(2012) 03 MAD CK 0126

In the Madras High Court

Case No : S.A. No. 504 of 2011 and M.P. No. 1 of 2011

Mrs. S. Thilagavathi and others APPELLANT

Vs

Mr. V. Subaramaniam (deceased), etc. and others RESPONDENT

Date of Decision : 30-03-2012

Acts Referred:

Specific Relief Act, 1877 — Section 20, 20(1), 20(2), 20(3), 20(4)
Specific Relief Act, 1963 — Section 20

Citation : (2012) 2 LW 686

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : N. Raja Vadivelu, for the Appellant; S.V. Jayaraman Senior Counsel for Mr. N. Sivakumar, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—The legal representatives of the plaintiff, in O.S.No.7399 of 1996 on the file of the learned XI Assistant Judge, City Civil Court, Chennai, are the appellants herein. Originally, Mr. A.Subramania Chettiar, the husband of the first appellant and father of the appellants 2 to 5, filed the above suit, for specific performance of an agreement of sale, dated 2.8.1990.

2. The Trial Court, decreed the suit in favour of the plaintiff.

3. Being aggrieved by the judgment and decree passed by the Trial Court, the first respondent, filed an Appeal in A.S.No. 172 of 2005, on the file of the learned Additional District and Sessions Judge (Fast Track Court No. III) Chennai.

4. The First Appellate Court, allowed the Appeal, reversing the judgment and decree passed by the Trial Court and dismissed the suit.

5. Aggrieved by the judgment and decree, passed by the First Appellate Court, the legal representatives of the deceased/plaintiff have filed present the Second Appeal.

6. The case of the deceased/plaintiff was that, the suit property, originally belonged to the first respondent/first defendant and the second defendant (since deceased) was her husband. On 2.8.1990, the defendants 1 and 2 and the deceased/plaintiff entered into an agreement of sale, by which, the first respondent herein and her husband agreed to sell the suit property to the deceased/plaintiff, for a sale consideration of Rs. 4,00,000/- and a sum of Rs. 10,000/- was paid by a cheque earlier and Rs. 58,000/- was paid by cash on the date of agreement, and the total sum of Rs. 68,000/- was treated as advance and towards the balance sale consideration, the purchaser was directed to discharge the simple mortgage, executed by the first respondent, in favour of one A.Subramania Chettiar, within a period of 15 days, from the date of the execution of the agreement and the balance sale consideration shall be paid, within a period of three months. On payment of balance sale consideration, the sale deed to be executed and at the time of execution of the sale deed, possession will be handed over to the deceased/plaintiff.

7. As per the agreement of sale, the deceased/plaintiff discharged the mortgage, created by the first respondent, in favour of the said Mr. A.Subramania Chettiar and the mortgagee further demanded a sum of Rs. 60,000/-, payable by the first respondent herein, for delivering documents of title and that amount was also paid, and on 16.8.1990, a sum of Rs. 2,000/- was paid to the first respondent, through her son, by name, Mr. K.Rajendran, viz., the sixth respondent herein. Therefore, the deceased/plaintiff had paid a sum of Rs. 2,30,000/-, towards sale agreement and he was ready and willing to pay the balance sale consideration of Rs. 1,70,000/- as per the agreement of sale, and he was calling upon the first respondent and her husband to execute the sale deed and the deceased/plaintiff also sent a letter, dated 5.12.1990, to the first respondent and her husband, asking them to vacate and handover vacant possession, on receipt of the balance sale consideration and the first respondent and her husband, sent a letter dated 14.12.1990, acknowledging the receipts of Rs. 2,30,000/- towards sale consideration and undertook to complete the sale transact

ion, by 28.2.1991, stating that they were not able to handover vacant possession, as the tenant did not vacate the suit premises. Even thereafter, the first respondent and her husband did not take any steps to receive the balance sale consideration and execute the sale deed and therefore, the deceased/ plaintiff sent a letter, dated 28.2.1991, informing the first respondent to handover vacant possession and informing that, he was ready and willing to perform his part of the contract and the time taken by them to hand over possession, expired on 28.2.1991. Thereafter, the first respondent sent a reply, dated 15.3.1991, stating that she received a sum of Rs. 2,25,000/- as loan, and the said amount was not received, as part of the sale consideration and she was not willing to execute any sale deed and the agreement was obtained, at the instance of her son and husband and therefore, she was not liable to execute the sale deed and she would pay the said amount, within a period of six months. Therefore, the deceased/plaintiff issued a Lawyer''s notice, dated 21.3.1991, calling upon the first respondent and her husband to act according to the terms of the agreement, to which, the first respondent sent a reply, dated 15.3.1991, and thereafter, the plaintiff filed the suit for specific performance, on 24.4.1991.

8. The respondents filed a written statement, denying the agreement of sale, dated 2.8.1990, alleged to have been executed by the defendants 1 and 2 and contended that the defendants 1 and 2, never offered to sell any suit property and the deceased/plaintiff was requested to lend a sum of Rs. 3,00,000/- to discharge mortgage loan and the deceased/plaintiff agreed to give Rs. 3,00,000/-, on the security of the suit property and under the guise of getting mortgage deed from the defendants 1 and 2, the agreement of sale was obtained by the deceased/plaintiff, as otherwise, the deceased/plaintiff refused to lend money and therefore, the agreement of sale was only a formality and was executed, as security for loan. The defendants further admitted the discharge of the mortgage with one Mr. A.Subramania Chettiar and also admitted the receipt of Rs. 10,000/- on 27.07.1990, but contended that it was not received towards part of sale consideration and it was obtained, as a loan and they also admitted that they received a sum of Rs. 2,25,000/- as loan from the deceased/plaintiff. It was further stated that only after the receipt of the letter, dated 5.12.1990, they came to know about the evil design of the deceased/plaintiff and thereafter, they met the deceased/plaintiff, in person and the deceased/plaintiff assured that the agreement of sale was obtained by way of abundant caution and he was not interested in buying the property and he was only interested in getting back his money with interest. Therefore, the defendants 1 and 2 contended that the amount was received, only as the loan and they never agreed to execute any sale deed and hence, the suit filed by the deceased/plaintiff for specific performance is not maintainable.

9. During the pendency of the suit, the second defendant, viz., husband of the first respondent herein died and his legal representatives were impleaded, as defendants 3 to 8 and the ninth defendant, viz., Palani filed a separate written statement, stating that the second defendant was suffering from paralysis, since 1983-84, and he was not in a position to speak normally and his thumb impression was obtained by practicing fraud and the property does not belong to the first respondent herein and only vacant land belonged to the first respondent and the superstructure was constructed by her husband and therefore, they have no right to execute the agreement of sale.

10. The learned Trial Judge framed ten issues for consideration in the suit, which reads as follows:-

1. Whether the agreement, dated 2.8.1990, alleged by the plaintiff is true and valid?

2. Whether the defendants received only Rs. 2,25,000/- as a loan transaction?

3 Whether the payment of advance of Rs. 2,30,000/- by the plaintiff on the date of the alleged agreement dated 2.8.1990 is true?

4. Whether the plaintiff was ready and willing to perform his part of the contract?

5. Whether the plaintiff is entitled to recover possession of the suit property?

6. Whether the defendants are liable to pay compensation of Rs. 10,000/- as claimed by the plaintiff?

7. Whether the plaintiff is entitled to the relief of specific performance of the contract as claimed by him.?

8. To what relief the plaintiff is entitled to? On 4.9.2001 the following issue has been framed as additional Issue: -

9 (i). Whether the defendants 3 to 8 are bound to execute the sale deed as prayed for? On 18.6.2003 the following issues have been framed as additional issue Nos. 2 and 3.

10 (ii) Whether the defendants 9 to 12 are liable for the suit claim? (iii) To what reliefs?

11. The learned Trial Judge considered issues 1 to 4 and 7 and held that the first defendant and her husband executed an agreement of sale and the deceased/ plaintiff acted according to the terms of the agreement, discharged mortgage and paid Rs. 2,30,000/-towards the sale consideration and that was also accepted by the first respondent and held that the deceased/plaintiff was entitled to the decree of specific performance and also for recovery of possession of the suit property and denied the relief of compensation to the deceased/plaintiff, while answering issue No. 6 and also answered additional issues 1 and 2, in favour of the deceased/plaintiff stating that the defendants 3 to 12 are bound to execute the sale deed, as they are the legal representatives of the deceased/ second defendant and decreed the suit for specific performance, on payment of balance sale consideration of Rs. 1,70,000/- within a period of two months.

12. Aggrieved by the same, the first respondent/first defendant filed an Appeal, A.S.No. 172, of 2005, on the file of the learned Additional District and Sessions Judge (Fast Track Court No. III) Chennai, and the First Appellate Court, reversed the judgment and decree, passed by the Trial Court and allowed the appeal, holding that the deceased/plaintiff was not ready and willing to perform his part of the contract and he has not proved the execution of Ex. A.9, the letter dated 14.12.1990, alleged to have been executed by the defendants 1 and 2 and no attempt was made by the plaintiff to pay the balance sale consideration, as per the agreement of sale and as the plaintiff failed to prove that he was ready and willing to perform his part of the contract, he was not entitled to the relief of specific performance and he also failed to prove his means to pay the balance sale consideration and as per the agreement, he has not paid the balance sale consideration, within a period of three months. The First Appellate Court further held that the agreement of sale was of the year 1990 and if the appellants were directed to execute the sale deed in the year 2009, that would cause several hardships and prejudice to them, as the value of the property escalated during

the past 20 years and therefore, the hardship that may be caused to the appellants, by dismissing the appeal will outweigh the benefit accrued to the plaintiff and therefore, the deceased/plaintiff is not entitled to the relief of specific performance and exercising discretion u/s 20 of the Specific Relief Act (hereinafter referred to as ''the Act'') the First Appellate Court refused to grant the relief of specific performance and allowed the Appeal. The First Appellate Court also held that the Trial Court erred in granting relief of recovery of possession, in the absence of any prayer to that effect and that is against Section 22 of the Act. Moreover, the suit was also bad for non-joinder of the tenants. Hence, this Second Appeal.

13. The following Substantial Questions of Law arises for consideration in this Appeal:-

i) Whether the Lower Appellate Court was right in denying the relief of specific performance, after holding that the first respondent and her husband entered into an agreement of sale with the deceased/plaintiff and the agreement of sale, dated 2.8.1990 was true, valid and the first respondent received the sum of Rs. 2,30,000/-?

ii) Whether the Lower Appellate Court was right in denying the relief of specific performance, holding that the deceased/plaintiff failed to pay the balance sale consideration within three months'' time, as stipulated in the agreement of sale?

iii) Whether the Lower Appellate Court was right in applying the provisions of Section 20 (2) of the Specific Relief Act, to deny the relief of specific performance, holding that having regard to the lapse of time, the first respondent would be put to disadvantage, if she is directed to execute the sale deed, for a sum of Rs. 4,00,000/- as per the agreement of sale, dated 2.8.1990, and therefore, the discretion cannot be exercised in favour of the deceased/ plaintiff?

iv) Whether the Lower Appellate Court was right in holding that the Trial Court was right in granting the relief of recovery of possession, in the absence of any prayer to that effect.?

14. Mr. Raja Vadivelu, the learned counsel appearing for the appellants submitted that the Lower Appellate Court, having found that the defendants 1 and 2 executed the sale agreement, dated 2.8.1990, in favour of the deceased/plaintiff and having found that the agreement of sale was true, valid and consideration was received by them, under the agreement, ought to have dismissed the appeal filed by the first respondent herein and the Lower Appellate Court, without properly appreciating Exs. A.7, A.9, A.10, A12 and A. 13, erred in holding that the deceased/plaintiff was not ready to pay the balance sale consideration, within the stipulated period stated in the agreement.

15. The learned counsel for the appellants further submitted that the Lower Appellate Court also erred in rejecting Ex. A9, viz., the undertaking letter given

by defendants 1 and 2, agreeing to execute the sale deed on 28.2.1991.

16. The learned counsel for the appellants also submitted that the first respondent herein admitted the execution of Ex. A.9, in her evidence and it is not the case of the first respondent that the deceased/plaintiff was not having means to pay the balance sale consideration and having regard to the conduct of the deceased/plaintiff, in issuing notice Ex. A.10, on 28.2.1991, informing the defendants 1 and 2 about the undertaking given by her in her letter dated 14.12.1990, and issuing a Lawyer''s notice, on 21.3.1991, Ex. A. 12, it was amply proved that the deceased plaintiff was ready and willing to perform his part of the contract and the suit was filed immediately, thereafter, on 24.4.1991, and therefore, it cannot be contended that the deceased/plaintiff was not ready and willing to pay the balance sale consideration. The learned counsel further contended that escalation of price cannot be put against the appellants, as they were not at fault and due to the pendency of the suit, they did not pay the balance sale consideration and even after the suit was decreed, they were ready to pay the balance sale consideration and therefore, the Lower Appellate Court wrongly exercised its discretion, available u/s 20 of the Act and the learned counsel relied on a judgment reported in the case of P. D''Souza Vs. Shondrilo Naidu, in support of his contention.

17. The learned counsel for the appellants further contended that the Lower Appellate Court was wrong in holding that the Trial Court erred in granting the relief of recovery of possession, in the absence of any prayer to the effect and submitted in the plaint itself, the plaintiff has prayed for possession of the suit property and considering the same, the Trial Court has granted the decree and without appreciating various Exhibits, the Lower Appellate Court erroneously held that the plaintiff was not entitled to the relief of specific performance and allowed the appeal and the findings of the Lower Appellate Court are perverse, illegal and are liable to be set aside.

18. Per contra, Mr. S.V.Jaya Raman, the learned Senior counsel for the respondents submitted that, as per the agreement of sale, three months'' time was given to the deceased/plaintiff to complete the sale transaction and that period expired on 2.11.1990 and admittedly, no attempt was made by the deceased/plaintiff to pay the balance sale consideration and only on 28.2.1991, he issued a letter, as if the defendants 1 and 2, executed an undertaking on 14.12.1990 and that undertaking was also considered by the Lower Appellate Court and held that it was not proved and when the alleged undertaking, dated 14.12.1990 was rejected, there was no proof on the side of the plaintiff to prove that he was ready and willing to pay the balance sale consideration, within the period, stipulated in the agreement of sale and considering all these aspects, the Lower Appellate Court rightly exercised its discretion in favour of the respondents/ defendants and allowed the appeal, thereby, dismissing the suit.
20. The learned Senior Counsel for the respondents in support of his contention, relied upon a judgment of the Hon''ble Supreme Court, reported in the case of

Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., , which was relied upon by the Lower Appellate Court and held that as per the judgment of the Hon''ble Supreme Court, the plaintiff has to prove the readiness and willingness, from the date of transaction till the date of sale and in this case, that was not proved by the plaintiff and hence, the Lower Appellate Court has rightly dismissed the suit and allowed the appeal and judgment and decree of the Lower Appellate Court does not call for interference.

20. Heard the learned counsel appearing for the parties.

21. To appreciate the contention of both the parties, the Clauses in the agreement of sale-Ex. A. 1, dated 2.8.1990, have to be scrutinized, to gather the intention of the parties. The various Clauses in the agreement of sale are extracted under: -

1. The Vendors shall sell and the Purchaser shall purchase absolutely, the house, ground and premises, bearing No. 3, Mandapam Road 1st Lane, Kilpauk, Madras-10, more fully described in the Schedule, for a sum of Rs. 4,00,000/- (Rupees Four Lakhs only) free from all encumbrances.

2. The Purchaser has already paid to the Vendors, a sum of Rs. 10,000/- (Rupees Ten Thousand Only) by a cheque, dated 27.7.1990 and a sum of Rs. 58,000/- (Rupees Fifty Eight Thousand only) by cash today, totally a sum of Rs. 68,000 (Rupees Sixty Eight Thousand only) as and by way of advance, the receipt of which sum in the aforesaid manner the Vendors do hereby acknowledge.

3. The Purchaser shall discharge the first simple mortgage in favour of A.Subramania Chettiar, within fifteen days from this day on behalf of the Vendors herein from and out of the sale consideration of the Schedule mentioned property and get back all the original documents of the said property and keep the same with him.

9. The parties have the right of specific performance of this agreement in case of breach of any term of this agreement by any party. Besides, the aggrieved party has also the right to claim damages, as per law."

22. In this case, as per the agreement of sale, the deceased plaintiff ought to have discharged the simple mortgage, executed in favour of A.Subraminian Chettiar, within a period of 15 days, from the date of the agreement and get back all the original documents of property, vide Clause-3.

23. It is admitted by the first respondent, that the deceased plaintiff discharged the mortgage amount, payable to Mr. A.Subramania Chettiar, and also admitted that, including the advance amount paid to the said Mr. Subramania Chettiar, the deceased plaintiff had paid Rs. 2,25,000/-, towards the sale consideration and not Rs. 2,30,000/- as claimed by the deceased plaintiff.

24. As a matter of fact, the Lower Appellate Court, also held that the mortgage amount was discharged by the deceased plaintiff and he performed his part of

the contract. Therefore, we will have to see whether the first respondent had also acted, as per the terms of the contract. Before going into that aspect, we will have to see the stand taken by the first respondent. The deceased plaintiff issued a letter dated 5.12.1990, which is in Tamil language to the defendants 1 and 2, stating that they have paid Rs. 2,30,000/-towards the sale consideration and agreed to buy their house for a sum of Rs. 4,00,000/- by entering into an agreement of sale dated, 02.08.1990 and the first respondent agreed to handover vacant possession and receive the balance sale consideration and the defendants did not vacate the tenants and when that was questioned by the deceased plaintiff, the first respondent informed that her husband was not well and the tenants would be vacated, within a period of one month''s time and evenafter the expiry of one month, the tenants were not vacated and therefore, the deceased plaintiff requested the defendants 1 and 2, to execute the documents, in his favour. This letter was marked as Ex. A.7, and Ex. A8, is the acknowledgment. Thereafter, the defendants 1 and 2, viz., the first respondent and her husband, alleged to have executed a letter of. undertaking, which is marked as Ex. A.9, agreeing to complete the sale transaction, on or before 28.2.1991. This document Ex. A.9, dated 14.12.1990 is disputed and doubted by the Lower Appellate Court. The first respondent and her husband failed to act, as per the letter of undertaking, dated 14.12.1990. Thereafter, the deceased plaintiff sent a letter dated 28.2.1991, reiterating the agreement payment of Rs. 2,30,000/-, reminding the undertaking given by them and requested the first respondent and her husband to execute the sale deed, in his favour, within a period of one month''s time and at that time only, the first respondent sent a reply-Ex. A12, dated 15.3.1991, stating that the agreement of sale was obtained by her husband and son, by coercion and she was not interested in selling any property and she wanted to settle the property, in favour of her son and daughters and without her full consent, her husband and son forced her to enter into the agreement with the deceased plaintiff for sale and therefore, that agreement of sale is not binding on her. In that letter, she also acknowledged the receipt of Rs. 2,25,000/-.

25. Contrary to the stand taken in Ex. A12, the first respondent filed a written statement in the suit, stating that, they approached the deceased plaintiff for getting Rs. 3,00,000/- as loan, to discharge a mortgage loan and the deceased plaintiff agreed to lend that amount on security of the property and instead of drafting the mortgage deed, the plaintiff fabricated a document and asked the first respondent and her husband to sign the document, failing which, he would not give money and bona fide believing the plaintiff, she and her husband signed the document, which is now projected, as the sale agreement in the suit. In the evidence also, the first respondent reiterated the same allegations made in the written statement and stated that, she borrowed a sum of Rs. 3,00,000/- from the plaintiff, for discharging the earlier mortgage and at the instance of the plaintiff, the document was executed and it was never intended to be treated as agreement of sale and it was only given as security for the loan amount and

therefore, she is not bound to execute the sale deed.

26. Therefore, the first respondent and her husband had taken a different stand in the written statement as well as in the evidence, contrary to her letter-Ex. A. 12. In Ex. A.12, she admitted that the document was obtained from her by force, by her husband and son and she was not willing to execute the sale deed, as she wanted to settle the property on her children.

27. In other words, the first respondent did not project the case as putforth in the written statement that she only availed a loan of Rs. 3,00,000/- and for that purpose, the document was executed, as security. Therefore, having admitted the execution of the document, in favour of the deceased plaintiff and also admitted that no force or fraud had been practiced on her, by the deceased plaintiff and she was forced by her son and husband to execute the document, it is not open to the first respondent, to turnaround and say that the agreement of sale was not executed by her and it was only obtained, as security for the loan, availed by her. This fact was not properly appreciated by the Lower Appellate Court.

28. Further, the Lower Appellate Court relied upon a judgment reported in Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., , to arrive at a conclusion that time was the essence of the contract and the deceased plaintiff did not act, according to the terms of the contract and he did not pay the balance sale consideration within three months'' time, from the date of agreement of sale. The First Appellate Court, without properly appreciating the judgment of the Hon''ble Supreme Court, erred in holding that, as per the above judgment, the deceased plaintiff was not entitled to the relief of specific performance, as he has not paid the balance sale consideration within three months'' time.

29. In the above said judgment, the Hon''ble Supreme Court held that in the case of immovable property, time is never regarded as the essence of the contract, and there is no presumption as to time, being the essence of contract. The Hon''ble Supreme Court, also relied upon various judgments of the intra Court and held that, it is a settled law that the fixation of the period, within which the contract has to be performed, does not make the stipulation as to time the essence of the contract and they have stated so, after relying upon the judgment reported in 1979 S.C.720 in the case of [Hind Construction Contractors Vs. State of Maharashtra] wherein, the Hon''ble Supreme Court has held as follows:-

In the latest 4th edn. of Halsbury''s Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol. 4, Para 1179, which runs thus:-

1179. Where time is of the essence of the contract. The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor''s right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental.

Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental, time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion. Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fa a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed. (Emphasis supplied)

It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental, for instance, if the contract were to include causes providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasis portion of the aforesaid statement of law is based on Lamprell v. Billericay Union (1849) 3 Exch 283 at 308, Webb v. Hughes (1870) L.R. 10 Eq 281 and Charles Richards Ltd. v. Oppenheim (1950) 1 KB 616.

30. The Hon''ble Supreme Court, having regard to the facts of that case, held that parties agreed that time was the essence of contract and as per the agreement of sale, which was the subject matter of that judgment, the purchaser ought to have paid Rs. 98,000/- within 10 days'' time and that amount was not paid and therefore, he committed breach of contract and he was not entitled to the relief of specific performance. But in this case, as per Clause (3) of the agreement of sale, the deceased plaintiff has to discharge the mortgage, within 15 days'' time and that was discharged by him and the same was also admitted by the first respondent. Further, the deceased plaintiff has to pay the balance sale consideration, within three months'' time, as per Clause (4) of the said agreement and a duty was also cast upon the first respondent and her husband to produce necessary Income Tax Clearance Certificate for the sale of the property, within two months'' time from that date and to produce Encumbrance Certificate, for a period of 13 years and handover vacant possession of the schedule mentioned property to the purchaser, at the time of execution of the sale deed, vide-A Clauses. 5, 6 & 7)

31. Admittedly, no attempt was made by the first respondent and her husband to

get the income tax Clearance Certificate or Encumbrance Certificate. According to the deceased plaintiff, the tenant was not vacated and therefore, even on 5.12.1990, a letter was sent by the deceased plaintiff, to the first respondent and her husband, reminding them of the promise to get the vacant possession and complete the sale consideration, within a period of seven days. This letter was acknowledged by the first respondent, under Ex. A.8 and no reply was sent, denying the contents. It is the further case of the deceased plaintiff that, thereafter, the first respondent and her husband executed a letter of undertaking, agreeing to complete the sale transaction, on or before 28.02.1991 and agreed to get vacant possession of the premises by that time. It was mentioned in Ex. A10, the letter dated 28.2.1991, sent by the deceased plaintiff and to that letter, a reply was sent by the first respondent, dated 15.3.1991, marked as Ex. A. 12 and in that letter also, she did not deny execution of letter of Ex. A.9. On the other hand, she only stated that her husband and her son forced her to sign the document and she was not willing to sell the property. Though, she denied Ex. A.9, in her evidence, she admitted the receipt of sale consideration, as spoken to by the plaintiff and her only defence was that the amount was received only as loan and not pursuant to the agreement of sale.

32. As stated supra, the stand of the first respondent is contrary to the contents of Ex. A.12, the letter dated 15.3.1991 and the Lower Appellate Court, without properly appreciating the totality of the circumstances, erred in holding that the deceased plaintiff was not ready and willing to perform his part of the contract by offering the balance sale consideration.

33. As rightly pointed out by the learned counsel for the appellants that in a suit for specific performance, the defendants are also expected to act in a just and fair manner and the conduct of the defendants has also to be considered, while deciding the relief.

34. According to me, the conduct of the deceased plaintiff in a letter-Ex. A. 7, dated 5.12.1990, Ex. A. 10, dated 28.2.1991, would prove that he was ever ready and willing to perform his part of the contract and it was the defendants, who did not act according to the terms of the contract by producing Income Tax Clearance Certificate, Encumbrance Certificate and failed to get vacant possession of the property and by reason of the conduct of the defendants, the deceased plaintiff did not pay the balance sale consideration. There is no dispute regarding the means of the deceased plaintiff and when the plaintiff was capable of advancing Rs. 2,30,000/-, it would not have been difficult for him to pay the balance sale consideration of Rs. 1,70,000/-and he has also expressed his willingness to pay the balance sale consideration in his letters-Exs. A.7 and A. 10. Therefore, the findings of the Lower Appellate Court that the plaintiff was not ready and willing to perform his part of the contract, is not only erroneous, but also perverse. Further, the Lower Appellate Court erred in rejecting Ex. A.9, without properly considering the fact that in Ex. A. 12, the first respondent did not deny the letter of undertaking, executed by them.

35. Therefore, I hold that the plaintiff has proved that agreement of sale was entered into between him, the first respondent and her husband and the plaintiff was ready and willing to perform his part of the contract from the date of the contract, till the date of filing of the suit and therefore, the Substantial Questions of Law, 1 and 2 are answered in favour of the appellants.

36. The Lower Appellate Court, erred in allowing the Appeal filed by the respondents, holding that the respondents would be put to disadvantage and hardship, if they were directed to sell the property for a sum of Rs. 4,00,000/- fixed in the year 1990 and the value of the property is hundred times more than the value fixed on the date of agreement and the hardship that may be caused to the respondents, will outweigh the hardship that may be caused to the plaintiff and therefore, the plaintiff is not entitled to the relief of specific performance. The Lower Appellate Court, without properly appreciating the provisions of Section 20 (2) of the Act, erred in holding that the appellants are not entitled to the relief of specific performance. For better appreciation, Section 20 of the Act is extracted under:-

Discretion as to decreeing specific performance - (1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief, merely because, it is lawful to do so, but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.

(2) The following are cases in which, the Court may properly exercise discretion not to decree specific performance-

(a) Where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which, the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) Where the performance of the contract would involve some hardship on the defendant, which, he did not foresee, whereas, its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances, which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation-1 : Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to consitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b)

Explanation-2 : The question whether the performance of a contract would involve hardship on the defendant within the meaning of Clause (b) shall, except, in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances, existing at the time of the contract.

3) The Court, may properly exercise discretion to decree specific performance in any case, where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

4) The Court shall not refuse to any party specific performance of a contract, merely on the ground that the contract is not enforceable at the instance of the other party.

37. Moreover, the Hon''ble Supreme Court in the judgment reported in 2010(2) C.T.C. 751 in the case of [B.Nemi Chand Jain and another Vs. G.Ravindran and others) dealt with the scope of Section 20 (2) of the Act and held as follows:-

Even while declaring that the jurisdiction of the Court to decree specific performance is only discretionary and that the Court is not bound to grant the relief merely because it is lawful to do so, sub-section (1) of Section 20, makes three things very clear viz., (i) that the discretion is not arbitrary, but sound and reasonable; (ii) that it is guided by judicial principles; and (iii) that it is capable of correction by a Court of Appeal.

120. Without elaborating on (i) what is sound and reasonable exercise of discretion and (ii) what are judicial principles that should guide the exercise of discretion and which are capable of correction by a Court of Appeal, sub-sections (2), (3) and (4) of Section 20, lay down three indications. They are as follows:- (i) Under sub-section (2), the cases in which a Court may exercise the discretion not to decree specific performance are indicated.

(ii) Under sub-section (3), the case in which the Court may exercise the discretion to grant specific performance, is indicated.

(iii) In sub-section (4), a stray case where the Court shall not refuse specific performance, is indicated.

121. The cases in which the Court is entitled to exercise the discretion not to grant specific performance, as listed in sub-section (2) of Section 20 are as follows:-

(I) Cases where - (a) either the terms of the contract (b) or the conduct of the parties at the time of entering into the contract (c) or the other circumstances under which the contract was entered into, are such that the contract gives the plaintiff, an unfair advantage over the defendant.

(II) Cases where the performance of the contract would involve some hardship on the defendant that he did not foresee, while the non performance would involve no such hardship on the plaintiff.

(III) Cases where the defendant entered into the contract under circumstances, which though not rendering the contract voidable, makes it inequitable to enforce the specific performance.

122. The test of & quot; unfair advantage & quot; prescribed under Clause (a) of sub-section (2) and the test of & quot; hardship & quot; prescribed under Clause (b) of sub-section (2), are qualified by the two Explanations under sub-section (2). By virtue of Explanations 1 and 2 - (i) The mere inadequacy of consideration would not constitute an unfair advantage or hardship.

(ii) The mere fact that the contract is onerous to the defendant would not constitute an unfair advantage or hardship.

(iii) The mere fact that the contract is improvident in its nature would not constitute an unfair advantage or hardship.

(iv) The question whether the performance of the contract would involve hardship on the defendant, is to be determined only with reference to the circumstances existing at the time of the contract, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract.

123. The scope and purpose of sub-sections (3) and (4) of Section 20, need not be examined, since the facts of the case on hand do not warrant such an exercise. This is not a case where the plaintiffs claim to have done substantial acts or suffered losses in consequence of Ex. A-1. Except paying money to the extent of Rs. 1.63 crores, much before the date of execution of the Sale Agreement (Ex. A-1), viz., 16.5.2007 and paying a sum of Rs. 1.37 crores on 17.5.2007 and a sum of Rs. 1 crore on 30.6.2007, the plaintiffs had not done & quot; any other substantial acts & quot; nor do they claim to have & quot; suffered losses & quot;. Therefore the case is not covered by sub section (3). This is also not a case where the contract has become unenforceable at the option of the other party, so as to be covered by sub section (4).

124. Thus, the issue as to whether the plaintiffs are entitled to the discretionary relief of specific performance, has to be examined, in the light of the provisions of sub-sections (1) and (2) of Section 20. While doing so, the Court should remember two important things. They are:-

(i) Though as a matter of general principle, the exercise of discretion one way or the other, by a Court of first instance or a quasi judicial or administrative authority, cannot normally be upset by a Court of Appeal, by substituting its own discretion, Section 20(1) makes a deviation from this general principle by stating in express terms that the discretion exercised in the matter of specific performance, is capable of correction by a Court of Appeal, (ii) The list of cases provided in Clauses (a), (b) and (c) of sub-section (2) in which specific performance may not be granted-- the case indicated in sub-section (3) where specific performance may be granted--and the exclusion of one of the grounds on which specific performance can be refused, indicated in sub-section (4) are only illustrative and not exhaustive.

125. In simple terms, what Section 20 has done is this. After providing in sub-section (1) of Section 20 that the grant of the relief is discretionary, guided by

sound and reasonable judicial principles capable of correction by a Court of Appeal, sub-sections (2), (3) and (4) provide an illustrative list as a road map, to enable the Courts to exercise the discretion to grant or not, the relief, in a scientific manner. They do not provide a straight jacket formula, but a canvas on which the Courts have to exercise the power of discretion.

126. That sub-section (2) of Section 20 is only illustrative and not exhaustive, is seen easily from the Report of the Law Commission of India, which recommended a change to Section 22 of the Specific Relief Act of 1877. The relevant portion of the Report of the Law Commission is as follows:- & quot; It is not possible to exhaustively enumerate the grounds of unfairness or of hardship mentioned in Clause (ii). As stated by Pomeroy, the variety of forms of hardship and unfairness is infinite; the Courts, therefore, in dealing with these subjects have wisely refrained from limiting themselves by special rules. In this particular field precedents are of comparatively little value. There are, however, certain advantages or hardship. Thus, the fact that the contract is onerous to the defendant or improvident in nature, or that there is inadequacy of consideration, will not be circumstances falling within Clause (b). It would be advisable to add an explanation to the section making this position clear. It is not clear from Clause (ii) at what point of time the circumstances causing the hardship must exist in order to be a ground for refusing specific performance. In England, it has been established that as a general rule hardship, to operate as a ground of defence must have existed at the time of the contract, and not arisen subsequently from a change of circumstances. In India, too, it has been held that the circumstances which have subsequently arisen such as a rise in prices, owing to external circumstances, like war conditions, or the results of litigation, do not constitute ''hardship'' which can be relieved against, under Clause (b), A subsequent change of conditions causing hardship may, however, be a ground for refusing specific performance where it has been brought about by the acts of the plaintiff. We recommended that the following principles to be incorporated in an explanation to the section.& quot; Therefore, it is trite to point out that the variety of forms of hardship and unfairness is infinite and that the grounds of unfairness or of hardship, cannot be exhaustively enumerated.

127. In Parakunnan Veetill Joseph''s Vs. Nedumbara Kuruvila''s and Ors, }, the Supreme Court held as follows:-

14. Section 20 of the Specific Relief Act, 1963, preserves judicial discretion of Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. & quot;

128. Now therefore, let us test the issues of (i) unfair advantage to the plaintiff and (ii) hardship on the defendant, so as to see if the discretionary relief can be

granted to the plaintiffs in the case on hand.

Unfair advantage to the plaintiff:

129. The question as to whether the specific enforcement of the contract would give an unfair advantage to the plaintiffs, has to be tested only with reference to three things viz., (i) the terms of the contract (ii) the conduct of the parties at the time of entering into the contract and (iii) the other circumstances under which the contract was entered into. While testing the issue of unfair advantage to the plaintiffs, the restrictions imposed by Explanation 1 that (i) mere inadequacy of consideration (ii) the mere onerous nature of the contract on the defendant and (iii) the improvident nature of the contract, would not constitute unfair advantage, has also to be borne in mind.

38. Further, in the case of Motilal Jain Vs. Smt. Ramdasi Devi, reported in 2000 Volume 6 S.C.C. 420 : 2001-1-L.W. 388 , the Hon''ble Supreme Court pointed out various aspects of delay, which is extracted hereunder:-

It may be apt to bear in mind the following aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property:

(i) delay running beyond the period prescribed under the Limitation Act;

(ii) delay in cases where though the suit is within the period of limitation, yet:

(a) due to delay the third parties have acquired the rights in the subject-matter of the suit;

(b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief.

Therefore, what is important is to see (i) if at all there was a delay on the part of the plaintiffs in coming to Court and (ii) if such delay led either to the parties changing their positions or to the character of the property getting changed.

39. In this case, it is not the case of the respondents that the performance of the contract involved some hardship on them, which they did not foresee and as per Explanation 2 of Section 20 of the Act, the hardship that would be caused to the respondents must have resulted from any act of the plaintiff subsequent to the contract and it must be determined with reference to the circumstances existing at the time of contract.

40. In this case, no plea has been raised by the respondents, regarding the hardship that may be caused to them by executing the sale deed and no circumstances has been stated, which existed at the time of contract, which resulted in hardship on the respondents or the hardship was experienced by the respondents due to any act of the plaintiff, subsequent to the contract.

41. As stated supra, immediately after expiry of time, the deceased plaintiff issued notice, reminding them to comply with the terms of the agreement of sale and the first respondent gave an undertaking letter, agreeing to complete the

sale transaction, on or before 28.2.1991 and on 28.2.1991, the deceased plaintiff issued a notice, calling upon them to complete the sale transaction and also filed the suit immediately thereafter. Hence, it cannot be stated that, by the conduct of the deceased plaintiff, any hardship is caused to the respondents. Further, the subsequent raise in price, cannot be a reason for denying the relief of specific performance, unless, the plaintiff is guilty of laches or due to the delay on the part of the plaintiff, some events had taken place, which makes it impossible for the performance of the contract.

42. Therefore, the findings of the Lower Appellate Court that discretion u/s 20 cannot be exercised in favour of the deceased plaintiff the appellants herein is not correct and the Lower Appellate Court has erroneously exercised discretion against the appellants and having regard to the facts and circumstances of the case, ought to have held that the appellants have performed their part of the contract and ought to have dismissed the Appeal, filed by the respondents. Hence, the substantial question of Law No. 3, is answered in favour of the appellants.

43. The Lower Appellate Court also erred in holding that the Trial Court erred in granting the relief of possession in the absence of any prayer to the effect. Therefore, the decree for possession is contrary to Section 22 of the Act and therefore, the judgment of the Trial Court is liable to be set aside.

44. The findings of the Lower Appellate Court is perverse. It is seen from the plaint, that the plaintiff has prayed for possession. Further, relying upon the Hon''ble Supreme Court judgment, I held in a judgment reported in 2012-1-C.T.C. 823 in the case of [Krishnamoorthy Gounder Vs. Venkatakrishnan and others] that even in the absence of prayer for possession, the Court has got power to order delivery, while decreeing the suit for specific performance. Hence, the substantial question of law No. 4, is also answered in favour of the appellants. In the result, the judgment and decree of the Lower Appellate Court is set aside and that of the Trial Court is restored and the Second Appeal is allowed. No costs.