
(2012) 10 MAD CK 0119
In the Madras High Court
Case No : C.S. No. 632 of 1997

Pan Resorts Ltd.

APPELLANT

Vs

H.H. Karthika Thirunal Lakshmi Bayi (deceased) and Others

RESPONDENT

Date of Decision : 01-10-2012

Acts Referred:

Income Tax Act, 1961 — Section 230A, 269UD, 269UL(i)
Specific Relief Act, 1963 — Section 20, 22(2)

Citation : (2012) 7 MLJ 844

Hon'ble Judges : V. Periya Karuppiyah, J

Bench : Single Bench

Advocate : R. Parthasarathy for Ms. P. Seshadri, Mohan Parasaran and Sathish Parasaran, for the Appellant; C. Selvaraju for R. Rajarajan, S.V. Jayaraman, for Ms. P. Anitha and Ms. A. Arulmozhi, for the Respondent

Final Decision : Dismissed

Judgement

V. Periya Karuppiyah, J.—The suit has been filed by the plaintiff to direct the Defendants 1 to 4 and 7 to 9 to specifically perform the agreement dated 3.8.1994 entered into between the plaintiff and the Defendants 1 to 9 and to do all acts necessary for the execution of the sale deed in favour of the plaintiff, after receiving the balance of sale consideration payable to the defendants in proportion to their respective shares in terms of the agreement for sale dated 3.8.1994 and on their failing to do so, direct an Officer of this Honourable Court to execute the sale deed for the remaining portion of the suit property in respect of the undivided shares owned by the Defendants 1 to 4 and 7 to 9 in favour of the plaintiff in terms of the agreement dated 3.8.1994 and to direct the defendants to do all acts necessary to put the plaintiff in full possession of the suit property and to pay the costs of the suit. The brief facts of the case of the plaintiff are as follows:

(a) The Defendants 1 to 9 were the joint owners of a property called Travancore House/Adyar house/Ramalayam situated at L.B. Road, Padmanabha Nagar,

Adyar, Chennai-600 020. According to the defendants, they had right of way in the common pathway in the said property measuring an extent of 20 grounds. According to the defendants, the said property devolved upon them by a Will dated 28.11.1981 executed by His Highness Sri Padmanabha Sri Chitrai Balarama Varma who was also called as Rama Varma, Maharaja of Travancore, and he died on 20.7.1991. After his death, the said Will was probated in the High Court at Kerala by order dated 3.4.1992. As per the Will, the Defendants 1 to 8 each are entitled to individually a share of 11.25% in the said property and the 9th defendant is entitled to the remaining 10% of the said property which was held by them as undivided co-owners.

(b) The Defendants 1 to 9 had entered into a tripartite agreement for sale dated 10.3.1993 of the schedule mentioned property comprising the Defendants 1 to 9 on one part as vendors and one Mr. Shankar Khandadi and one Mr. Usman Fayaz as parties of the second part and the Indian Bank represented by its Chief Manager, Adyar Branch, Madras-20 as the party of the third part. In terms of the agreement dated 10.3.1993, the said property was to be sold to Mr. Shankar Khandadi and Mr. Usman Fayaz for a total consideration of Rs. 325 lakhs. A draft for a sum of Rs. 50 lakhs was handed over to the 9th defendant, who was the power of attorney of Defendants 1 to 8 in proportion to the respective shares of Defendants 1 to 9. As per the said agreement, the sale transaction was to be completed within 4 months from the date of defendants obtaining No Objection Certificate from the Income Tax Department. The Indian Bank was given option to purchase the property on the same terms and conditions provided, if the agreement holders fails to perform their part of the contract, the Bank should exercise its option within 15 days after the expiry of the period of 4 months as contemplated under clause 4 of the agreement. Even though some progress was made pursuant to the agreement dated 10.3.1993, the said agreement was not put through between the originally contemplated parties, instead, a Memorandum of Agreement dated 3.8.1994 was entered into between the plaintiff, the defendants and the earlier agreement holders Mr. Shankar Khandadi and Mr. Usman Fayaz and Indian Bank, Adyar Branch. In terms of clause 12 of the said agreement dated 3.8.1994, the earlier agreement holders had relinquished their rights completely in favour of the plaintiff. The consideration of Rs. 325 lakhs was maintained in this agreement. Apart from retaining the earlier advance of Rs. 50 lakhs on account of the plaintiff, the plaintiff further paid a sum of Rs. 50 lakhs by nine demand drafts to be appropriated by each one of the Defendants 1 to 9 in accordance with their respective share. The plaintiff agreed to pay a further sum of Rs. 50 lakhs to the Defendants 1 to 9 on such production and alternatively on the production of Urban Land Ceiling Clearance or No Objection certificate under Chapter XX-C of the Income Tax Act from the appropriate authority whichever is earlier.

(c) As per Clause 8 of the agreement, time limit was contemplated and in any event the Defendants 1 to 9 had agreed to register the Sale Deed at the cost of the plaintiff on or before 31.3.1995 after obtaining necessary clearances

certificates. Without obtaining necessary certificates contemplated, it cannot be said that the Defendants 1 to 9 have completed their obligations to enable the plaintiff to further proceed in the matter as per the agreement. No Objection Certificate for the sale of the property was granted in favour of the plaintiff on 21.11.1994. The plaintiff has made a commitment to pay the entire sale consideration before the end of January 1995 on the understanding that the Defendants 1 to 9 should obtain the Income Tax Clearance Certificate by 10.1.1996. In the absence of confirmation from the Defendants 1 to 9, it would be presumed that the Defendants 1 to 9 have not been able to obtain Income Tax Clearance Certificate. It was not informed to the plaintiff as to whether all the Defendants 1 to 9 have obtained 230A Income Tax Clearance Certificates and whether furnitures and fittings have been removed from the suit property and as to whether all the Defendants 1 to 9 were in a position to comply with the requirements of Clause 8 of the agreement dated 3.8.1994 to complete the sale transaction by 31.3.1995. The plaintiff is always ready and willing to perform its part of the contract by tendering the sale consideration as agreed. It is evident from the communication received from the counsel representing the Defendants 1 to 9 by the counsel for the plaintiff that the parties have contemplated to present in Trivandrum on 4.4.1995 for execution of sale deeds and at that time, there will be an oral agreement with regard to actual area found on measurement and thereafter, the consideration would be adjusted on proportionate basis making it binding on all parties. The meeting could not be convened on 4.4.1995 due to the inconvenience expressed by most of the Defendants 1 to 9 and finally, the Defendants 1 to 9 confirmed that the sale transaction could be completed in all respects before the end of June 1995 by letter dated 29.6.1995.

(d) In the notice, sent through plaintiffs counsel dated 21.8.1995, it is mentioned that the plaintiff received the Income Tax Clearance Certificate only in respect of defendants 3, 4, 5, 7 and 8. The plaintiff expressed its readiness and willingness to complete the transaction and requested the defendants to execute the sale deed within 15 days of receipt of the notice sent through its counsel dated 21.8.1995. A reply to legal notice dated 21.8.1995 was sent by the defendants 1, 2, 4, 5, 7 and 9 on 7.9.1995. It is evident from the said reply that the defendants have failed and neglected to perform their part of the contract and had not fulfilled their obligations in its entirety. It is stated in the reply notice that Income Tax Clearance Certificates had been obtained only in respect of the some of the defendants who had sent their reply through their advocates. A doubt was raised regarding area of land and therefore, the plaintiff wanted to have a rectification deed. The defendants refused to comply with the demands made by the plaintiff which constitute a breach of the agreement dated 3.8.1994. Since the plaintiff apprehended that the defendants were evading to perform their part of the contract and may alienate the suit property, the plaintiff caused a public notice dated 7.9.1995 published in "The Hindu dated 13.9.1995" warning any person who was dealing with the said property about the existence

of the plaintiff rights. After the receipt of the said legal notice, the Defendants 5 and 6 proceeded to execute sale deeds in favour of the plaintiff in respect of their shares.

(e) The 5th defendant executed two registered sale deeds on 6.11.1995 in favour of the plaintiff and received the said consideration and accepted the correct measurement of the property as put forth by the plaintiff. Similarly, the 6th defendant also executed two registered sale deeds dated 24.11.1995 conveying his undivided interest in favour of the plaintiff. However, the sale deeds executed were held up for registration for complying with certain mandatory formalities which would go to prove that the plaintiff is not responsible, particularly, with regard to delay in obtaining the Income Tax Clearance Certificate required to be obtained u/s 230-A of the Income Tax Act. The plaintiffs counsel sent a legal notice to the Defendants 1 to 4 and 7 to 9 on 22.12.1995. The compliance of the agreement by the co-owners was mentioned in the said notice. The plaintiff denied the allegations made in the reply notice dated 17.9.1995 sent by some of the defendants through their counsel including denying the statement that the tripartite agreement was agreed to be dropped. The plaintiff also requested the other defendants to comply with the agreement as done by the other co-owners/sharers viz., Defendants 5 and 6, failing which, the plaintiff have no other option except to institute a civil suit on the expiry of the period of 15 days from the date of receipt of the notice. The plaintiff has also filed the copies of the bankers pay order obtained on 2.8.1995 in favour of each of the defendants showing that it was always ready and willing to perform the contract and continues to be ready and willing to perform the contract. Out of nine defendants, six defendants, without bona fide, have issued the notice to the plaintiff through their counsel dated 13.8.1995. It is Defendants 1 to 4 and 7 to 9 who had evaded to perform their part of the contract and even now, the plaintiff is ready and willing to perform its part of the contract, which is confirmed by the conduct of the plaintiff, having secured Bankers Pay Orders for the remaining balance sale consideration. As the plaintiff has no other option and in order to protect its right and interest, the plaintiff is constrained to institute the suit.

(f) The Defendants 5 and 6 are only impleaded as proforma parties and no relief is sought against them in view of the fact they had already executed sale deeds in respect of their shares pursuant to agreement dated 3.8.1994. The 10th defendant, Indian Bank is impleaded as proforma party as it is a party to the original agreement for sale. The plaintiffs stated that equity is in favour of the plaintiff because the agreement dated 3.8.1994 has been partly performed by execution of sale deeds by Defendants 5 and 6 to the extent of their share. Since the agreement dated 3.8.1994 is a composite agreement, it has to be fully performed by all the parties. Hence, the suit has been filed by the plaintiff praying for specific performance.

2. The objections raised by the 4th defendant in the written statement are as follows:

(a) The suit filed by the plaintiff for specific performance is devoid of merits and not maintainable in law and it is liable to be dismissed in limine. The plaintiff is not entitled to any equity relief much less than the relief of either specific performance or consequential relief of physical possession of the suit property.

(b) The Defendants 1 to 9 are the absolute owners of the suit property and they have inherited the said property by a Will dated 28.11.1981 executed by His Highness Sri Chithrai Thirunal Padmanabha Dasa, the former Ruler of Travancore, who died on 20.7.1991. After his demise, his Will was duly probated before the High Court of Kerala and the defendants got the property jointly. The said property admeasured an extent of 20 grounds and the Defendants 1 to 9 have common pathway from L.B. Road, leading to their property which includes a palace, wherein the family members of the Defendants 1 to 9 are still living. It is true, as per the above said Will, the Defendants 1 to 8 are each entitled to an undivided share of 11.25% and the 9th defendant is entitled to undivided share of 10% from and out of the suit schedule property, as co-owners.

(c) The Defendants 1 to 9 have entered into an agreement for sale on 10.3.1993 which was tripartite in nature wherein the Defendants 1 to 9 were the parties of 1st part, the intended purchasers viz. Mr. Shankar Khandadi and one Mr. Usman Fayaz were the parties of the 2nd part and the financier viz., the Chief Manager of Indian Bank, Adyar Branch was the party of the 3rd part, in which, the sale consideration was fixed at Rs. 325 lakhs, out of which Rs. 50 lakhs was paid by the parties of the 2nd part to the parties of the 1st part proportionately. Since the agreement holders viz., the parties of the 2nd part have not performed their part of the said agreement for sale and also expressed that they were not in a position to proceed further in pursuant to the said agreement, the same was dropped as not acted upon by them. Hence, it was decided to enter into a memorandum of agreement regarding the sale of the said property, with the plaintiff and accordingly, the same was entered into on 3.8.1994 with strict conditions and terms agreed by both parties, wherein the erstwhile agreement holders viz. Mr. Shankar Khandadi and one Mr. Usman Fayaz and the financier viz., the Chief Manager of Indian Bank, Adyar Branch were also the parties.

(d) It is stated that though some progress was made in pursuant to the agreement dated 10.3.1993, the said agreement was not put through between the originally contemplated parties. Since the erstwhile agreement holders have not performed their part of the agreement, it was not acted upon and in that situation only, the subsequent memorandum of agreement has been entered into with the plaintiff on 3.8.1994. The plaintiff had full knowledge of all the facts. The plaintiff had paid a sum of Rs. 50 lakhs, apart from Rs. 50 lakhs, paid by the erstwhile agreement holders, as per the said memorandum of agreement to the Defendants 1 to 9 proportionately as per their share.

(e) The income tax authorities has granted the necessary certificate u/s 269UL (i) on 21.11.1994 approving the sale to the plaintiff for Rs. 325 lakhs. The plaintiff should have paid a further sum of Rs. 50 lakhs in September 1994 or

atleast in November 1994 to the Defendants 1 to 9 as per the terms of the agreement dated 3.8.1994 and the balance of Rs. 175 lakhs had to be paid at the time of Registration. The Defendants 1 to 9 had not received any amount except the sum of Rs. 100 lakhs and thus, the plaintiff had failed to perform their part of the contract as per the agreement dated 3.8.1994. However, they proceeded to create correspondence showing that they are ready and willing to perform their part of the agreement.

(f) As per Clause 5 of the agreement, the plaintiff was to pay the balance of sale consideration without waiting for clearance under the Urban Land Ceiling Act and complete the transaction and get the sale deed executed within 4 months from the last date, for which, the Defendants 1 to 9 obtain and produce NOC and clearance from Income Tax Department. The said certificates were obtained by the defendants but the plaintiff has not complied with the admitted terms.

(g) By letter dated 2.12.1994, the plaintiff sent a draft sale deed for submission to Income Tax Department for 230-A certificate and promised to pay the balance sale consideration in three weeks on receipt of 230-A certificate, by their letter dated 19.1.1995. The Defendants 1 to 9 had obtained necessary Income Tax clearance and informed to the plaintiff but suddenly, the plaintiff by letter dated 28.3.1995 claimed to have noted some discrepancy in the extent agreed to be sold and in regard to the right of passage. The same was refused by the Defendants 1 to 9 by letter dated 28.3.1995 to the plaintiffs counsel T.N.C. Varadhan. The Defendants 1 to 9 had also expressed their readiness to execute the sale deed in the month of April, 1995 but the plaintiff was not ready and willing and reiterated his contentions again in his letter dated 29.6.1995. The plaintiff has not at all been put in possession of the suit property. The plaintiff did not choose to perform their side of contract as per the terms and conditions of the agreement and allowed to lapse it. Hence, the plaintiff is not entitled to have any remedy of equity nature much less than the reliefs prayed for in the suit. As the 9th defendant started to act against the interest of the principals viz. the Defendants 1 to 8, the power of attorney given to 9th Defendant was cancelled. Hence, from the date of cancellation the 9th defendant has been ceased to be the Power of Attorney and any act done by him on behalf of the Defendants 1 to 8 would be certainly invalid.

(h) The plaintiff by his letter dated 7.8.1995 claimed to have obtained Bankers Pay Orders for a total sum of Rs. 1,89,18,047/-, after lapse of nearly 5 months from the date of rebuttal by the Defendants 1 to 9. The same was not a proper tender or readiness to perform the contract agreed to between the parties. The offer of the plaintiff was rejected by the Defendants 1 to 9 through their counsel by letter dated 13.8.1995 wherein it was clearly stated that the plaintiff had failed to perform his part of the contract and had hence, committed a breach of the same disentitling him to claim any relief under the suit agreement. In the reply notice dated 21.8.1995, the plaintiff did not make any reference to the legal notice dated 13.8.1995. After admitting the receipt of the clearance

certificate even in November 1994, they falsely alleged that the sale could not be completed due to certain difficulties expressed by the vendors. They called upon the Defendants 1 to 9 to execute the sale within 15 days of receipt of the notice. This was followed by a public notice dated 7.9.1995 claiming and asserting their rights under the suit agreement dated 3.8.1994. The Defendants 1 to 9 have given a suitable reply on 17.9.1995 through their counsel clearly pointing out that time is the essence of contract. The defendants further denied the plaintiffs readiness and willingness to complete the suit sale agreement dated 3.8.1994. It was also clearly mentioned that there was no variation in extent agreed to be sold and hence, they were not willing to vary the price agreed.

(i) On 12.9.1995, the then shareholders of the plaintiff company agreed to transfer all their shares to K. Sarojini, wife of K. Subbiah for a total value of 225 lakhs. A perusal of the said agreement clearly shows that the said Sarojini was financing the plaintiffs shareholders for purchasing the suit property under the suit agreement. Only pursuant to this agreement to finance the plaintiff, the plaintiff company managed to obtain sale deeds from 2 sharers viz., the Defendants 5 and 6 for a consideration on Rs. 18,28,125/- each. It is thus clear that the plaintiff company had no wherewithal to purchase the suit property at all. Even after the defendants' reply on 17.9.1995, the plaintiff had shown no inclination to complete the sale through Court immediately thereafter. The registration of the sale deed by the Defendants 5 and 6 had been made even without producing 230-A certificate and thus the plaintiff was fully aware that 230-A certificate was not necessary to register the sale deeds and the excuse pleaded by them for completing the sale is false to his knowledge. The reference to a clause in the suit agreement that the building should not be demolished is wrongly interpreted. The possession has never been handed over to the plaintiff at any point of time. On this false plea of the plaintiff, they became disentitled to the relief of specific performance. The defendant therefore submits that the plaintiff is not entitled to the equitable relief of specific performance at all and the suit deserves to be dismissed with costs.

3. The objections raised by the 9th defendant in the written statement are as follows:

(a) There is no mention in the plaint as to how Mr. K. Subbiah, shown as director of the plaintiff company is competent and duly authorised to sign and verify the plaint. Even assuming that Mr. K. Subbiah has legal competence and authority to sign and verify the plaint, the verification of the plaint has not been done in a manner known to law. Hence, the plaint is liable to be rejected. The suit has not been instituted in accordance with Clause No. 11 of the suit agreement dated 3.8.1994 which is sought to be specifically enforced by the plaintiff. Admittedly, the plaintiff has not deposited the balance sale consideration and there was no averment in the plaint to the effect that the terms of clause 11 have been complied with. Therefore, the plaintiff is liable to be non-suited. The defendants are the co-owners of the suit property, in particular, the defendant owns 10%

share in the suit property. This defendant admits the tripartite agreement of sale dated 10.3.1993. Though a sum of Rs. 50 lakhs was paid as advance, Mr. Fayaz one of the purchasers took back a sum of Rs. 25 lakhs from this defendant on 11.3.1993. The sum of Rs. 25 lakhs so returned to Mr. Fayaz is made up of the proportionate share of each one of the defendant herein. This defendant admits that the suit agreement dated 3.8.1994 referred to in the plaint, this defendant received a sum of Rs. 5 lakhs from the plaintiff as an advance amount.

(b) The plaintiff handed over the draft sale deed for obtaining the necessary clearance u/s 230-A of the Income Tax Act only in December 1994 by letter dated 2.12.1994. Though under Clause 5 of the agreement dated 3.8.1994 time was regarded as the essence of the contract, the plaintiff took 4 months time to hand over the draft sale deed; the plaintiff need not have taken such a long time to hand over the draft sale deed to the defendants. This delay has to be viewed in the light of Clause 5 of the suit agreement dated 3.8.1994 which provides that the plaintiff should pay the balance sale consideration within 4 months from the last date when the defendants produced NOC under chapter XX-C of the Income Tax Act and the clearance u/s 230-A of the I.T. Act. The plaintiff did not take any step whatsoever to get the sale deed from this defendant either on or before 31.3.1995 or within 4 months from 2.3.1995. The plaintiff informed this defendant by letter dated 2.8.1995 that a pay order for Rs. 23,22,006/- had been secured towards balance said consideration. The 9th defendant by his counsel's notice dated 13.8.1995 informed the plaintiff that he was not willing to accept the pay order. In the said counsel's notice dated 13.8.1995, it was specifically mentioned that on 17.6.1995 during the meeting between the counsel for the plaintiff and the defendants, the plaintiffs counsel suggested an option to give up the transaction and it was accepted by the counsel for these defendants. The counsel for these defendants by letter dated 28.3.1995 informed the plaintiffs counsel for the plaintiff that 4.4.1995 could be a mutually convenient date for the execution and registration of sale deeds in favour of the plaintiff but neither the plaintiff nor its counsel took any steps to get the sale deeds prepared executed and registered. The plaintiff never had the necessary wherewithal to pay the balance sale consideration and complete the transaction. Even the alleged pay order Rs. 23,22,006/- does not represent the correct amount payable to the defendants. This fact was made known to the plaintiff by letter dated 13.8.1995; curiously neither the legal notice dated 21.8.1995 nor the subsequent legal notice dated 22.12.1995 refers to the alleged pay order for Rs. 23,22,006/- said to have been procured by the plaintiff towards the balance sale consideration. Thus, this deliberate omission shows that the plaintiff had in fact never procured any such pay order.

(c) The suit has been filed nearly two years later in November 1997 after the correspondence between the plaintiff and the 9th defendant ended in December 1995. The plaintiff has not explained the delay in instituting the suit before the Court. No proof has been shown before Court to prove its financial capacity to pay the balance sale consideration. It is submitted that a sum of Rs. 25 lakhs was

refunded to Mr. Fayaz and thus what was paid under the earlier agreement dated 10.3.1993 was only Rs. 25 lakhs. The plaintiff delayed in handing over the copy of the draft sale deed to enable the 9th defendant to apply for Income Tax Clearance certificate. Thus, the plaintiff sought to take full advantage of the four months time prescribed by Clause 5 of the suit agreement of sale to complete the sale transaction. The Income Tax clearance was obtained by this defendant on 2.3.1995 and it was duly intimated to the plaintiff as well. The plaintiff never made any tangible attempt to pay the balance sale consideration. Though it was made clear by letter dated 28.3.1995 sent by the counsel for the defendants to the counsel for the plaintiff that the registration could be had on 4.4.1995, no attempt was made by the plaintiff to complete the sale transaction. The pay order sent to this defendant was returned to the plaintiff. The plaintiff is not entitled for the relief of specific performance as prayed for.

4. On the above pleadings, originally, this Court has framed the following issues for trial on 8.11.2005.

1. Whether the plaintiff was ready and willing to perform his part of the contract ?
2. Whether the plaintiff has committed breach of the terms of agreement dated 3.8.1994, as alleged by the defendants ?
3. Whether the plaintiff is entitled to the relief of specific performance sought for ?
4. To what relief the parties are entitled to?

Subsequently, this Court has framed the following additional issues for trial on 3.9.2007.

1. Whether the plaintiff is entitled to the relief of specific performance based on the alleged agreement for sale dated 3.8.1994 as against the 4th defendant ?
2. Whether the alleged agreement for sale dated 3.8.1994 was valid and executable at the time of filing the present suit ?
3. Whether the time in essence of the contract viz., the alleged agreement for sale dated 3.8.1994?
4. Whether the claim of the plaintiff for specific performance based on the alleged agreement for sale dated 3.8.1994 is barred by limitation ?
5. Whether the plaintiff is entitled for a relief of consequential relief of possession?

5. The trial Court examined the Director of the plaintiff Company as P.W. 1 and admitted Exhibits P-1 to P-25 on the side of the plaintiff. The defendants have examined the 8th defendant as D.W. 1 and have produced Exhibits D-1 to D-5 in support of their case.

6. Heard, Mr. R. Parthasarathy, learned counsel appearing for M/s. P. Seshadri,

Mohan Parasaran & Sathish Parasaran, learned counsel for the plaintiff, Mr. C. Selvaraju, learned senior counsel appearing for Mr. R. Rajarajan, learned counsel for defendants 1 to 3, Mr. S.V. Jayaraman, learned senior counsel appearing for Ms. P. Anitha, learned counsel for the 4th defendant and for Ms. A. Arulmozhi, learned counsel appearing for defendants 7 to 9. No appearance for Defendants, 5, 6 and 10.

7. Learned counsel for the plaintiff would submit in his arguments that the present suit has been laid by the plaintiff for specifically enforcing the agreement of sale in the form of Memorandum of Understanding dated 3.8.1994 entered into between the Defendants 1 to 9 on the first part, the previous agreement holders on the second part, the plaintiff on the third part and the 10th defendant on the fourth part and the agreement was a joint agreement which had superceded the early tripartite agreement had in between the Defendants 1 to 9 on the first part, one Mr. Shankar Kandadai and one Mr. Usman Fayaz on the second part and the 10th defendant on the third part on 10.3.1993. He would further submit that, in the said earlier agreement, it was agreed in between the parties that the suit property which is described in the schedule was accepted to be sold for Rs. 325 lakhs and an advance of the said agreement, a sum of Rs. 50 lakhs was paid by them to the Defendants 1 to 9. Subsequently, the said agreement was renewed in the form of Memorandum of Understanding on 3.8.1994 in between the plaintiff and the defendants, to which, the previous agreement holders, Shankar Kandadai and Usman Fayaz have given consent to give up that agreement in favour of the plaintiff. He would also submit that the plaintiff paid another sum of Rs. 50 lakhs to the defendants towards the advance for the said agreement and had entered the agreement of sale. He would further submit that 4 months time was fixed from the date of obtaining No Objection Certificate u/s 269UD of Income Tax Act and also the Income Tax Clearance of all the Defendants 1 to 9 u/s 230-A of the said Act. It was also agreed that clearance from the Urban Land Ceiling Act should also be obtained. He would further submit that under Clause 4 of the agreement, the obtaining of Urban Land Ceiling Clearance and NOC under Chapter XX-C of Income Tax Act was contemplated.

8. Learned counsel would further submit that Clause 5 of the agreement would show the balance payment to be made within 4 months without waiting for the clearance from the Urban Land Ceiling Act and Income Tax Clearance Certificate and No Objection Certificate under Chapter XX-C of the Income Tax Act. He would also submit that the said time limit was fixed on or before 31.3.1995 after obtaining all clearance certificates. He would further submit that at the time of execution of the sale deed, within certain time, the Defendants 1 to 9 have agreed to put the plaintiff in vacant possession with an undertaking not to demolish the palace. He would further submit that the order of clearance from Urban Land Ceiling Act was obtained on 20.11.1994 and NOC from Income Tax Department was obtained on 21.11.1994. However, the Income Tax Clearance u/s 230-A for the defendants were yet to be obtained. He would further submit that

the plaintiff has written a letter on 2.12.1994 in Exhibit P-7 offering the entire payment and seek to remove the furnitures and fittings in the premises and thereby to give vacant possession. He would also submit that the plaintiff has renewed his intention to pay the balance consideration to the Defendants 1 to 9 and to get the sale deed executed in the subsequent letter dated 28.3.1995 produced in Exhibit P-9 and therefore, the plaintiff was always ready and willing to perform his part of the contract by paying the balance amount within the time to get the sale deed from the Defendants 1 to 9. He would further submit that the earlier agreement produced in Exhibit P-2 had with the third persons Mr. Shankar Kandadai and Usman Fayaz was not referring to any pathway, however, in the subsequent suit agreement in Exhibit P-3, the right of pathway has been included. He would further submit that the agreed condition was to execute the sale deed after obtaining the Income Tax Clearance by the defendants and therefore the fixed date at 31.3.1995 is not a condition. He would further submit that the sketch appended to the sale agreement would disclose the pathway and since there was some dispute in respect of pathway the plaintiff did not pay the sum of Rs. 50 lakhs immediately on obtaining the No Objection Certificate from the Income Tax Department on 21.11.1994 in Exhibit P-6.

9. Learned counsel for the plaintiff would also submit that the advocate for Defendants 1 to 9 had written a letter on 28.3.1995 in respect of ascertaining the correct area. He has asked for time till 4.4.1995 for having a meeting and therefore, preparation of sale deed could not be made possible before 31.3.1995. He would further submit that there was a discrepancy in the area of the pathway and the letter dated 28.3.1995 produced in Exhibit D2 would go to show that the time limit fixed at 31.3.1995 was given a go-by. Even in the said letter nothing was disclosed about the obtaining of Section 230-A certificate of clearance of payment of Income Tax. Due to the said letter written by the counsel, the plaintiff was not in a position, as to whether he has to pay the money for the entire extent or the available extent. He would further submit in his argument that the plaintiff is willing to take the property with all discrepancies and deficiencies.

10. Learned counsel would further submit in his arguments that after the issuance of notice, the plaintiff was striving much for effecting settlement in between the parties and therefore, he had to wait till the end of the period of limitation and to file a suit against the defendants and sought for the reliefs only against those defendants who had not executed the sale deeds in favour of the plaintiff. He would further submit that during the said attempt of compromise, the Defendants 5 and 6 have agreed to execute the sale deed in respect of their shares in the suit property and accordingly they have executed the sale deeds in Exhibits P-16 to P. 19. Actually, the Defendants 1 to 8 are entitled to 75% and the 9th defendant was entitled to 10% and one Smt. Sethu Parvathy Bayee, mother of Maharaja of Trivancore was entitled to 15% in the suit property as per the Will executed by His Highness Shri Padmanabha Sri Chitrai Balarama Varma, the Maharaja of Tiruvancore. The said Will came into force on 20.7.1991, after

the probate proceedings were taken and ordered on 3.4.1992 before the High Court of Kerala. He would further submit that the Defendants 5 and 6 who were having their respective shares out of 75% of the share bequeathed under the said Will, passed their title to the plaintiff by executing sale deed Exhibits P-16 to P19, and the other defendants among Defendants 1 to 9, did not execute any sale deed as per the agreement of sale and therefore, the plaintiff approached this Court. He would further submit that the Defendants 5 and 6 having agreed for selling their undivided share would confirm the agreement of sale had in between the plaintiff and the defendants and the readiness and willingness on the part of the plaintiff and the steps taken by the plaintiff for compromising the dispute in between the parties and therefore, the delay has been caused in taking action through Court of law.

11. Learned counsel would further submit that the Income Tax Clearance certificate were filed with reference to defendants 3 to 5, defendants 7 & 9 and the Income Tax Clearance certificate for defendants 1, 2 and 6 are yet to be produced. He would also submit that it is the right of the plaintiff to waive the production of such Income Tax Clearance Certificate, however, in view of the non-production of such certificate, the time limit for payment of the balance sale consideration and the execution of the sale deed are yet alive since the time limit fixed was 4 months from the date of production of No Objection Certificate given by the Defendants 1 to 9, the proposed vendors. He would further submit that the plaintiff was constrained to send notice to the defendants in Exhibit P-13 and Exhibit P-20, for showing his willingness to get the sale deed despite discrepancies in the area of the suit property. He would also submit that the defendant's case, that the right in the pathway as mentioned in the agreement of sale was already sold, cannot be sustained. However, the plaintiff is ready to receive the available property, in the event of Defendants 1 to 4, 7 to 9 executing the sale deed in his favour, after receiving the balance sale consideration.

12. Learned counsel would also submit that the plaintiff is always ready to deposit the money into Court but it could be done only upon the orders of the Court and he cannot suo motu deposit the money before Court. The non-payment of the balance sale consideration would not amount to failure to perform his part of the contract. He would also submit that he has taken demand draft for the proportionate consideration as to the availability of the land on the ground and the copies of demand drafts are alone sent considering the safety of demand drafts and the plaintiff was ready to hand over the demand drafts taken by the plaintiff whenever the Defendants 1 to 4 and 7 to 9 were approaching to receive. He would further submit in his arguments that he is ready to deposit the money as directed by the Court within the stipulated time. He would further submit in his argument that the principle laid down in the judgment of the Honourable Apex Court in Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others, to the effect that there would be much difference in the market value of the property, in case, the contract was performed after several years and the steady increase in price would also bring drastic changes and therefore,

the specific performance entered long prior to the taking up of the case, should not be rejected merely because very lower consideration had been quoted and would be transferred, if specific performance is ordered. He would also submit that as per the dictum laid down in the said judgment, the plaintiff is always willing to pay the present market value in proportionate to the shares of the Defendants 1 to 4 and 7 to 9 and it would be paid if suitable consideration has been judicially fixed by this Court. He would suggest that the shares belonging to the Defendants 1 to 4 and 7 to 9 would be around Rs. 12 crores and the plaintiff was willing to deposit the said amount for the purpose of getting the sale deed from the defendants. Learned counsel for the plaintiff had also presented a memo to that effect.

13. Learned counsel for the plaintiff would therefore request the Court that the Defendants 1 to 4, 7 to 9 may be directed to execute the sale deed in respect of the share of those persons after receiving the consideration likely to be fixed by the Court at Rs. 12 crores towards their shares and the plaintiff is ready to deposit the said amount. He would further submit that the Defendants 1 to 4 and defendants 7 to 9 may be directed to execute the sale deed in favour of the plaintiff after receiving the balance sale consideration of Rs. 2,25,00,000/- or Rs. 12,00,00,000/- instead of a sum of Rs. 2,25,00,000/- and to execute the sale deed in favour of the plaintiffs and in failure to do so, to pass an order directing the Defendants 1 to 4 and Defendants 7 to 9 to execute the sale deed in favour of the plaintiff and in default, the Court may itself execute the sale in favour of the plaintiff through Court.

14. Learned counsel would cite catena of judgments of the Honourable Apex Court in Radha Sundar Dutta Vs. Mohd. Jahadur Rahim and Others, Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others, Nathulal Vs. Phoolchand, , Shri Parmeshwari Prasad Gupta Vs. The Union of India (UOI), Prakash Chandra Vs. Angadlal and Others, Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., United Bank of India Vs. Naresh Kumar and others, P. D'Souza Vs. Shondrilo Naidu, , Smt. Swarnam Ramachandran and Another Vs. Aravacode Chakungal Jayapalan, Divisional Manager, United India Insurance Co. Ltd. and Another Vs. Samir Chandra Chaudhary, Maharashtra State Mining Corporation Vs. Sunil Pathak, , Silvey and Others Vs. Arun Varghese and Another, , Kaliaperumal Vs. Rajagopal and Another, M.P. Housing Board Vs. Progressive Writers and Publishers, FGP Ltd. Vs. Saleh Hooseini Doctor and Another, B. Nemi Chand Jain and Another v. G. Ravindran and Others 2010 (2) CTC 751. Among those judgments, learned counsel for the plaintiff would rely upon Prakash Chandra Vs. Angadlal and Others, and S. Ramakrishnan Vs. R.M. Subbiah, for the principle that specific relief has to be granted as a rule and its denial is an exception. He would rely upon the judgment in Nathulal v. Phoolchand (supra) and S. Ramakrishnan v. R.M. Subbiah (supra) for the principle that the plaintiff need not deposit the balance of sale consideration prior to the direction to be issued by the Court. He would rely upon the judgment in Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., Smt.

Swarnam Ramachandran and Another Vs. Aravacode Chakungal Jayapalan, M.P. Housing Board v. Progressive Writers and Publishers (supra), Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others, for the principle that the facts and circumstances of the case would determine the rule as to when the time would be the time be the essence of the contract.

15. Learned counsel would further rely upon the judgments in Nirmala Anand Vs. Advent Corporation (P) Ltd. and Others, , P. D'Souza v. Shondrilo Naidu (supra) for the principle that the escalation in the price of the property is not a determinative factor. Learned counsel for the plaintiff would further rely upon the judgments of the Honourable Apex Court in Nathulal v. Phoolchand (supra), P. D'Souza v. Shondrilo Naidu (supra), Silvey and Others v. Arun Verghese and Another (supra), Swarnam Ramachandran v. Aravacode Chakungal Jayapalan (supra) for the principle as to the obligations of the defendant and the conduct of the defendant to be noted in a case of specific performance.

16. Learned counsel had cited a judgment B. Nemi Chand Jain and Another v. G. Ravindran and Others (supra) for the principle that the filing of the suit within the period as allowed by law of limitation would not be considered as delay and such delay would not be fatal to the enforcement of agreement. He would further cite other judgments of the Honourable Apex Court in Gautam Sarup Vs. Leela Jetly and Others, to insist upon the principle that admission is the best evidence. He would also cite United Bank of India v. Naresh Kumar and Others (supra), Sri Parmeshwari Prasad v. Union of India (supra), Maharashtra State Mining Corporation v. Sunil (supra) for the purpose of showing the principle as to the implied authority of the Managing Director or Chairman of the Company to represent the Company or the ratification given by the Board would validate the action. He would further submit that the discretion to be given u/s 20 of the Specific Relief Act ought to have been exercised very fairly with judicial conscience and for that, he had cited the judgments in B. Nemi Chand Jain and Another v. G. Ravindran and Others (supra), P. D'Souza v. Shondrilo Naidu (supra) in support of his argument.

17. Learned counsel would also submit that the plaintiff is always willing to perform his part of the contract if the escalated price has been fixed at Rs. 12 crores in all, by the Court in view of the judgment of the Honourable Apex Court in Sardamani Kandappan v. S. Rajlakshmi (supra). He would also submit that despite the submission of the plaintiff that he would pay Rs. 12 crores towards the balance of sale consideration if any higher amount is fixed by the Court, to which, the plaintiff is always willing to deposit such money and to get the sale deed executed. He would also submit that even though the defendants have not produced all the certificates as required under the clauses in the Memorandum of Understanding, the plaintiff has taken the risk to get the sale deed and had issued the notice that he was ready to pay the money and get the sale deed executed. Still, the defendants did not come forward to execute the sale deed in order to honour the agreement of sale. Therefore, he would request the Court to

decree the suit as prayed for with costs.

18. Learned senior counsel appearing for defendants Mr. S.V. Jayaraman, would submit in his argument that the precedents which would lay the legal proposition as cited by the learned counsel for the plaintiff are not disputed. He would further submit in his argument that the plaintiff who had come to the Court as the plaintiff seeking for specific performance of the agreement of sale must show his bona fide to honour the contract by saying that he was always ready and willing to perform his part of the contract. He would further submit that the plaintiff neither showed his readiness nor his willingness to perform his part of the contract and therefore, he is not entitled to the equitable relief. He would also submit that if the plaintiff was actually ready to perform his part of the contract, he would have paid the agreed sum of Rs. 50 lakhs on a particular point as fixed in the agreement of sale. He would also submit that the said stipulation ought to have been complied with and the breach of which, would disentitle the plaintiff from getting the reliefs.

19. Learned senior counsel would further submit in his argument that the plaintiff was not ready within the time as stipulated in the agreement i.e., on or before 31.3.1995 despite the Income Tax Clearance and other Urban Land Ceiling Clearance have been obtained by the defendants and was not informed about the same. He would further submit in his arguments that no doubt the plaintiff has sent a notice containing the xerox copies of the demand drafts but those demand drafts would not represent the actual agreed consideration as per the agreement of sale and therefore, the readiness of the plaintiff, even if it is true, would be only a conditional one. He would also submit that the plaintiff did not send the original demand drafts nor the entire amount due under the agreement of sale to the defendants and the said action of the plaintiff would not in any way show his readiness and willingness as per the conditions entered in the Memorandum of Understanding.

20. Learned counsel would also submit that the plaintiff, even though argued that he is ready to accept the extent of the suit property whatever it is available on ground with the reduced area of the pathway leading to the suit property, the said argument has no basis in the pleadings. The plaintiff ought to have pleaded to accept the available extent in order to seek specific performance of the agreement. He would also submit that when the plaintiff is lacking in complying with the conditions stipulated in the agreement, the Court may not exercise its discretion in favour of the plaintiff since the relief of specific performance is an equitable relief. He would also submit that the plaintiff has come forward with a false plea that possession is stated to be with him, but actually possession was not handed over to him. Even through the pleadings of the plaintiff, it could be understood that the plaintiff was stating on one occasion that he was given with possession however, he has asked for the prayer for possession. He would therefore submit that the plaintiff who had come with such false pleas, would not get any relief at the hands of this Court.

21. Learned senior counsel would further submit that the plaintiff was also not shrewd enough to pursue his remedy immediately after the exchange of notices but was waiting till the last period of limitation and has file the suit and it would show his laches and inaction on his part in seeking the specific performance. He would submit that even though the plaintiff is entitled to file the suit within 3 years, he ought to have shown to Court that he was not disinterested in seeking the specific performance of the agreement of sale and the said interest to obtain specific performance is very much lacking in this case. He would further submit that the plaintiff had come to Court, more than a year after the issuance of notice and the arguments advanced by the learned counsel for the plaintiff that there was a mediation between the plaintiff and the defendants was not supported by any pleadings or evidence. Therefore, the delay was an unexplained one and in such case, the equitable relief of specific performance may not be granted.

22. Learned senior counsel would also continue in his argument that the plaintiff himself admitted that the Urban Land Ceiling Clearance Certificate were obtained on 21.11.1994 in the plaint and the said admission, coupled with the conditions imposed in Clause 4 and 5 of the agreement that no objection certificate under XX-C of the Income Tax Act and the Income Tax Clearance Certificate in respect of each of the Defendants 1 to 9 u/s 230-A of the Income Tax Act, it could be seen that the plaintiff ought to have performed his part of the contract immediately after 21.11.1994 and to pay the entire money to the defendants in order to get the sale deed executed from them. He would further submit that the plaintiff did not even pay Rs. 50 lakhs payable on production of the Income Tax Clearance certificate nor paid the entire sale consideration within the time stipulated and therefore the plaintiff is not entitled to any relief in the suit. He would also submit that in paragraph 11 of the proof affidavit of P.W. 1., he would admit that the plaintiff was in fact, put in possession and the plaintiff it had undertaken not to demolish the existing palace over and above the schedule land for a period of two years from 3.8.1994. He would also submit that the plaintiff has however, asked for full possession of the suit property in the prayer and that would show that the plaintiff has uttered falsity and lie in the evidence which would disentitle the plaintiff to get at the specific relief.

23. He would also refer to a judgment of this Court in K. Krishnan Nair and Others Vs. K. Parameswaran Pillai (died) and Others, for the principle that whenever the plaintiff is entitled for specific performance and he was found guilty of pleading falsity, he would not be entitled to such an equitable relief He would also cite a judgment of the Honourable Apex Court in Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others, for the same principle of law.

24. Learned senior counsel would further submit that the Defendants 1 to 9 had obtained no objection certificate from the authorities under XX(C) of the Income Tax Act on 4.8.1994 and also obtained Urban Land Ceiling Clearance Certificate in the month of September 1994 and the said order was communicated to the

plaintiff on 20.11.1994 along with the Urban Land Ceiling Clearance Certificate. He would further submit that the said admission in the plaint would go to show that the defendants have complied with the condition, however, the plaintiff did not perform his part of contract. He would also insist in his argument that nothing prevented the plaintiff to pay the agreed sum of Rs. 50 lakhs after 21.11.1994 but he did not do so. He would also submit that there was no explanation offered by the plaintiff for the non-payment of Rs. 50 lakhs as per the stipulation made in Clause 4 of the agreement. He would further submit that the plaintiff has referred to the availability of the lesser extent of the suit property in paragraph 18 of the plaint but he did not plead that he would be willing to accept the lesser extent by paying the entire sale consideration in favour of the defendants. He would also submit that the plaintiffs reference as to the information given to the Defendants 1 to 9 that the sale transaction could be very well communicated in all respects before the end of June 1995 in paragraph No. 19 of the plaint which would go to show that the plaintiff was not able to complete the sale transaction within the stipulated period of either 4 months or 31.3.1995 which would show that the plaintiff was not ready to perform his part of the contract.

25. Learned senior counsel would also submit that despite the defendants replied to the notice of the plaintiff specifically stating the breach of contract committed by the plaintiff, the plaintiff could file the suit only in the month of May 1997 without showing any readiness and willingness on his part to pay the agreed amount to the defendants and get the sale deed executed. He would also submit that the plaintiff had issued the second notice on 22.12.1995 when there was no necessity to send such notice. He would further submit that the said attitude of the plaintiff would go to show that it was a ruse to get time from paying the consideration and getting the sale deed executed. He would also submit that even in the said notice dated 22.12.1995, the plaintiff did not offer any volunteer to pay the balance sale consideration in order to perform his part of the contract. He would further submit that the arguments advanced regarding the mediation done in between the said notice as well as the filing of the suit was not pleaded in the plaint nor any names of mediator or the place of mediation has been stated in the plaint.

26. Learned senior counsel would further submit that the plaintiff even in the plaint sought for the execution of sale deed for an extent of 20 grounds which is not possible, since even as per the pleadings of the plaintiff the total extent of the property available was only 18 grounds 2053 sq. ft. He would submit that the plaintiff did not show to Court that the Defendants 1 to 9 have ignored the conditions made in Clause 4 of the agreement which is material and binding on both parties. According to the said Clause 4, the plaintiff was under the obligation to pay a further advance of Rs. 50 lakhs to the defendants as early as possible when the Defendants 1 to 9 produced the Urban Land Ceiling Certificate from the authorities. He would also submit in his arguments that the defendants are not ratifying the payment, the plaintiff want to deposit before the Court nor

to condone the said delay in not paying the said money to the defendants.

27. Learned senior counsel would also submit that the condition imposed under Clause 5 of the agreement that the transaction should be completed without awaiting the Clearance from Urban Land Ceiling Act, if Income Tax Clearance and No Objection to be obtained under the Income Tax Act have been obtained without detriment to the said condition of payment of Rs. 50 lakhs, to which, the plaintiff should adhere to. He would also submit that the plaintiff has also violated the condition imposed in Clause 5 when the clearance certificate were produced by the defendants on 21.11.1994 and the plaintiff did not perform his part of the contract within the stipulated time.

28. Learned senior counsel would also draw the attention of the Court in support of his argument a judgment of the Honourable Apex Court in Chand Rani v. Kamal Rani (supra) and argued that the payment of money stipulated in a particular period is mandatory. He would further submit that the period for completion of the sale deed was fixed on 31.3.1995 and the cumulative reading of the said conditions would go to show that the registration should be over on or before 31.3.1995 and for which, the plaintiffs laches and non-payment of money were the causes and therefore, the plaintiff is not entitled to any specific relief.

29. He would also submit that the condition imposed in Clause 5 would go to show that the payment should be made by the plaintiff first and thereafter only, the registration to be completed after obtaining the necessary certificate under Income Tax Act. He would therefore, submit that the said conditions of producing the certificates under Income Tax Act would not extend the time when an outer period was fixed at 31.3.1995 and any laches on the part of the plaintiff would certainly disentitle from getting the discretionary relief of specific performance. He would also submit that the letter written by the advocate of the defendants would not extend the debts for payment and the said letter should have been considered along with the correspondence of the plaintiff which would show that there was no understanding in between the parties that such a period of performance has been extended. He would also submit that the fixation of time till the end of June 1995 was unilaterally fixed by the plaintiff and the defendant never agreed for the same. He would further submit that the tendering of the xerox copies of the demand drafts, that too, for a lesser sum would not be considered as a valid tender of money and the subsequent non-payment of money throughout till this date would show the unwillingness of the plaintiff to pay the money and to perform his part of the contract.

30. He would further submit that when the plaintiff is not actually willing to pay the balance money to the defendants within the time stipulated in the agreement, then the plaintiff cannot be considered as a deserving person to get a decree of specific performance. He would also submit that the explanation offered by the learned counsel for the plaintiff that the balance sale consideration ought to have been deposited into Court to the credit of the suit only when the Court had directed to pay the said money and since there was no such order, the

plaintiff did not deposit the money into Court cannot help the plaintiff. He would also submit that the plaintiff ought to have applied for depositing the balance sale consideration into Court but he did not apply for such depositing the balance sale consideration into Court. He would further submit that the agreement of sale entered into between the parties have become incapable of performance since the defendants have become unable to convey the property with a right of pathway where it is not available. He would therefore submit that the agreement of sale without the right of pathway is frustrated. Therefore, the plaintiff is not entitled to the relief as prayed for.

31. He would also submit that the plaintiff neither paid the money as stipulated under Clause 4 of the agreement on the production of Urban Land Ceiling Clearance Certificate nor paid the entire balance sale consideration after the production of No Objection Certificate and the Income Tax Clearance Certificate by the defendants on 21.11.1994 and the said non-compliance of the conditions of paying the money would vitiate the contract. He would also submit that the time fixed by the parties to the agreement was certainly the essence of the contract and the non-payment of Rs. 50 lakhs on production of Urban Land Ceiling Clearance Certificate and the balance sale consideration within 31.3.1995 would show the violation of such terms by the plaintiff.

32. He would also bring it to the notice of the Court a judgment of Honourable Apex Court in *Sardamani Kandappan v. S. Rajlakshmi* (supra) and *K.S. Vidyanadam and Others Vs. Vairavan*, in support of his argument. He would further submit that the correspondence had in between the parties would also show that the time was the essence of the contract and when no justification is seen for non-payment of balance sale consideration within such time, it would be amounting to breach of the conditions made in the agreement.

33. He would also rely upon yet another judgment of the Honourable Apex Court in *Citadel Fine Pharmaceuticals Vs. Ramaniyam Real Estates P. Ltd. and Another*, in support of his argument. He would also submit that the plea of plaintiff that he had purchased the respective shares of the Defendants 5 and 6 in the suit property after date of issuing the notice to the defendants and before the filing of the suit would go to show that the plaintiffs claim was bona fide, would not in anyway help the plaintiff. He would further submit that the claim that the Defendants 5 and 6 have executed the sale deeds in favour of the plaintiff in respect of their respective shares in the property would not in any way compel the other defendants, viz., Defendants 1 to 4 and defendants 7 to 9 to execute the sale deed in favour of the plaintiff. He would further submit that the plaintiff has to establish his case and to seek remedy on that basis. The settlement reached in between the plaintiff and the Defendants 5 and 6 would not in any way make the other defendants to execute the sale deed in respect of the suit property.

34. He would further submit in his argument that the remedy for the plaintiff would be to file a suit for partition of his due shares purchased from the

Defendants 5 and 6 and he cannot compel the other defendants to execute sale deed in favour of the plaintiff. The right of co-ownership and the right to purchase of property under the Partition Act has been laid down in the judgment of this Court in A.K. Lakshmipathy (Dead) and Others Vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and Others, He would therefore submit that the plaintiff would not be entitled to any relief as prayed for and therefore, the suit ought to have been dismissed against the defendants.

35. Learned senior counsel Mr. C. Selvaraju, appearing for Mr. R. Neelakandan, learned counsel for the 4th defendant would submit in his argument that the memorandum of understanding produced in Exhibit P-3 would show the Clause 4 is an important one which was admittedly not complied with by the plaintiff. He would further submit that as per the said stipulation in Clause 4, on production of Urban Land Ceiling Clearance Certificate, a sum of Rs. 50 lakhs should be paid by the plaintiff, to which, the plaintiff did not comply with. When the said non-compliance was not explained to the satisfaction of the Court, the discretionary relief may not be granted by the Court in favour of the plaintiff. He would also submit that the 4th defendant was not a cause for the delay since he had produced the Income Tax Clearance even in the year 1994 itself. He would further submit in his argument that the balance sale consideration of Rs. 2 crores 25 lakhs ought to have been paid by the plaintiff to the defendants on or before 31.3.1995, out of which, a sum of Rs. 50 lakhs should have been paid within 4 months from the date of production of the Urban Land Ceiling Clearance by the defendants to the plaintiff i.e., on 21.11.1994. Since both the obligations cast upon the plaintiff were not performed by the plaintiff it can be inferred that the plaintiff, was not ready and willing to perform his part of the contract.

36. Learned senior counsel would also submit in his argument that the plaintiff has not come forward with acceptable evidence by speaking through the correct person who had dealt with the transactions. He would further submit that the plaintiff company was managed by one Mr. Shreyas Sri Paul, during the time of entering into the Memorandum of Understanding on 3.8.1994 and he had only signed as the Director of the plaintiff company and thereafter during the transactions had in between the parties, he had correspondence with the defendants on behalf of the plaintiff till 30.12.1995 and the legal notice in Exhibit P-20 was sent by the plaintiff and those transactions would have been known to the then Managing Director Mr. Shreyas Sri Paul only and the plaintiff who is now representing as Director of the plaintiff company was not competent to speak about the important factual aspect as to its readiness and willingness and towards the payment of the balance of sale consideration through the xerox copies of demand drafts etc.

37. Learned senior counsel would also submit that the plaint filed and represented by Mr. K. Subbiah as its Director was not valid since no document has been produced that the said K. Subbiah was one of its Directors and the Board's resolution has been passed for the said K. Subbiah, to represent the

plaintiff Company. He would also submit that after the death of the said Director Mr. K. Subbiah, one Mr. Sarath Kakumanu is stated to have been the Director of the plaintiff Company whether the said Mr. Sarath Kakumanu was a Director to represent the plaintiff company, after the said Mr. K. Subbiah. He would further submit that the competency to represent the Company ought to have been proved by the plaintiff in order to maintain the suit on behalf of the Company, in which, the said Mr. K. Subbiah and after him Mr. Sarath Kakumanu are stated to be the Director of the said Company. In the absence of such evidence or proof on the part of the plaintiff, the suit ought to have been dismissed on that ground itself.

38. Further more, he would submit in his argument that the best evidence to be adduced by the plaintiff for proving the readiness and willingness and the transactions happened prior to the filing of the suit would be the said Mr. Shreyas Sir Paul and in the absence of examination of the said witness, the plaintiff's claim for specific performance cannot be ordered.

39. Learned senior counsel would also submit in his argument that the execution of the sale deeds by the Defendants 5 and 6 towards their respective shares would not in any way discharge the burden of proving the requirements for the grant of specific performance on the foot of the Memorandum of Understanding Exhibit P-3. He would also submit that as per Exhibit P-3, Memorandum of Understanding, the obligation cast upon the plaintiff was that he has to obtain sale deed from all the defendants and therefore, there cannot be any several or separate sale deeds as executed by Defendants 5 and 6. The arguments advanced by the learned counsel for the plaintiff that there cannot be any doubt about the financial capacity of the plaintiff since the Indian Bank was a party to the Memorandum of Understanding Exhibit P-3, to which, the parties agreed that the 10th defendant (Indian Bank) as the 4th party in the Memorandum of Understanding agreed to step into the shoes of the plaintiff to purchase the property when the plaintiff defaulted, cannot be sustained.

40. Learned senior counsel would further submit that no evidence has been adduced on the side of the 10th defendant to show that the 10th defendant was ready to purchase the said property, in default of the plaintiff. He would further submit that the case was pending from the year 1997 and there was no offer putforth by the 10th defendant to step into the shoes of the plaintiff to get the sale deed in its favour by paying the entire sale consideration.

41. Learned senior counsel would also submit in his argument that the plaintiff has sent notices in order to prolong the case and there was no intention to pay of the entire sale consideration and to get the sale deed on the part of the plaintiff. He would also submit, if really the plaintiff was actually ready and willing to perform its part of the contract, it would have sent the entire balance of sale consideration with the original demand drafts enclosed in the ratio of the defendants share. He would also submit that the plaintiff had wantonly raised the dispute in respect of the area of the property from 20 grounds to 18 grounds

2053 sq. ft and had sent a proportionate balance of sale consideration which is not a correct tender. He would also submit that such deficit consideration unilaterally sent by the plaintiff would not show the readiness and willingness of the plaintiff. He would further submit that the grant of specific performance is a discretionary relief as per the provisions of Section 20 of the Specific Relief act and the said relief cannot be granted merely because it was legal to do so. He would further submit in his argument that even though there was a general proposition of law that time is not the essence of the contract in the case of sale of immovable property, the parties to the said contract can make the time as the essence of the contract. He would further submit that such stipulation made in an agreement could also be seen for ascertaining the readiness and willingness of the parties to the contract.

42. In order to support his argument, he would rely upon the judgment of the Honourable Apex Court in Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., , the judgment of the Constitutional Bench. He would further submit in argument that the further payment fixed in between the parties to pay within the stipulated time and the failure of the purchaser to pay such an amount would be amounting to failure to pay the money within the time. He would also submit that the plaintiff was silent after issuance of notice for about 2 years and this would also draw an inference that he was not ready and willing to perform his part of the contract. In such cases, equity cannot be favoured against the plaintiff in support of his argument. He would cite a judgment of the Honourable Apex Court in K.S. Vidyandam and Others v. Vairavan (supra).

43. Learned senior counsel would cite yet another judgment of the Honourable Apex Court Saradamani Kandappan v. S. Rajalakshmi and Others (supra) for the proposition that the intention of parties to make the time as essence of contract could be inferred from the conditions of the contract. He would also cite yet another judgment of the Honourable Apex Court Citadel Vine pharmaceuticals v. Ramaniyam Real Estates Pvt. Ltd. and Another (supra) for the same principle.

44. Learned senior counsel would also submit that the unfair advantage which is likely to get by the plaintiff in case the specific performance was ordered would be no doubt true since the agreement was entered in the year 1994 and the price of the properties have raised manifold and it cannot be ascertained what would be the present price and to ask the parties to comply with that. He would further submit that when such unfair advantage is likely to have accrued to the plaintiff, if specific performance is ordered, it would deviate the defendants valuable right. He has referred to a judgment of the Honourable Apex Court in Parakunnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors, in support of his argument. He would also submit in his argument that the escalation of the price in between the date of agreement and the date of disposal of the suit could have been considered only before the trial Court but it is not a fit case to consider the said contingency, since the plaintiff is not entitled for the relief of specific performance and there is no evidence available for fixing the present market

value. He would also submit that the raise in price of the land agreed to be conveyed is a relevant factor and if the specific performance is ordered in favour of the plaintiff to stick to the agreement dated 3.8.1994 to pay a balance sum of Rs. 2.25 crores, minus the sale price amount of Defendants 5 and 6, it would be a different thing, since the price of the suit property had raised multi-fold.

45. Learned senior counsel would also submit that the learned counsel for the plaintiff had filed a memo by offering to pay a sum of Rs. 12 crores and that would go to show that the price of the property has been raised multi-fold and it would not be at Rs. 12 crores as suggested by the plaintiff. He would also submit that the market value of the property has to be ascertained through proper evidence and if anything is suggested on any guess work, it would be amounting to invention of new terms of contract in between the parties. He would also submit that when such escalation of price is an admitted one, the equitable relief of specific performance need not be granted.

46. In support of his argument, he had cited the judgment of the Honourable Apex Court in V. Pechimuthu Vs. Gowrammal, and Vimalleshwar Nagappa Shet Vs. Noor Ahmed Sheriff and Others, . He would also submit that the plaintiff was not ready and willing to perform his part of the contract either by paying a sum of Rs. 50 lakhs within 4 months after the production of Urban Land Ceiling Clearance nor paid the entire balance sale consideration on or before 31.3.1995 as fixed by the parties in the agreement and therefore, there could not be any proof of readiness and willingness on the part of the plaintiff. He would rely upon the judgment of the Honourable Apex Court in Pramod Buildings and Developers (P) Ltd. Vs. Shanta Chopra, in support of his argument and requested the Court to dismiss the suit for specific performance for want of readiness and willingness of the plaintiff. He would further submit in his argument that merely because the plaintiffs sister concern are in and around the suit property, the plaintiff cannot seek for the sale of the said property as per the agreement reached in between them when the requirements of readiness and willingness is lacking on the part of the plaintiff. He would therefore, request the Court to dismiss the suit with exemplary costs.

47. The arguments advanced by the learned counsel appearing for both sides have to be dealt with on issue wise.

48. Additional Issue Nos. 2 and 4:

The suit has been filed by the plaintiff seeking for the following reliefs against the Defendants 1 to 4, 7 to 9.

To direct the Defendants 1 to 4 and 7 to 9,

(a) to specifically perform the agreement dated 3.8.1994 entered into between the plaintiff and the Defendants 1 to 9 and to do all acts necessary for the execution of the Sale Deed in favour of the plaintiff, after receiving the balance of sale consideration payable to the defendants in proportion to their respective

shares in terms of the agreement for sale dated 3.8.1994 and on their failing to do so direct an Officer of the Court to execute the sale deed of the remaining portion of the suit property in respect of the undivided shares owned by the Defendants 1 to 4 and 7 to 9 in favour of the plaintiff in terms of the agreement dated 3.8.1994.

(b) direct the defendants to do all acts necessary to put the plaintiff in full possession of the suit property.

(c) pay costs of the suit.

(d) pass such further or other orders as this Honourable Court may deem fit and proper in the circumstances of the case.

49. The admitted case of both parties would be that the plaintiff is a company and it had entered into a memorandum of understanding with the Defendants 1 to 9 as first party and the erstwhile agreement holders in respect of the suit property namely Mr. Shankar Khandadi and Mr. Usman Fayaz as the second, party and the plaintiff itself the third party and the 10th defendant as the fourth party and agreed to buy 20 grounds of the suit property put up with the sketch, inclusive of a right of way in a common pathway leading from Lattice Bridge Road to suit property at a breadth of 33 feet, for a total consideration of Rs. 3,25,00,000/-. In the said Memorandum of Understanding dated 3.8.1994 produced as Exhibit P-3, there are several clauses agreed in between the parties and the important clauses are Clauses Nos. 1, 4, 5, 8 to 11 and 14, apart from other clauses. The earlier advance amount paid by the previous agreement holder were released for consideration as mentioned in agreement and it was agreed that the vendors, namely Defendants 1 to 9 had received a sum of Rs. 1 crore as advance paid in the said agreement of sale. It was agreed in between the parties that the vendors shall put the purchaser in vacant possession on the date of registration of the deed of sale as per Clause 2; the purchaser, namely, the plaintiff agreed to pay a further advance of Rs. 50 lakhs on production of Urban Land Ceiling Clearance Certificate or No Objection certificate under Chapter XX-C of Income Tax Act under Clause 4; apart from that, the plaintiff (purchaser) shall pay the balance sale consideration as agreed in between the parties within 4 months on the production of No Objection Certificate under Chapter XX-C of Income Tax Act and Income Tax Clearance Certificate u/s 230-A of the Income Tax Act under Clause 5; the parties agreed to get the sale deed executed on or before 31.3.1995 after obtaining all necessary clearance certificates under Clause 8; if the vendors fail, the purchaser, namely, the plaintiff is entitled to recover all the advance amount together with interest at 24% per annum under clause 9; if the purchaser fails, the vendors viz., the defendants shall retain 10% of the advance amount and claim for damages under Clause 10; if the vendors (Defendants 1 to 9) fail, the purchaser (plaintiff) is entitled to seek relief under the Specific Relief Act and deposit the balance consideration or claim the advance with interest at 24% per annum under Clause 11; and in the event of vendors (Defendants 1 to 9) fulfil their obligations and

the purchaser (plaintiff) fails, the vendors shall return the advance with 6% interest.

50. The main features of Exhibit P-3 Memorandum of Understanding would govern the entire enforceability of the said agreement in between the parties. The time fixed for completion of the execution of the sale deed was fixed as 31.3.1995. It has been contended that the said fixing of the date would not be amounting to a date within which the contract should have been completed, since the parties to the contract have agreed mutually to extend the time even after 31.3.1995, by virtue of correspondence had in between them. Whether such time is essence of contract or not will be dealt with in a separate issue. As far as these issues are concerned, whether the suit filed by the plaintiff is within the time as allowed by Law of Limitation and whether the agreement entered into between the parties was valid and executable at the time of filing the present suit. No doubt, the outer limit for performance and execution of sale deed is fixed at 31.3.1995. Without detriment to decide the issues regarding the extension of the said period, if we calculate the period of limitation from the said date, namely, 31.3.1995, the period of limitation as fixed under Article 54 of Limitation Act, namely 3 years would run upto 31.3.1995. No doubt, the plaint was presented into Court during the month of May 1997 and it was taken on file during July 1997 which is well within the period of limitation. When time has been fixed in an agreement of sale, the first part of Article 54 alone is applicable and there is no necessity to go into the second part of Article 54 of Limitation Act to ascertain the date of refusal. Therefore, I am of the considered opinion that the suit filed by the plaintiff was well before the period of limitation.

51. In the earlier paragraph, I have discussed and found that the suit filed by the plaintiff on the foot of the agreement of sale entered into between the parties on 3.8.1994 in Exhibit P-3 was well within the time. The said agreement entered into between the plaintiff, Defendants 1 to 9 and 10th defendant along with the previous agreement vendees has not been disputed about its execution. The Defendants 1 to 4, 7 to 9 have only contended that the plaintiff is not entitled to the relief of specific performance as entered into between the parties in Exhibit P-3. In the evidence adduced on either side, I could see that the truth, validity and the executability of the said agreement was not disputed. As regards the enforcement of the said agreement, other aspects have to be gone into and therefore, I could see that the said agreement of sale dated 3.8.1994 was a valid agreement at the time of filing the suit. Accordingly, both the issues are decided.

52. Additional Issues 3 and Issue Nos. 1 and 2:

In the earlier issues, I found that the said agreement Exhibit P-3 was executed in between the parties along with the previous agreement vendees on 3.8.1994, and it was a true and valid agreement entered into between the parties. As regards its enforceability, it has to be considered whether the plaintiff was always ready and willing to perform his part of the contract as stipulated in the said agreement. For finding the readiness and willingness of the plaintiff, it has to be

considered whether the plaintiff has not committed any breach of conditions of the agreement Exhibit P-3. In order to find out whether the plaintiff has committed breach of the terms of the agreement, it has to be necessarily decided as to whether the time fixed in the agreement of sale Exhibit P-3 by the parties is essence to the contract or not. The plaintiff examined P.W. 1 alone on his side and produced Exhibits P-1 to P-25. P.W. 1 is stated to be a Director of the plaintiff company in his evidence. An objection has been raised that P.W. 1 has no competency to adduce evidence since there was no document produced regarding his authority to depose on behalf of the plaintiff. However, in the earlier proceedings filed by the defendants, P.W. 1 was also impleaded as one of the defendants in O.S. No. 3149 of 2008 before the City Civil Court, Chennai. However, no document has been produced that P.W. 1 was one of the Directors of the plaintiff Company even though he has deposed that he is one of the Directors of the Company. He had admitted in his cross examination he had nothing to do with the plaintiff company till 1996. P.W. 1 had produced Exhibits P-16 and P-17, the sale deeds dated 6.11.1995 executed by the 5th defendant in respect of conveying 5.625% undivided share in the suit schedule properties in favour of the plaintiff. Similarly, the 6th defendant executed 2 sale deeds in Exhibits P-18 and P-19 dated 24.11.1995 conveying 5.4625% undivided share in the suit schedule property in each of the sale deeds in favour of the plaintiff. Those sale deeds had conveyed 22.5% of the undivided share of the suit schedule property and in the said sale deeds Exhibits P-16 and P-17 which had been referred that the plaintiff was a vendee. It has not been disputed that P.W. 1 was not the Managing Director after 1996. In this aspect, it has to be referred to the judgments of the Honourable Apex Court in *United Bank of India Vs. Naresh Kumar and others*, as cited by the learned counsel for the plaintiff. The relevant passage would run as follows:

10... A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of it's officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by it's officer.

53. Yet another judgment in *Sri Parmeshwari Prasad Gupta v. The Union of India* (supra) was also relied upon by the plaintiff. The relevant passage runs as follows:

14...Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorised, was done on behalf of the Company. Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validly terminated

on December 17, 1953. The appellant was not entitled to the declaration prayed for by him and the trial Court as well as the High Court was right in dismissing the claim.

54. Yet another judgment in Maharashtra State Mining Corporation v. Sunil (supra) was relied upon for the same purpose. The relevant passage runs as follows:

7. The High Court was right when it held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act cannot be subsequently "rectified" by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim "ratihabitio priori mandato aequiparatur" namely "a subsequent ratification of an act is equivalent to a prior authority to perform such act". Therefore ratification assumes an invalid act which is retrospectively validated."

55. Those judgments will categorically lay down the principle that the approval of the earlier act can be done by ratification by word or conduct or action through which the improper and unauthorised performance can be corrected. In the evidence of P.W. 1 it has been suggested that P.W. 1 has resigned from the Directorship of the Company on 29.12.2005 to which, he has denied it. Therefore, I could see that P.W. 1 was previously the Director of the plaintiff company and he is said to have resigned on 29.12.2005, to which, no evidence is available. Therefore, I could see that P.W. 1 was one of the Directors during the time of examination of P.W. 1 and when he was questioned regarding the suit transaction it was impliedly admitted that he was the then Managing Director of the plaintiff Company. When P.W. 1 was a Director of the Company, even though he was not a Director during the transaction had in between the parties, he was competent to depose as well as maintain the suit representing the plaintiff Company. Therefore, P.W. 1 is competent to represent the plaintiff, after the death of the earlier Director K. Subbiah.

56. The execution of Exhibit P-3, Memorandum of Understanding in between all the four parties, including the plaintiff and defendants 1 to 10, was an admitted one. The important clauses as regards the time for execution of the contract are being dealt with in Clauses 4, 5 & 8. For better understanding, the said clauses are extracted hereunder:

4. The Parties of The First Part shall obtain and produce Urban Land Ceiling Clearance Certificate from the Authorities as early as possible, if necessary under the Act or Rules. The Party of The Third Part agrees to pay a further advance of Rs. 50,00,000/-(Rupees Fifty lakhs only) to The Parties of The First Part on such production, if the Urban Land Ceiling Clearance is produced earlier to N.O.C. from the appropriate Authority. I.T. Dept, Madras; or on production of N.O.C. under chapter XX-C of the Income Tax Act, whichever is earlier. The time for obtaining the clearance under Urban Land Ceiling is coterminous with the time taken for

obtaining the clearance under the Income Tax Act under chapter XX-C of the Act.

5. The Party of The Third Part shall pay the balance sale consideration without waiting for the clearance under U.L.C. Act and complete the transaction and get the Sale Deed executed within four months from the last date when The Parties of The First Part obtain and produce (a) N.O.C. Under Chapter XX-C; and (b) Income Tax Clearance Certificates u/s 230-A. Time is the essence of this contract.

...

8. In any event, the parties herein agree to get the Sae Deed executed personally by all The Parties of The First Part and arrange to register the same at the cost of The Party of The Third Part on or before 31.3.1995 after obtaining all the necessary clearance certificates.

57. According to Clause 8, it has been categorically agreed that the first party should arrange the registration of the sale deed and the third party to execute the sale deed on or before 31.3.1995 after obtaining all necessary clearance certificates. It is also mentioned in Clause 5 that time is the essence of the contract. It has been strenuously argued by the learned counsel for the plaintiff that even though, the parties have agreed for certain time limit and also with a condition that time is the essence of contract, it has not been considered that the said stipulated time should have been considered as essence of the contract and the conduct of parties to the said adherence of clause would show that the time fixed in the agreement was not treated as essence of the contract.

58. The judgments referred to in Chand Rani v. Kamal Rani (supra) as to the principle that time, when essence of the contract, it has been laid down as follows:

19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.

59. Yet another judgment in Swarnam Ramachandran v. Aravacode Chakungal Jayapalan (supra) would also hold the field. The relevant passage would run as follows:

10...Notwithstanding that a specific date was mentioned in the agreement, one has not only to look at the letter but also at the substance of the contract. Whether time is of essence is a question of fact and the real test is intention of

the parties. It depends upon facts and circumstances of each case.

...

12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract was on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the Court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the Court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract.

60. In the judgment of the Honourable Apex Court in *M.P. Housing Board v. Progressive Writers and Publishers* it has been held as follows:

27. It is fairly well settled that time is not normally an essence of any agreement qua immovable properties and even if there was an express covenant of time being an essence, the overall agreement have to be looked at to determine whether time was the essence. Whether time is the essence of the contract would, therefore, be a question of fact to be determined in each case and merely expression of the stipulated time would not make time an essence of the contract.

61. In yet another judgment of the Honourable Apex Court in *Sardamani Kandappan v. S. Rajlakshmi* (supra), it has been held as follows:

23. The above Section deals with the effect of failure to perform at a fixed time in contracts in which time is essential. The question whether time is the essence of the contract, with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.

62. The aforesaid judgment of the Honourable Apex Court has clearly laid down that the principle of time as essence of contract is normally presumed to be not applicable for a contract of sale in respect of immovable properties except in a

Deed of Reconveyance or Renewal of Lease. It has also been dictated that the march of time as essence of contract has to be tested with the intention of parties which has to be culled out upon the facts and circumstances of each case. In the back drop of the said dicta laid down by the Honourable Apex Court, when we approach the facts and circumstances through the pleadings and evidence, I could see that the counsel for the defendants had written a letter on 28.3.1995 to the counsel for the plaintiff stating that the talk in respect of the extent of the property and the execution of sale deed in between the parties would be convened on 4.4.1995 which is mutually convenient date and therefore, it could be considered that 31.3.1995 was not the crucial date to comply with the execution of sale deed on or before 31.3.1995. On a careful perusal of the said letter written by the counsel for the defendants which was produced as Exhibit D2 on the side of the defendants in paragraph 3, it has been clearly laid down as follows:

3. Princess Poyam Thirunal has some urgent work at Bombay. After our telephonic talk I had informed that, Princess can proceed to Bombay as it may not be possible for the party to complete the sale deed on or before 31.3.1995."

63. Apart from the said disability for not registering the document on or before 31.3.1995, it has been postponed by the counsel for the defendant to 4.4.1995 for holding a talk in respect of extent of the property and the execution of the sale deed and the payment of consideration for the said properties. Therefore, the time fixed to execute the sale deed on or before 31.3.1995 was not treated as the essence of the contract.

64. As regards readiness and willingness of the plaintiff to perform its part of contract, the learned senior counsel appearing for most of the defendants viz., defendants 1 to 3, 7 to 9, Mr. S.V. Jayaraman would stress in his argument that the plaintiff was not at all ready and willing to perform his part of the contract throughout and he was also liable for breach of contract. Similarly, the learned senior counsel appearing for the 4th defendant, Mr. C. Selvaraju would also submit that the plaintiff is not only guilty of breach of contract but was deliberately failed to honour the terms of agreement by not paying the agreed sum immediately on production of Urban Land Ceiling Clearance Certificate as per Clause 4 of the Agreement. Whether the said non-payment, if true is a serious laches on the part of the plaintiff. However, the learned counsel Mr. R. Parthasarathy would argue that the said non-payment of Rs. 50 lakhs as per Clause 4 of the agreement was due to discrepancies in the extent of the property and the pathway right in the common pathway connecting Lattice Bridge Road with the suit property as described in the agreement of sale. It has been further submitted by the learned counsel for the plaintiff that the said reason has been elicited in the re-examination of P.W. 1.

65. On a careful consideration of these submissions and evidence adduced on the side of the plaintiff regarding the payment as per the conditions, I could see that the condition as imposed under Clause 4 of the agreement was to the effect that

the purchaser, namely, the plaintiff agreed to pay a further advance of Rs. 50 lakhs on production of Urban Land Ceiling Clearance Certificate or No Objection Certificate under XX-C of Income Tax Act by the defendants. According to the pleadings found in the plaint in paragraph 14, it has been categorically admitted that the Urban Land Ceiling Authorities have issued a clearance certificate in September 1994 itself. Similarly, in paragraph 15 of the plaint it is stated that the Income tax Authorities had issued No Objection for the sale of the property in favour of the plaintiff on 21.11.1994 by its order dated 21.11.1994 in AA/MDS/8(286) 11/94-95-M. 111. In the evidence of both sides, I could also see that those certificates have been produced as Exhibits P-4 and P6 respectively. According to Exhibit P-6, the No Objection Certificate from the Income Tax authorities were obtained by the Defendants 1 to 9 and handed over to the plaintiff which is dated 21.11.1994. Therefore, the plaintiff is at the obligation to pay an additional advance of Rs. 50 lakhs to the defendants on such production of No Objection Certificate from Income Tax authorities. The said amount of Rs. 50 lakhs was admittedly not paid towards additional advance by the plaintiff to the Defendants 1 to 9. However, it has been argued by the learned counsel for the plaintiff that a letter written by the plaintiff to the Defendants 1 to 9 on 28.3.1995 produced in Exhibit P-9 would disclose that there was a dispute in the extent of the property and therefore, the said payment of Rs. 50 lakhs could not be paid by the plaintiff to the Defendants 1 to 9. The said reason put forth by the learned counsel for the plaintiff, was vehemently opposed by the learned senior counsel appearing for the Defendants 1 to 4 and 7 to 9.

66. A judgment of the Honourable Apex Court in Pramod Buildings & Developers (P) Ltd v. Shanta Chopra (supra) has been cited by the leaned senior counsel appearing for the 4th defendant. The relevant passage would run as follows:

18. As rightly held by the High Court, it was for the plaintiff who approached the Court to prove that he was ready and willing to perform the contract. The plaintiff in a suit for specific performance, cannot obviously succeed unless he proved that he was ready and willing to perform the contract. The exhaustive correspondence between the parties clearly discloses the respective stands of the parties. Even the prayer in the plaint shows that the appellant was not ready to pay the entire balance of Rs. 34,00,000 as agreed under the agreement of sale but that the plaintiff insisted upon the appellant to pay the municipal taxes before the sale, as a condition for sale. If the appellant was not willing to pay Rs. 34 lakhs at the time of sale, as specifically agreed under the agreement of sale, the appellant could not claim that it was ready and willing to perform its obligations.

67. In the judgment as cited by the learned counsel for the plaintiff in Nathulal v. Phoolchand (supra) it has been held as follows:

12...If, therefore, tinder the terms, of the contract the obligations of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligations by the other party without in the

first instance performing his own part of the contract which in the sequence of obligations is performable by him earlier.

68. Yet another judgment cited by the learned counsel for the plaintiff in *P. D'Souza v. Shondriilo Naidu* (supra) would lay down the principle as follows:

27. It is not a case where the plaintiff had not made the requisite averments in the plaint. The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale. The plaintiff was a tenant of the defendant.

69. In the aforesaid judgments, it has been categorically laid down that the readiness and willingness of the stipulations made in the contract would depend upon the question as to whether the performance of the defendants was also required so as to seek the reciprocal performance from the other side.

70. If so whether such performance has been correctly done by the defendant is a question, to seek for the performance from the other side. As admittedly stated in the plaint that "No Objection Certificate" from Income Tax Department has been obtained on 21.11.1994, apart from Urban Land Ceiling Authority which gave the clearance even in September 1994 in respect of the suit property through its letter dated 20.11.1994. Those documents are produced as Exhibits P-6 and P4 respectively. According to Clause 4, the plaintiff was under the liability of performing his part of the contract on such production of those certificates by paying Rs. 50 lakhs towards additional advance. It has been explained by the plaintiff that the said payment of Rs. 50 lakhs was not paid due to the discrepancy in the area and the pathway right. The said explanation emanated only in a letter written on 8.3.1995, when the time stipulated for execution of the sale deeds on or before 31.3.1995 was reaching. There is no murmur in between the date of submission of No Objection Certificate from the Income Tax Authority and the Urban Land Ceiling Clearance certificate on 20.11.1994 and 28.3.1995 regarding the discrepancy in the area.

71. It is not disputed that the defendants have pursued in getting the No Objection Certificate from the Income Tax Department as well as the clearance from Urban Land Ceiling Authorities and produced them to the plaintiff on 21.11.1994. The performance due on the side of the Defendants 1 to 9 was completed on 21.11.1994, the reciprocal performance due as per Clause 4 of the agreement was to pay a sum of Rs. 50 lakhs towards additional advance to the Defendants 1 to 9 but it was not paid by the plaintiff. The explanation offered by the plaintiff in the re-examination that there was discrepancy in the extent of the pathway right of the suit property, cannot be believed for not paying the said payment which has to be paid by the plaintiff on the performance of the defendants through the production of No Objection Certificate from the Income Tax as well as Urban Land Ceiling Certificate from the authorities concerned. The failure on the part of the plaintiff to pay the said additional advance is a serious

one and it would show that the plaintiff was not ready and willing to perform his part of the contract from 21.11.1994 till 28.3.1995.

72. Could the said lacunae or failure to perform the part of the plaintiff be redressed by the subsequent acts of the parties had through the communication and correspondence in between them.

73. The communications in between the plaintiff and defendants were produced as Exhibits P-7 to P-9 and Exhibits D-1 and D-2. According to the evidence adduced by both sides, I could see that the outer period fixed for the purpose would be ending by 31.3.1995 and therefore, the correspondence had in between the parties till 31.3.1995 or very much important for the purpose of ascertaining the mutual understandings reached in between the parties. On a careful perusal of Exhibit P-7, a letter written by the plaintiff, the plaintiff would state that the plaintiff would be making the payment of entire balance of sale consideration at the end of 1995 and have the execution and registration of sale deed along with the draft copy of sale deed so as to obtain Income Tax Clearance Certificates. The plaintiff has also requested the defendants to remove all the furnitures and fittings from the said building located in the suit property for facilitating the delivery of vacant possession on the date of registration of the sale deed. Exhibit P-80, another letter written by the plaintiff to 9th defendant, in which, the plaintiff reiterated that the entire balance of sale consideration would be paid by the end of January 1995. Further more, in Exhibit P-9, a letter written by the plaintiff to all the defendants on 28.3.1995, for the first time, stating that the extent of the property was only 18 grounds 2053 sq. ft. and not 20 grounds and also sought for certain information about the Income Tax Clearance Certificate obtained and the removal of the furnitures and fittings from the said building in the property and to comply with the requirements of Clause 8 of the agreement. However, it was stated in the said letter that the said letter was written for recording the readiness and eagerness to pay the entire balance consideration and to complete the transaction as per agreement and sought for 20 grounds property to be conveyed. In the letter sent by the counsel for the defendants, namely, K.L. Narasimhan on 28.3.1995, produced as Exhibit D-2 it is stated that the registration could not be possible before 31.3.1995 however, it had been fixed for execution of sale deed on 4.4.1995 and the sale deed would be executed for 20 grounds for the consideration of Rs. 3.25 crores and the actual area will be found on measurement and consideration therefor, on proportionate basis making it binding on both sides.

74. Considering all these correspondence, I could see that the parties along with their counsel have not considered that the sale deed need not be executed on or before 31.3.1995 but it could be executed on 4.4.1995 for 20 grounds and the accepted consideration and the actual measurement could be arrived at on measuring the property and the proportionate consideration may be fixed in between the parties. On the said date namely 4.4.1995, neither the entire balance sale consideration was paid nor the sale deed was executed. In the said

correspondence discussed above viz., Exhibits P-7 to P-9 and Exhibit D-2, the non-payment of additional advance to the tune of Rs. 50 lakhs on the production of Urban Land Ceiling Certificate on 20.11.1994 has not been explained by the plaintiff. Despite the plaintiff has stated that he is ready to pay the entire balance of sale consideration before the end of January 1995 even the said amount of Rs. 50 lakhs which ought to have been paid on 21.11.1994 was not paid. Even though the defendants have communicated through their lawyer that let the consideration fixed for the entire property be Rs. 3.25 crores and could be executed for 20 grounds and the proportionate sale consideration could be ascertain thereafter, the plaintiff did not come forward to either pay the said money on 4.4.1995 inclusive of Rs. 50 lakhs which ought to have been paid on 21.11.1994 and get the sale deed executed nor had he sent the proportionate amount through original demand drafts immediately on receipt of Exhibit D2 from defendants lawyer. However, he had enclosed the xerox copies of the demand drafts for the proportionate extent of the property, namely, 18 grounds 2053 sq. ft. along with the letter dated 7.8.1995 produced as Exhibit P-11. In the said letter, the plaintiff requested the defendants separately seeking convenient date for execution of the sale deed after receiving the original demand draft from the plaintiff. Whether the tender made by the plaintiff through Exhibit P-11 series of letters would show the readiness and willingness on the part of the plaintiff is a crucial question.

75. We have already discussed and found that the time limit fixed by the parties at 31.3.1995 for performance of the contract was postponed to 4.4.1995. However, a letter was sent by the plaintiff to the defendants stating that the time to complete the transaction in all respects was decided by the counsel for the defendants before the end of June 1995 and the same was not fructified and therefore, the plaintiff was ready to pay the consideration and eager to pay the same and complete the transaction atleast before 15.7.1995. It has also been sought for delivering the vacant possession of an extent of 20 grounds with an uninterrupted right of way. The contents of Exhibit P-10 would candidly show that the plaintiff was not willing to get 18 grounds 2053 sq. ft but wanted 20 grounds as agreed in the agreement for the payment of entire balance of sale consideration. Even after saying that, he is ready to pay the balance of sale consideration, the plaintiff had only sent a xerox copy of the demand drafts to each of the Defendants 1 to 9 towards the proportionate balance of sale consideration for 18 grounds and 2053 sq. ft. only. The said circumstances and the conduct of plaintiff would go to show that the plaintiff was not unconditionally ready to give the payment of the entire balance of sale consideration, despite no additional advance of Rs. 50 lakhs was paid on 21.11.1994 and to get the sale deed in favour of the plaintiff.

76. The arguments advanced by the learned counsel for the plaintiff would go to show that the readiness and willingness to perform the contract entered into between the parties, on the part of the plaintiff need not be suspected, because the 4th party to the agreement, Exhibit P-3, namely 10th defendant, being a

nationalised bank is in support of the plaintiff to finance or to step into the shoes of the plaintiff to get the sale deed and therefore, the readiness and willingness can be inferred through the presence of the 10th defendant. Such an argument of the learned counsel for the plaintiff may be helpful to ascertain the financial capacity of parties but readiness and willingness is a different one.

77. In the judgment of the Honourable Apex Court in *Narinderjit Singh Vs. North Star Estate Promoters Ltd.*, , it is very clearly laid down as follows:

21. In *Narinderjit Singh Vs. North Star Estate Promoters Ltd.*, this Court observed that "readiness and willingness cannot be treated as a straitjacket formula and the issue has to be decided keeping in view the facts and circumstances relevant to the intention and conduct of the party concerned". The same view was reiterated in *P. D'Souza v. Shondrilo Naidu*.

78. In the aforesaid judgment, it has been reiterated, the earlier judgments of the Honourable Apex Court and was found that the readiness and willingness to perform the contract has to be adjudged with reference to the conduct of the parties and the attending circumstances. The plaintiff, even though, has repeatedly stating that he was ready and willing to pay the balance of sale consideration and get the sale deed executed through his letters, Exhibits P-9, P-10, P-11, but he had not mentioned the payment of Rs. 50 lakhs which he was obliged to pay under clause 4 of the agreement in his subsequent correspondence. The plaintiff has also not come forward with the payment of the entire balance of sale consideration as agreed to be paid on or before 4.4.1995 in order to get the sale deed. This non-payment of Rs. 50 lakhs as per Clause 4 of the agreement and the failure to pay the entire balance of sale consideration atleast by 4.4.1995 on the part of the plaintiff would not only show the breach of terms of agreement by the plaintiff but also the unwillingness to pay the entire balance sale consideration even after negotiations had been done at the end of the fixed date namely 31.3.1995 or 4.4.1995 as the case may be.

79. It is quite clear that the plaintiff need not jingle the coin to show his financial capacity showing readiness and willingness on the part of the plaintiff. The said proposition have been laid in the judgment of the Honourable Apex Court in *Nathulal v. Phoolchand* (supra). The relevant passage would run as follows:

6...To prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction: *Bank of India Ltd. and Others v. Famsetji A.H. Chinoy and Messrs. Chinoy and Company*

80. The said principle has been followed by this Court in the judgment in *S. Ramakrishnan v. R.M. Subbiah* (supra). The relevant passage would run thus:

18... There are catena of decisions of this Court and the Apex Court to the effect that readiness and willingness do not imply that the purchaser must produce money and the conditions to be fulfilled are that purchaser had done some act in furtherance of the contract and the act performed by him was with certainty.

81. The dictum laid down by the aforesaid judgment would go to show that there is no need for deposit of the money before the Court to show readiness and willingness on the part of the plaintiff. However, the plaintiff who was stating that he was ready and willing to perform his part of the contract, did not explain about the non-payment of Rs. 50 lakhs, to which, he was obliged to pay on the production of Urban Land Ceiling Clearance Certificate on 20.11.1994. No attempt has been made to pay the said sum with an explanation by the plaintiff till the date of suit and even after the filing of the suit. Therefore, I am of the considered view that the plaintiff was not ready and willing to perform his part of the contract as contemplated under Clause of the Memorandum of Understanding Exhibit P-3. Accordingly, additional issue No. 3 is decided in favour of the plaintiff. However, Issue No. 1 and Issue No. 2 are decided against the plaintiff.

82. Issue No. 3 and Additional issue No. 1

The suit has been filed by the plaintiff seeking for specific performance of the contract namely memorandum of understanding dated 3.8.1994 Exhibit P-3 which was based upon the previous agreement dated 10.3.1993. The grant of the relief of specific performance based upon the agreement of sale is governed by Section 20 of the Specific Relief Act. Section 20 of the Specific Relief Act runs as follows:

20. 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 constitute 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.

83. According to the submission of the learned counsel for the plaintiff specific relief shall be normally granted as a rule and the denial of the same is an exception. For the said principle, he would cite a judgment of the Honourable Apex Court in Prakash Chandra Vs. Angadlal and Others, The relevant passage would run as follows:

9. The ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief."

Yet another judgment of the Honourable Apex Court in S. Ramakrishnan v. R.M. Subbiah (supra) was also cited for the said principle. The relevant passage would run thus:

20...The relief by way of specific performance being discretionary u/s 20, the plaintiff must come to Court with clean hands and with all the materials with regard to readiness and willingness to complete the sale transaction as stipulated in the agreement. The oral evidence of P.W. 1 and the documents clearly established that the plaintiff has come to Court with clean hands and he was always ready and willing to perform his part of the contract and he was anxious to complete the sale transaction and only the defendant was evading the execution of the sale deed. So this Court has to necessarily exercise its discretionary power to order specific performance of the contract.

Whether the aforesaid principles laid down in this judgment would be helpful to the plaintiffs the question to be decided on the basis of the evidence adduced by the plaintiff.

84. According to the said provisions, judicial discretion has to be exercised for the grant of such a relief. When we approach the evidence adduced in this case, the person who represented the plaintiff company at the time of execution of the suit agreement Exhibit P-3 and had the correspondence with the defendants till December 1995, was one Mr. Shreyas Sri Paul and he was not examined to speak about the intention of parties had at that time towards the performance of agreement of sale. The possession of the suit property was stated to have been given by the defendants to the plaintiff and the plaintiff was seeking the full

possession of the suit property in the prayer. However, the communication in Exhibits P-6 to P-9 would go to show that the vacant possession should have been given to the plaintiff. Those documents would go to show that possession was yet to be given by the defendants to the plaintiff whereas the pleading in the plaint would go to show that the entire building in the suit property was not handed over and therefore, the plaintiff requested the defendants to remove the fixtures and fittings prior to the execution of the sale deed. The pleadings put forth by the plaintiff regarding the possession is contradictory. No doubt, it is a settled law that the plaintiff has to approach the Court with clean hands. But, such submission is contradictory to the evidence and therefore, this Court cannot exercise the discretion in favour of the plaintiff.

85. Apart from that, the property comprised in 20 grounds in the suit property was agreed to be sold for a total consideration of Rs. 3.25 crores. The total sum of Rs. 1 crore was paid as advance towards the said transaction. No further payment was made including the additional advance of Rs. 50 lakhs till the date of the suit and after the date of the suit. The agreement was entered into between the parties in the year 1994. The suit was tried and it was brought to Court in the year 2012 for arguments and on the date of addressing arguments, value of the property cannot be said as static. The suit property is located in a very prominent place at Adayar and it is a vast extent. The parties to the suit cannot dispute the value of property had increased multi-fold. Even though the price has been escalated from the date of execution of the agreement and the suit has been filed within the period of limitation, it is pending for more than 17 years. No doubt, the suit property is an urban property and no evidence has been adduced regarding its present value. The plaintiff had put forth an offer by filing a memo that he is ready to pay a sum of Rs. 12 crores with other expenditures, in case, this Court has come to a conclusion that the value of the property had increased multi-fold. The said offer was negated by the learned senior counsel appearing for the defendants.

86. Before filing the suit, the Defendants 5 and 6 have executed sale deeds in respect of their share in the suit property through Exhibits P-16 to P-19. The plaintiff has filed the suit for the remaining extent of properties from the Defendants 1 to 4 and 7 to 9. Whether the escalation of price would be a bar for the grant of specific performance is the question. A judgment in *Vimaleshwar Nagappa Shet v. Noor Ahmed Shariff* (supra) would run as follows:

11. It is settled law that Section 20 of the Specific Relief Act, 1963 confers discretionary powers (Vide *M. Meenakashi v. Metadin Agarwal*, *Nirmala Anand v. Advent Corpn. (P) Ltd.* and *Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Karuvila's Son*). It is also well settled that the value of the property escalates in urban areas very fast and it would not be equitable to grant specific performance after the lapse of a long period of time.

87. However, the learned counsel for the plaintiff would cite a judgment of the Honourable Apex Court in *P. D'Souza v. Shondrilo Naidu* (supra) in support of his

argument that escalation of price would not deter the Court to grant the relief of specific performance. The relevant passage would run as follows:

39...It is therefore, too late for the appellant now to suggest that having regard to the escalation in price, the respondent should be denied the benefit of the decree passed in his favour. Explanation I appended to Section 20 clearly stipulates that merely inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20.

88. When we apply the principle laid down by the Honourable Apex Court in the aforesaid judgments, I could see that the suit property is in a posh locality namely Adyar and the price escalation is very fast and there is no evidence before the Court for assessing the correct market price as on date. According to the submission of the learned counsel for the plaintiff, it may be more than Rs. 25 crores or more. In the said circumstances, if the specific performance is ordered for execution of sale deed by the Defendants 1 to 4 and 7 to 9 for a balance sum of Rs. 2 crores 25 lakhs or to a sum of Rs. 12 crores as suggested by the plaintiff, it would be highly inequitable when especially, the plaintiff had breached Clause 4 of the memorandum of understanding Exhibit P-3. Therefore, the judgment of the Honourable Apex Court in *Vimaleshwar Nagappa Shet v. Noor Ahmed Shariff and Others* (supra) is more applicable than the judgment of the Honourable Apex Court in *P. D'Souza v. Shondrilo Naidu* (supra).

89. I have already discussed and come to a conclusion that the Managing Director who acted on behalf of the plaintiff at the time of execution of the contract as well as during the correspondence till 22.12, 1995 was not examined to speak about all these facts. The evidence of P.W. 1 who was not aware of the events happened before 1996, cannot be considered best evidence for proving the essential facts for the grant of specific performance of Exhibit P-3. Therefore, the plaintiff is very much lacking in winning the conscience of the Court to grant the equitable relief of specific performance.

90. For the foregoing discussions, I am of the considered view that the plaintiff is not entitled for the grant of specific performance on the basis of the agreement dated 3.8.1994 against the Defendants 1 to 4 and 7 to 9. Accordingly, these two issues are decided against the plaintiff.

91. Additional Issue No. 5

In the foregoing issues, I have discussed the evidence adduced by the plaintiff in respect of possession of the suit property. The plaintiff had pleaded that the possession of the building was handed over and the defendants are at the liberty to remove the fixtures and fittings in the building so as to give full possession of the suit property on the execution of the sale deed by the Defendants 1 to 4 and 7 to 9. The plaintiff has categorically admitted that he was not put in full possession but was in partial possession. It has been argued that the Defendants

5 and 6 have executed the sale deeds in Exhibits P-16 to P-19 in respect of their respective shares in the suit property and they have handed over possession to the plaintiff and therefore, the plaintiff ought to have been considered as in possession of the suit property and therefore, absolute possession should have been given to the plaintiff. The mere execution of the sale deeds in Exhibits P-16 to P-19 regarding the undivided shares in the property would not give either actual possession of the suit property and it cannot be considered that the plaintiff was in possession of the said property. It can be at best considered that he was in constructive possession of the undivided share of the Defendants 5 and 6 and the actual possession could be granted on the foot of the sale deeds in Exhibits P-16 to P-19 only when a suit for partition and separate possession of the respective shares of the Defendants 5 and 6 is filed and decreed. Till then, the possession of the Defendants 1 to 4 and to 9 cannot be disturbed since the plaintiff is found not entitled to get a decree of specific performance. Therefore, I am of the considered view that the plaintiffs claim that the possession may be handed over in pursuance of the specific performance decree is also found untenable. Accordingly, this issue is also decided against the plaintiff.

92. Issue No. 4:

In the earlier issues, I have discussed and found that the suit was filed within time and time was not essence of the contract in favour of the plaintiff. However, the other issues and additional issues were found against the plaintiff. When the plaintiff is not entitled for specific performance of the suit agreement Exhibit P-3, it has been categorically agreed in between the parties that plaintiff is entitled for refund of the money paid to the defendants. Clause 9 and 10 of the suit agreement Exhibit P-3 would govern the return the advance amount payable by the Defendants 1 to 4, 7 to 9 to the plaintiff. Admittedly, the advance amount paid was a sum of Rs. 1 crore. The defendants 4 and 5 had executed sale deeds in Exhibits P-16 to P-19 after adjusting the advance amount paid towards their share. In case, the Defendants 1 to 4 and 7 to 9 have to return the advance amount, it is being governed by Clauses 9 and 10 of the agreement. I have already discussed and found that the plaintiff was guilty of breach of clause 4 of the agreement by failing to pay the sum of Rs. 50 lakhs on the receipt of Urban Land Ceiling Clearance Certificate from the Defendants 1 to 9. Therefore, I could see that Clause 10 alone is applicable to the present case and Clause 9 is not applicable. The plaintiff is entitled to get 90% of the advance amount from the Defendants 1 to 4 and 7 to 9 after deducting the proportionate advance amount of Defendants 5 and 6. However, the said refund of the money cannot be ordered in this suit since the plaintiff has not asked for any alternate relief of refund of the advance amount as mandated under the provisions of Section 22(2) of the Specific Relief Act. No doubt, it is a settled law that the plaintiff can at any time seek to amend the plaint till it is finally decided. Therefore, it is for the plaintiff to do so and at this stage, since there is no prayer for the refund of the advance amount, this Court is not ordering for the return of the advance amount as per the terms in Clause 10 of the agreement of sale Exhibit P-3.

93. In the earlier issues, I have discussed and come to the conclusion that the plaintiff is not entitled for equitable remedy of specific performance as sought for by the plaintiff either for the consideration mentioned in Exhibit P-3 or to the suggested consideration of Rs. 12 crores by the plaintiff and therefore, the suit filed by the plaintiff seeking to specifically enforce Exhibit P-3 against the Defendants 1 to 4 and 7 to 9 is liable to be dismissed. In fine, the suit filed by the plaintiff is dismissed with costs.