terms of MOU.

19. In view of the above, we are unable to hold that the discretion exercised by the learned Trial Judge in refusing decree for specific performance to the appellant is contrary to the established principles nor can it be said that the discretion has been exercised in a perverse manner. Admittedly, the appellant did not exercise his option to get the sale deed executed in his favour on the payment of the balance consideration before the termination of the MOU by notice at Exhibit 45. We have also found that averments made therein and the conduct of the appellant would justify such termination though the aspect as to whether the amount paid by the appellant to the respondents is to be refunded would be examined whilst deciding the third point for determination. Hence, the first two points for determination are answered against the appellants.

20. With regard to the third point for determination, as pointed out hereinabove, it is not in dispute that at the time of the execution of the MOU, a sum of Rs. 5 lakhs was paid by the appellant to the respondents towards part of the consideration stipulated in the MOU. Thereafter, a sum of Rs. 40 lakhs were deposited directly into the accounts of the respondents. The evidence on record also suggest that D.W. 1 did not dispute that such amount was towards part of the consideration as stipulated in the MOU. The respondents have also taken a

stand that there was no concluded contract between them on the ground that the agreement for sale as stipulated in the clause 4 of the MOU has admittedly not been executed. This contention of the respondents has been accepted while examining the points for determination hereinabove. Though it was contended by the appellant in the plaint that he was ready and willing to execute his part of the bargain on making the balance payment due in terms of the MOU, but however, the records reveal that the said sum of Rs. 40 lakhs was used by the respondents to purchase a bungalow in Margao city. Though it is contended by the respondents that the said deal with regard to such bungalow could not go through as the appellant had not effected the balance payment as provided in the MOU, which forced the respondents to sell such bungalow to a third party at a low rate nevertheless, the veracity and the circumstances in which such transaction was entered into by the respondents has not been established by any cogent and reliable evidence on record. No document with that regard has been exhibited by the respondents to substantiate such contention. Merely producing some receipts and documents would not establish the contents thereof. In such circumstances, considering that the respondents were able to use the said sum of Rs. 40 lakhs to pay part of the consideration to purchase a bungalow in Margao city and the circumstances which forced the respondents to sell such bungalow at the same rate has not been established, we find that the respondents have taken some benefit of the said amount paid by the appellant to the respondents as part payment of the consideration as stipulated in the MOU. In such circumstances, taking note of the findings rendered herein above that there was no concluded contract between the parties, we find in the peculiar facts and circumstances of the case and considering the equities between the parties that the respondents are entitled for the refund of the total amount paid in terms of the MOU together with interest thereon. This view has been taken by us in the peculiar facts and circumstances of the case and taking note of the fact that the appellant has not taken any steps in terms of the clause 4 of the MOU to get the agreement for sale executed and finalise the schedule of payment of consideration. There is no evidence on record to establish that the respondents have suffered any loss or damages on account of default of the appellant in not taking steps to conclude the contract. On the other hand, the amount of Rs. 45 lakhs paid by the appellant was utilized by the respondents. In such circumstances, we find it appropriate to direct the refund of the said sum of Rs. 45 lakhs together with interest thereon. While accepting the rescission of the contract by the respondents, the Court can require the party in whose favour such relief is granted to restore any benefit which has been received from the other party in terms of such agreement. In terms of Section 22 of the Specific Relief Act, the Court can direct the refund of the amount paid by the defaulting party. In the facts and circumstances of this case taking note of the prevailing interest rates on the fixed deposit in Nationalized banks at the relevant time, we find that the refund of Rs. 45 lakhs with interest at the rate of 8% per annum would meet the ends of justice and equity. The third point for determination is answered accordingly.

21. In view of the above, we pass the following:

ORDER

"The appeal is partly allowed. The impugned judgment and decree dated 20.09.2013 is modified. The suit filed by the appellant is partly decreed in terms of the alternative prayer. The respondents are directed to pay to the appellant a sum of Rs. 45 lakhs received by them together with interest thereon at the rate of 8% per annum from the date of the filing of the suit up to actual payment. The appeal stands disposed of accordingly with no order as to costs.

Decree to be drawn accordingly."

22. After the pronouncement of judgment, the learned counsel appearing for the appellant seeks stay of the operation of the impugned judgment as according to him there was an interim order operating during the pendency of the appeal. Mr. J. Vaz, learned counsel appearing for the respondents opposes the said request as according to him some parallel proceedings were initiated to claim the amounts from the respondents herein. In the facts and circumstances of the case, considering that it is not in dispute that there was an interim order operating up to this date and in the interest of justice, interim order dated 17.10.2013 shall continue for a period of eight weeks and shall automatically stand vacated thereafter.

