

(2010) 05 BOM CK 0045
In the Bombay High Court
Case No : Suit No. 391 of 1982

Pankaj Anantrai Bhuwa and Others

APPELLANT

Vs

Ramkumar Shivchandray and Sons

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Evidence Act, 1872 — Section 114, 116
Income Tax Act, 1961 — Section 230A, 269(4), 371
Specific Relief Act, 1963 — Section 10, 14, 16, 20, 20(2)
Urban Land (Ceiling and Regulation) Act, 1976 — Section 27

Citation : (2010) 4 BomCR 663

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : D.S. Parikh and R.M. Tiwari, for the Appellant; Uday Bobade and Pankaj Kawli, instructed by Dadhich and Co., for the Respondent

Judgement

Roshan Dalvi, J.—The Plaintiffs have sued for specific performance of the Agreement for sale dated 23.4.1981 (the said Agreement), for a declaration that the agreement is valid and subsisting and for an order to convey and hand over possession of the property agreed to be sold under the said Agreement to Plaintiff No. 3, who is nominated by Plaintiff Nos. 1 and 2. The Defendant-Company (the Defendant) is the owner of the suit property being land with buildings and structures standing thereon at Prabhadevi Road, Final Plot No. 942, C.S. No. 1064 of Lower Parel, Mumbai, admeasuring 3883 sq. yards equivalent to 3248 sq. meters (the suit property).

2. The said Agreement dated 23.4.1981 is executed by way of a letter from the Defendant to the Plaintiffs and countersigned by the Plaintiffs.

3. Under the said Agreement, the Defendant agreed to sell, transfer and convey the suit property to the Plaintiffs on as is where is basis, free from all encumbrances for consideration of Rs. 20 Lakhs. The Defendant received an earnest of Rs. 50,000/-. The balance amount of Rs. 19.5 Lakhs was to be paid to

the Defendant on completion of the sale as per the said Agreement. The said Agreement was subject to all tenancies. The Plaintiffs also were tenants of the Defendant in respect of a very large portion of the suit property. The Defendant was to pay municipal taxes and collect and receive the rents in respect of the suit property. The Defendant was to make out a marketable title and forward the title deeds to the Plaintiffs. The Defendant agreed not to transfer tenancies or deal with the tenants. The Defendant also executed a Power of Attorney in favour of the Plaintiffs for submitting building plans for development of the suit property and recovering rent and compensation thereof, which came to be revoked / terminated on 27.2.1989. The Defendant had to obtain its income tax clearance certificate u/s 230A of the Income Tax Act, 1961 and if the certificate was not produced, the Plaintiffs were not to withhold the completion of sale for want of 230A certificate, but in that event the Defendant was to deposit with the Plaintiffs" Advocate Rs. 25,000/- by way of security deposit for its obtaining 230A certificate, but the Plaintiffs were to complete the sale notwithstanding. The Defendant also agreed to comply with the formalities and requirements of registration and admission of documents apart from obtaining the 230A certificate. The Plaintiffs were to be entitled to recover all the arrears of rent and compensation payable by the other tenants and occupants till the time of the completion of sale. The sale was to be completed within a period of 10 months from the date of the said Agreement subject, of course, to the Defendant" s title being marketable and the Defendant obtaining permission for transfer of the suit property u/s 27 of the Urban Land Ceiling (and Regulations) Act, 1976 (ULCRA). On account of the wilful default of the Defendant if the sale was not completed, the Plaintiffs were entitled to ask for specific performance and for payment of interest on the earnest money and the costs, charges and expenses incurred by the Plaintiffs and on account of the wilful default of the Plaintiffs if the sale was not completed, the Defendant was entitled to specific performance of the Agreement making time the essence of the contract by giving 15 days" notice to complete the sale transaction and upon the failure of the Plaintiffs to be entitled to terminate the Agreement and forfeit the amount of earnest paid in addition to be liable for payment of costs, charges and expenses incurred by the Defendant and to be entitled to deal with or dispose of the suit property.

4. Copy of the resolution of the Board of Directors of the Defendant at its Board meeting held on 14.4.1981, authorising two Directors of the Defendant to enter into the said Agreement was separately furnished to the Plaintiff and that fact recited in the Agreement itself.

5. It can be seen upon a reading of the Agreement that the main part to be performed by the Plaintiffs was the payment of the balance consideration of Rs. 19.50 Lakhs, only Rs. 50,000/- having been paid as earnest on the execution of the Agreement. The Defendant was essentially to obtain its certificate u/s 230A of the Income Tax Act. The completion of sale was to go on even if the certificate was not produced by the Defendant albeit upon deposit of Rs. 25,000/- in that behalf. The certificate could be obtained only upon the draft conveyance being

prepared and sent to the Defendant and upon the Defendant submitting the draft conveyance to the Income Tax Authorities.

6. The Defendant's title was clear and the Plaintiffs as the tenants of the Defendant were estopped from contending to the contrary as per the provisions of Section 116 of the Indian Evidence Act, 1872. Hence though there were the usual clauses for making out a marketable title or forwarding the title deeds to the Plaintiffs, who were the tenants and in possession of a large portion of the suit property, the Plaintiffs did not call upon the Defendant to perform those covenants or complain that the Defendant had failed to perform any of them. The conveyance was to be on "as is where is basis" and the Plaintiffs were given a separate Power of Attorney for developing the suit property as well as for collection of rents in respect thereof. The Defendant was to obtain the permission under the Urban Land Ceiling Act which also was not required as there was no vacant land and the Plaintiffs never called upon the Defendant to obtain any such permission. Parties have no disputes in respect of these usual covenants to be enforced by one another.

7. However, the two Directors of the Defendant were to act jointly as per the resolution supplied to the Plaintiffs which the Defendant strongly relies upon.

8. The essential term of the Agreement was the execution of the conveyance and completion of the sale within 10 months of the execution of the Agreement and even the main part which the Defendant had to perform in obtaining the statutory certificate was no deterrent to the execution of the conveyance. Since the Plaintiffs were to take the suit property on as is where is basis and the title of the Defendant was clear and in fact admitted, nothing further was required to be done by the Defendant.

9. However, upon the Plaintiffs' breach in paying the balance consideration and executing the conveyance, the Defendant was required to first make time the essence of the contract by giving 15 days' notice to complete the sale and only upon failure of the Plaintiffs to comply, were they entitled to terminate the said Agreement.

10. It would have to be seen whether the parties performed their respective parts of the said Agreement and whether the breach, if any, was such as to render it a wilful default entitling other to specific performance of the contract.

11. The Plaintiffs did not make payment of the balance consideration and complete the sale within 10-month time specifically prescribed. The Plaintiffs' default was not on account of any neglect or default on the part of the Defendant since they agreed to take the suit property on as is where is basis. The Defendant has, however, not made time the essence of the contract by giving 15 days' notice as specifically agreed in the said Agreement but have terminated the contract after the period of the contract came to an end on the ground that upon default of the Plaintiffs the Agreement ipso facto came to an end. The 10-month period for completion of sale would expire on 23.2.1982.

12. The admitted correspondence that ensued between the parties as set out in the Plaint itself shows that the very first letter after the said Agreement was written by the Plaintiffs' Advocate to the Defendant's Attorneys, putting on record that the Plaintiffs had paid Rs. 50,000/- to one of the Defendant's Directors, Rs. 40935.67 as betterment charges to the Municipality and Rs. 25,000/- as broker fees. Under the said letter, the Plaintiffs forwarded another cheque of Rs. 50,000/- to the Defendant as requested by one of its Directors and nominated Plaintiff No. 3 to have the conveyance registered in their name.

13. A week prior to the 10-month period granted for the completion of sale, the Plaintiffs' Advocate wrote another letter dated 16.2.1982 to the Defendant's Attorneys mentioning about the request of one of the Directors of the Defendant to make a further payment of Rs. 50,000/- which came to be forwarded. The letter recorded that sale would be completed before 15.4.1982 as agreed (instead of 23.2.1982). The Plaintiffs' Advocate called upon the Defendant's Attorneys to fix a suitable time for finalisation of the matter.

14. It may be mentioned that under the Agreement itself the copy of the resolution of the Board of Directors of the Defendant-Company furnished to the Plaintiffs, shows that the two Directors Deviprasad Poddar and Bhagwatiprasad Poddar were authorised to settle and finalise the documents to be executed between the parties and the common seal of the Company was to be affixed on the Power of Attorney and the conveyance in the presence of both of them. The purport and intent of this specific unusual resolution was that the Company would act not through one of its Directors but, by a special resolution in that behalf, by two of its Directors acting jointly. Similarly the Company would execute the documents being the Power of Attorney and the conveyance not in the presence of one of its Directors but in the presence of both of them. Since both of them were to settle and finalise the drafts, including the draft of the Deed of Conveyance, it follows as a matter of corollary that both of them would be only jointly entitled to do such other acts and deeds also for and towards the completion of sale and the execution of the conveyance. They were, therefore, required to act jointly. The resolution of the Company was made known to the Plaintiffs. The Plaintiffs had to abide by that resolution which was recited in the said Agreement itself.

15. Nevertheless the Plaintiffs dealt with one of the Directors of the Defendant, Deviprasad Poddar. The Plaintiffs also paid part consideration amount remaining unpaid to that Director of the Defendant- Company being Rs. 50,000/- paid twice as shown in the aforesaid two letters. Aside from the betterment charges and the broker fees, the Plaintiffs did not pay the balance consideration until after the period of time granted to the Plaintiffs for completion of sale expired on 23.2.1982.

16. The extension of time allegedly sought by the Plaintiffs and stated to have been granted was also not by the two Directors of the Defendant acting jointly. The Plaintiffs' Advocate has simpliciter recorded in his letter dated 16.2.1982

that time was extended.

17. The Defendant's Attorneys by their letter dated 24.2.1982 send the notice of termination since the sale which was to be completed by 23.2.1982 was not completed. The notice of termination stated that under the resolution of the Company, the authority was given to the two Directors to act jointly and that one Director could not have acted singly and accepted payment purportedly made by the Plaintiffs to him. The Defendant disputed that any payment was made to the Defendant. It was contended that had the Plaintiffs forwarded the draft of the conveyance to the Defendant, they would have obtained the 230A certificate by submitting true copy of the settled draft of conveyance to the Income Tax Authorities. Since the land was fully built up, Section 27 of the Urban Land Ceiling Act was struck down ultra vires and the Plaintiffs were to take the suit property on as is where is basis, no formalities were required to be complied by the Defendant. The postponement of the sale by 7 weeks, as claimed by the Plaintiffs, was refuted by the Defendant. The notice alleged that the Plaintiffs were not in a position to make payment and were delaying the payment on false pretexts. Consequently, the said Agreement was terminated and the earnest was forfeited.

18. It may be mentioned that the Defendant did not fully comply with the terms under the said Agreement relating to the termination of the Agreement by it as contained in Clause 18(b) of the said Agreement. The Defendant did not make time the essence of the contract. The Defendant did not give 15 days notice to complete the transaction. The Defendant simpliciter terminated the contract on the next day after which it was to be performed. It would have to be seen whether the notice of termination entitling the Defendant to terminate the contract and forfeit the earnest was correctly given as per the specific terms of the agreement. It would also have to be seen whether upon the non-performance of the contract by payment of the balance consideration and completion of sale within 10-month period granted to the Plaintiffs, the Plaintiffs would be barred from enforcing the Agreement and completing the sale thereafter.

19. The Plaintiffs contended through their Advocate's letter dated 27.2.1982 addressed to the Defendant's Attorneys that the entire negotiation and agreement was settled by the said Deviprasad Poddar because the other Director lived in Calcutta and was out of Mumbai. The letter alleged that there were several meetings held with the said Director, payments were not made and time extended which the Defendant was bound by.

20. The Plaintiffs claimed to perform the contract and sued the Defendant in that behalf.

21. After the filing of the Suit also the Plaintiffs negotiated settlement with the said Director of the Defendant only. The said Director agreed to the negotiations and certain meetings were held, payments made, letters exchanged and consent

terms in the Suit sought to be executed.

22. The correspondence that ensued between the parties and their Attorneys after the filing of the Suit is relied upon by the Plaintiffs to show that the Agreement was entered into by and between the Plaintiffs and the Defendant albeit represented by only one Director of the Defendant, the other Director disputing any such agreement on the ground that as per the special resolution passed and made known to the Plaintiffs, both the Directors were to act jointly and the individual act of a single Director would not bind the Defendant.

23. It is unnecessary to go into the entire correspondence in that behalf brought on record as subsequent events.

24. The Plaintiffs claim to have made certain further part payments to the Defendant such that under the amended Plaint Rs. 15.39 Lakhs out of Rs. 19.50 Lakhs are stated to have been paid by the Plaintiffs to the Defendant. These are admittedly not received and receipted by the two Directors acting jointly. The part payment made and recited in the Plaintiffs' letter dated 9.10.2002 shows the earnest paid, two installments of Rs. 50,000/- and two installments of Rs. 25,000/- paid to the aforesaid one Director of the Defendant-Company, certain betterment charges to the Municipality, further Rs. 1 Lakh paid to the said Director of the Company and diverse amount paid by way of property taxes to the Municipality. It may be mentioned that the Plaintiffs were tenants and in possession of a large portion of the suit property. For non-payment of the taxes, the suit property would be auctioned by the Municipality. It would be in the interest of the Plaintiffs to make the payment that they did.

25. The Defendant was to make those payments until the completion of sale. That would be for a period of about 10 months after the agreement. Upon the completion of sale, the Plaintiffs will be the owners and would be required to make payment of property taxes. The Plaintiffs in possession did not complete the sale. The Plaintiffs in possession instead made payments of diverse amounts to the Municipality from time to time.

26. The Defendant claims that even certain of these payments made to the Defendant were by way of rents payable by the Plaintiffs. The Plaintiffs were tenants in possession. They were bound to make payment of rents. The liability for payment of rent would cease only after the Plaintiffs acquired title. That would be upon the Plaintiffs making payment of the balance consideration and completing the sale. That would be upon the Plaintiffs sending the draft deed of conveyance to the Defendant. The Plaintiffs failed to convey it as agreed within 10 months. The Plaintiffs also failed to convey within the extended period of 7 weeks as claimed by the Plaintiffs. The payment made to the Defendant was correctly contended by the Defendant to have been paid by way of rent.

27. The Plaintiffs claim that all the payments are made towards the balance consideration upon the statement of accounts submitted by the Plaintiffs; which need not be otherwise gone into. The amount paid is in excess of the balance

consideration payable by the Plaintiffs. Consequently, there has arisen an unusual and absurd situation in which a tenant of an owner claiming the ownership upon completion of sale and execution of the conveyance, which never came to be, claims to have paid the balance consideration but not sent the draft deed of conveyance for execution. Even the balance consideration was paid after the Suit was filed. Most of that consideration is not paid to the Defendant but is paid to the Municipality on behalf of and on account of the Defendant. The Plaintiff would have nonetheless had to make the payment if the Defendant failed to make that payment for protection of its own possession against auction and sale of the suit property.

28. It is the Plaintiffs' case that they are ready and willing to perform their part under the Agreement for sale dated 23.4.1981. This readiness and willingness is only and essentially in making the payment of the balance consideration and completing the sale by execution of the conveyance. The Plaintiffs failed to do that within the period mentioned in the Agreement. The Plaintiffs claim that the period came to be extended by agreement between the parties. This agreement was by and between one of the Defendant's Director, though both of them were required to act jointly under a resolution specially passed by the Defendant. The Plaintiffs also claim that certain further part payments towards the balance consideration came to be made and paid to one of the Defendant's Directors. The Defendant, however, terminated the agreement.

29. It is the Defendant's case that termination is valid. The Defendant is entitled to forfeit the earnest paid and deal with and dispose of the suit property as agreed between the parties in the Agreement dated 23.4.1981. The Defendant relied upon the resolution passed by it authorising two Directors Deviprasad Poddar and Bhagwatiprasad Poddar to act jointly in respect of the Agreement for sale and the subsequent execution of the Power of Attorney as well as the conveyance by the Defendant. The Defendant refutes receipt of any balance consideration after the earnest was paid. It is its case that the amounts paid to one of its Directors were paid to him in his individual capacity and not to the Company in view of the resolution of the Company. It is further the case of the Defendant that the Defendant's title was admitted and so the only part which the Defendant had to perform under the said Agreement was to obtain a certificate u/s 230A of the Income Tax Act, which the Defendant could have obtained only upon submission of the final draft of the conveyance sent by the Plaintiffs to it. The Defendant claims that because the Plaintiffs did not have a requisite finance, they delayed the transaction and committed the breach, due to which the Defendant was entitled to terminate the contract which stood terminated under its Notice of termination dated 24.2.1982. The Defendant claims that it made time the essence of the contract and denied that it had extended time to 15.4.1982.

30. Upon such pleadings, the following issues came to be framed by Justice Daga on 2.3.2006 which are answered as follows:

ISSUES

- (1) Whether the Plaintiffs prove the suit agreement is subsisting and binding upon the Defendant as alleged in para 10 of the Plaint. - No
- (2) Whether the Plaintiffs prove that the Defendant was not entitled to terminate the said agreement and the termination by the Defendant is illegal, wrongful and not binding as alleged in para 8 of the plaint. - No
- (3) Whether the Plaintiffs prove that they were and are always ready and willing to perform their part of contract as alleged in para 12 of the plaint. - No
- (4) Whether the Plaintiffs prove that they have paid and Defendant has received in all the sum of Rs. 2,15,935.67 towards part payment as alleged in para 5 of the plaint. - No
- (5) Whether the Plaintiffs prove that they are entitled to have the conveyance in favour of the Plaintiff No. 3 as their nominee in the absence of privity of contract between the Defendant and the alleged nominee. - Yes if Plaintiff Nos. 1 and 2 are entitled, Plaintiff No. 3 would also be entitled.
- (6) Whether the Plaintiffs prove that there was any settlement of the suit as alleged in the amended plaint. - No
- (7) Whether the Plaintiffs prove that Shri Deviprasad Poddar a Director of the Defendant was unilaterally entitled to represent the Defendant or enter into any commitment or receive any amount from the Plaintiffs without consent and concurrence of Shri Bhagwatiprasad Poddar the other Director of the Defendant. - No
- (8) Whether the Plaintiffs prove that any amount paid by the Plaintiffs after filing of the suit towards taxes etc. of the suit property was towards part payment under the suit agreement for sale as alleged in the amended plaint of the Plaintiffs. - No
- (9) Whether the Plaintiffs prove that they were entitled to file or to prosecute the suit by reason of what is alleged in the amended paras of the plaint. - Need not be answered as not pressed.
- (10) Whether the Plaintiffs prove that the time to complete the agreement was allegedly extended to 15.4.1982 for the reasons alleged in para 7 of the plaint or otherwise. - No. It was not extended by the Defendant as resolved by it but only by one of its Directors acting singly.
- (11) Whether the Defendant proves that the time to complete the sale was the essence of the contract as stated in para 2 of the written statement. - No
- (12) Whether the suit is bad for mis-joinder of the parties as stated in amended written statement. - Need not be answered as not pressed.
- (13) Whether the Defendant proves that the suit agreement for sale was invalid,

void and un-enforceable by reason of non-filing of Form No. 37EE with the Competent Authority under Chapter XXA of the Income Tax Act and/or filing of Form No. 371 with the Appropriate Authority under Chapter XXC of the Income Tax Act as contended under paras 2(a) to 2(d) of the amended written statement. -No. Since the draft Deed of conveyance was itself not sent by the Plaintiffs for completion of sale.

(14) Whether the Plaintiffs are entitled to any relief, if so what ?

27. Plaintiff No. 2 led evidence on behalf of the Plaintiffs as P.W.1. The Plaintiffs also led evidence of the Advocate who represented the Plaintiffs at the time of the execution of the Agreement for sale. These witnesses have been cross-examined. The Defendant has not led any evidence. The execution of the Agreement is admitted. The correspondence that ensued between the Advocates and the Attorneys of the parties is also admitted. The resolution relied upon by the Defendant having been served upon the Plaintiffs is also admitted. The fact that the Plaintiffs have made payment of further consideration, though denied by the Defendant, is seen to have been made by the Plaintiffs albeit to one of the Directors of the Defendant and to the Municipality. The effect of such payment in law would have to be seen. The fact of the possession of the suit property is further admitted. The fact that the Plaintiffs are tenants of the Defendant is admitted and consequently, the ownership of the Defendant is not in dispute. The respective parts of the contract, which are to be performed by the respective parties, their rights and entitlement under the contract and their acts thereupon, would be seen from the terms of the contract itself, oral evidence in that regard being completely excluded by the documentary evidence contained in the agreement and the ensuing correspondence between the parties. The oral evidence is, therefore, largely redundant. Counsel on behalf of the parties have prudently not even referred to the oral evidence led by the Plaintiffs.

28. The aforesaid issues would have to be answered within the ambit of the parties' rights in law under the Agreement for sale entered into between them and their acts thereupon.

29. Issue No. (1) : The said Agreement dated 23.4.1981 had to be performed by completion of sale within 10 months of the agreement. The last date of completion of sale would be 23.2.1982. The Defendant was admittedly the owner of the suit property, the Plaintiffs being their tenants and consequently estopped from contending otherwise. The Plaintiffs agreed to purchase the suit property on as is where is basis subject to all existing tenancies. The Plaintiffs were to develop the suit property under the Power of Attorney executed by the Defendant and could recover the rents and compensation upon completion of sale. Permission under the Urban Land Ceiling Act, which was to be otherwise obtained by the Defendant, was not to be obtained at the relevant time since u/s 27 of the Act, under which the permission was to be obtained, was declared ultra vires the Constitution of India by the Apex Court. The only essential part of the contract to be performed by the Plaintiffs was to make payment of the balance

consideration. The only essential part, which had to be performed by the Defendant, was to obtain its Income Tax clearance certificate u/s 230A of the Income Tax Act. Even if that certificate was not obtained the conveyance had to be executed upon a mere deposit of Rs. 25,000/- by the Defendant pending the completion. Consequently, to keep the agreement valid and subsisting, the Plaintiffs must perform their part of the contract by offering and actually paying the balance consideration. The balance consideration payable was Rs. 19.5 Lakhs. The Plaintiffs had to pay the balance consideration on or before 23.2.1982. The Plaintiffs failed to make payment of the balance consideration as per the terms of the contract.

30. The Plaintiffs were specifically informed that the Defendant has passed the resolution under which two of their Directors Deviprasad Poddar and Bhagwatiprasad Poddar were both required to settle and finalise the drafts of the Agreement for sale, Power of Attorney and Deed of Conveyance to be executed between the parties. The Power of Attorney and the Conveyance were to be executed in the presence of both of them. Though the resolution does not mention about each act, that had to be performed by the Directors jointly. The resolution read as a whole shows the specific mandate of the Company in authorising two of its Directors to do each of the pertinent acts for the transaction that the Company sought to enter into with the Plaintiffs. Nevertheless, the Plaintiffs interacted with only one of the Directors of the Defendant. It has been the Plaintiffs' case in their evidence that the other Director was not available and the Plaintiffs were informed that the Director had consented to the other Director acting. That was nonetheless against the written mandate in the resolution passed by the Company and hence no act done by one of the Directors towards the completion of sale could be stated to be an act of the Defendant-Company. As per the true construction of the Agreement and its plain reading, the agreement would subsist for 10 months from its execution unless the time is extended for its performance.

31. Since the transaction is with regard to immovable property, time is not presumed to be the essence of the contract until it is so made. It was made essence of the contract in the contract itself despite the extension of 10 months for its completion. Time could have been extended. However, in this special case, time could have been extended by both the Directors acting jointly as per the mandate of the Defendant- Company. That has admittedly not been done. The Plaintiffs have admittedly not completed the sale within the initial period stipulated in the said Agreement. The settlement and finalisation of the draft of the Deed of Conveyance in favour of the Plaintiffs could have been done only if the time was extended. Hence the extension of time for the better performance of the acts contemplated by the Company to be performed by its Directors, for which they were authorised, was also by their joint action. It is the case of the Plaintiffs that the time came to be extended. That extension was orally granted by one of the Directors. The other Director did not consent to such extension of time even by ratification of the act of his co-director. The Defendant has,

therefore, refuted that there was any extension of time granted for the Plaintiffs.

Consequently, the said Agreement cannot be stated to be subsisting and binding upon the Defendant after the period set out in the Agreement, and not extended thereafter, came to an end. Hence issue No. (1) is answered in the negative.

32. Issue No. (2) : Under Clause 18(b) of the said Agreement, the Defendant was entitled to terminate the Agreement upon making time the essence of the contract by giving 15 days" notice to complete the sale transaction and upon the Plaintiffs failing to do so. This would be if there was a wilful default on the part of the Plaintiffs to complete the sale. Since the only part that the Plaintiffs had to perform was to make payment of consideration and since the Defendant did not have to perform any part other than to obtain its income tax clearance certificate, and which could be obtained only if the draft conveyance was given by the Plaintiffs, the suit property having been agreed to be purchased on as is where is basis, the wilful default would be upon non-payment of the balance consideration which the Plaintiffs were required to make provision for within a period of 10 months of the execution of the Agreement for sale. The Plaintiffs not having made payment of the balance consideration and having committed a default, wilfully so as not to complete the sale, the Defendant would certainly be entitled to terminate the Agreement albeit upon making time the essence of the contract as stipulated in the said Agreement.

33. Admittedly, the Defendant has not made time the essence of the contract. The Defendant has terminated the Agreement on the next day after it was to be performed and the sale was to be completed. The said Agreement was to be performed on or before 23.2.1982. The termination notice of the Defendant dated 24.2.1982 has set out correctly that the Directors of the Defendant had to act jointly, the Plaintiffs had failed to forward the draft of the conveyance so that the Defendant could not obtain the tax clearance certificate u/s 230A of the Income Tax Act, since the settled draft conveyance could not be submitted to the Income Tax Authorities, and the Defendant had no other formality to be complied since the permission under the Urban Land Ceiling Act was not required to be obtained as there was no excess vacant land, the suit property being fully built up and the Defendant had not agreed for postponement of completion of sale. However, since the notice of termination was given without making time the essence of the contract and since in law the contract of immovable property cannot have time for its performance as an essence of the contract unless it is so made, the notice of termination was not as per the true construction of the contract and the intent of the parties set out in Clause 18(b) of the Agreement. The Defendant had not given 15 days" notice required to complete the sale. The termination of the contract a day after the period for its completion is, therefore, not legal and is wrongful. The Defendant could not have terminated its contract as it did under the Notice of termination dated 24.2.1982. Hence issue No. (2) is answered in the negative.

34. Issue Nos. (3) & (4) : The only part to be performed by the Plaintiffs was a

payment of balance consideration of Rs. 19.5 Lakhs. The Plaintiffs had not made any payment or even part thereof to the Defendant itself as per the construction of the contract. Readiness and willingness of the Plaintiffs has to be adjudicated upon in terms of the true construction of the contract between the parties.

35. The Plaintiffs made payments of three amounts of Rs. 50,000/- and Rs. 1 Lakh to one of the Directors of the Defendant despite the aforesaid resolution of the Company enjoining the Directors to act jointly. The Company has not acknowledged the payment or receipted it. Despite knowledge of the specific requirement of the contracting party, the Plaintiffs claim to have made payments in the mode specifically forbidden by the Company. No such payment can be countenanced or accounted for.

36. The Plaintiffs claim to have made further payment towards the municipal taxes to the Bombay Municipal Corporation. The taxes were indeed required to be paid by the Defendant until the completion of sale. It was, therefore, to be paid by the Defendant until the last date on which the sale should have been completed and the balance consideration paid. The Plaintiffs were tenants in possession of a large part of the suit property. It was in the interest of the Plaintiffs themselves to make payment to the Municipal Corporation to avoid auction and sale of the suit property in possession of the Plaintiffs. Making such payments is not towards the balance consideration and cannot be countenanced or accounted for to that end.

37. The Plaintiffs are required to statutorily aver readiness and willingness to perform the essential terms of the contract which are to be performed by them u/s 16(c) of the Act, which bars the relief in an action for specific performance upon such failure. What is the requirement of the Plaintiffs' actual act in showing their readiness and willingness is explained in that section. This readiness and willingness is to be in accordance with the true construction of the contract. For this purpose, the relevant portion of Section 16 of the Specific Relief Act runs thus:

16. Personal bars to relief.-Specific performance of a contract cannot be enforced in favour of a person-

(a)....

(b)....

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation. -For the purposes of Clause (c).-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money

except when so directed by the Court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

Mr. Parikh essentially contended that the Plaintiffs were not to tender the consideration to show their readiness and willingness.

38. Consequently, as held in the case of *Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan*, relied upon by Mr. Bobade on behalf of the Defendant, the readiness and willingness of the Plaintiffs would be in relation to the real agreement between the parties and not as the Plaintiffs wished it or evinced it before the Suit or in the way the Plaintiffs wanted to fashion it at the trial. In that case the Plaintiffs' case was not proved by oral evidence. It was observed that the Plaintiffs' case was insupportable if it was upon an agreement which was partly oral and partly in writing or even if it was entirely in writing. In that case the reason for seeing the non-readiness of the Plaintiffs was that the Plaintiffs had no requisite money to purchase the property.

39. Similarly in the case of *Bharat Barrel and Drum Mfg. Co. Pvt. Ltd. Vs. Hindusthan Petroleum Corporation Ltd. and Others*, it was held that readiness and willingness must be averred according to the interpretation the Court places upon the agreement when the parties are not ad idem upon such interpretation. In that case the form required u/s 37I of the Income Tax Rules under Chapter XXC and under Chapter XXX, Section 269(4)(c) of the Income Tax Act was to be obtained within 4 months and if not done, it was agreed that the transfer would be illegal. In that case the transfer of steel received by the Plaintiff was under an allotment letter which prohibited the transfer. The Plaintiff sought repayment of the amount paid by the Plaintiff in excess of the agreement. Taking into account the revised rates of steel the Plaintiff's readiness and willingness to carry out their obligations was seen as per the interpretation of the agreement of transfer by them. It was held that such readiness and willingness was not acceptable. Similarly in the case of *N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others*, it was held that continuous readiness and willingness on the part of the Plaintiff was a condition precedent for grant of relief of specific performance. Hence the availability of consideration, conduct of the Plaintiff and the attending circumstances were required to be seen. In that case, the Plaintiff dabbled in real estate transactions without any means to purchase the property. It was held that the Plaintiff was not ready and willing to perform his part of the contract, his averment to that extent notwithstanding. Consequently, in such a case the Plaintiff's capacity to raise funds to deposit the amount ordered to be deposited and to comply with the necessary orders passed, would be the evidence to show his readiness and willingness.

In a case such as this only tender of consideration would substantiate the Plaintiffs' averment of readiness and willingness.

40. Similarly when the Plaintiffs were directed to deposit the amount pending the

Suit which the Plaintiffs failed to do so or to even furnish a Bank Guarantee as per the Court's directions, it has been held in the case of N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, that readiness and willingness is not shown.

41. In the case of His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar, the vendor sent the draft sale-deed which under the agreement was required to be finalised within 7 days and registered. The purchaser did not approve the draft sale-deed immediately, did not give any reply, did not have necessary cash for payment and did not offer cash. His conduct so scrutinised was held inconsistent with his averment of readiness and willingness in accordance with the terms of the contract.

42. Consequently, it was held in the case of Pushparani S. Sundaram and Others Vs. Pauline Manomani James (Deceased) and Others, that mere filing the Suit and taking the plea that the Plaintiff was ready and willing to perform the contract, is not sufficient where he had not sent any communication or notice regarding his readiness and willingness, paid only an insignificant amount as advance, not obtained the permission of the ULC Authorities, not taken any steps to ascertain the valuation of the structure as required under the Agreement for sale, etc. It was observed in Para-5 of that judgment that what is required is not a plea but a proof of the same u/s 16(c) of the Act. In that case, the only circumstance relied upon by the Plaintiff was tendering the amount of Rs. 5,000/- after the Agreement for sale was entered. It was observed that " Such small feeder to the vendor is quite often made to keep a vendor in good spirit." The amount was observed to be insignificantly short of the balance amount and " is too weak a filament to stand even to build an image of readiness and willingness."

43. True construction of the suit contract is also required to be appreciated. In this contract, simple that it is, the Plaintiffs were to pay consideration to obtain title. The Defendant was to do nothing which would be condition precedent for the Plaintiffs to pay the consideration. The payment of consideration was towards completing the sale in favour of the Plaintiffs. Sale could never be completed if the consideration is not paid. Sale would have had to be completed once consideration was paid or tendered to the Defendant. The Plaintiffs were given 10 months' time to do so. The Plaintiffs contend that 7 weeks' time was fresh breather given to them. Even if that is accepted, which the Defendant refutes, the Plaintiffs would have to complete the sale which would be by tender of consideration. In a contract such as this, therefore, it would not be taken to the contract merely for payment of money. It is the contract for completing the sale of an immovable property requiring the Plaintiffs to tender as the only part of their contract the agreed consideration. Hence the averment of the Plaintiffs that they were ready and willing would be an empty averment unless it is accompanied by the actual offer of payment.

44. In a contract such as this, therefore, a mere capacity to pay is also not

enough. A party may have the capacity to pay but may bind time and not make payment while prices escalate. A party may make a show of offer and not tender consideration in a bid to bind time despite his capacity to pay. Hence a contract of this kind goes further than the case of S.P. Narayaaswami Pillai (supra). If the Plaintiff only has to make payment of consideration as the part of his contract he must tender consideration without which his assurance of readiness and willingness is an empty averment devoid of substantiation.

45. In the case of Swarnam Ramchandran (supra), it has been held that requirement of fulfillment of the condition of readiness and willingness in a Suit for specific performance is that the purchaser shows that he was ready and willing to fulfill the terms of the Agreement, that he had not abandoned the contract and that he had kept the contract subsisting. It was held that on the facts of those cases, those conditions were fulfilled. That was a contract of sale dated 18.2.1981 for a lump sum consideration of Rs. 10 Lakhs in which earnest of Rs. 1 Lakh was paid and under which an option was given to vendor to extend the date of sale upto 31.12.1981. Time to complete the sale was extended. The vendor accepted part payment of Rs. 75,000/- and before 13.9.1981 made time the essence for such payment. In that case the purchaser sent a post-dated cheque for Rs. 45,000/- which was dishonoured indicating that he had no funds on the due date i.e. on 13.9.1981. Since time to pay was extended the dishonour of the cheque was held not a non-compliance on the part of the Defendant and upon overall conduct of the purchaser it was held that he was ready and willing to perform his part. Since time was not the essence of payment, purchaser's later payment was held enough to constitute his readiness and willingness in that behalf.

46. The facts of the case being dissimilar to this, it cannot be said in this Suit that the Plaintiffs were ready and willing to perform the contract as per its true construction.

47. Mr. Parikh argued that the purchaser who sued the owner did not require to show the command of necessary finance throughout the life of the contract. See : S.P. Narayaaswami Pillai Vs. Dhanakoti Ammal, That was the case of a contract to be performed within 3 months by payment of consideration of Rs. 9,700/- upon an advance of Rs. 500/- being received on 23.6.1958, the date of the execution of the agreement for sale. In that case the contract was to be performed by the Plaintiff securing an encumbrance certificate for the property on 8.9.1958, which the Defendant cleared only on 13.9.1958. The Plaintiff purchased the stamp paper of the value of Rs. 765/- for engrossing the sale-deed on 20.9.1958 and sued on the last date shown in the agreement for sale for completing the transaction. Though he was not required to have the necessary finance throughout the life of the contract, it was observed in paragraph 5 of the judgment that the Plaintiff must establish his readiness and willingness to perform his part of the contract at proper time i.e. within reasonable time and if time could be reasonably extended and if he establishes his capacity to perform

the contract within the extended time it would be sufficient. Relying upon the case of AIR 1928 208 (Privy Council) at page 216, it was observed that preparedness to fulfill obligations was to be only when the time expired and not during the entire life of the contract as such insistence would make fixing the time for performance meaningless. However, the contention of Mr. Parikh that the Plaintiffs were not required to tender consideration or to deposit any amount in Court or to offer it to the Defendant at any time, is against what has been laid down in this case. The Plaintiffs would have to establish their capacity to perform the contract at-least within time. The Plaintiffs claimed an extended time. The Plaintiffs have not established any such capacity to perform even within the extended time and consequently, their averment of readiness and willingness is futile.

Consequently, the readiness and willingness of the Plaintiffs cannot be seen as per the true construction of the simple contract of the sale of the immovable property essentially in the possession of the Plaintiffs on as is where is basis. Hence both these issues are answered in the negative.

48. Issue No. (5) : Under Clause-16 of the Agreement for sale dated 23.4.1981 the execution of the conveyance was agreed to be in favour of the purchasers or their nominees. Hence if the Plaintiffs are otherwise entitled to have the conveyance executed in their favour, it could be also in favour of Plaintiff No. 3 as their nominee. Issue No. (5) is answered in the affirmative to that extent.

49. Issue No. (6) : The settlement alleged by the Plaintiffs is admittedly by and between one of the Directors of the Defendant-Company Deviprasad Poddar acting on behalf of the Company and instructing the Attorneys of the Company in that behalf. Mr. Parikh, though, argued that the Attorney who carried on the correspondence with the Plaintiffs was the Attorney of the Defendant Company and not the Attorney of one individual Director. However, the settlement of the Suit has neither been agreed by the other Director of the Defendant nor ratified by that Director or the Defendant Company. The settlement, if any, is, therefore, not proved in view of the special contract between the parties to which the specifically named two Directors of the Defendant had to act jointly since both of them were authorised to settle and finalise the documents to be executed for completion of the sale. Consequently, there could be no settlement as alleged by the Plaintiffs and the Defendant in the amended Plaint, the Attorneys being the Attorneys of the Defendant, notwithstanding. Consequently, reliance placed upon the judgment in the case of Chairman and M.D., N.T.P.C. Ltd., 2004 AIR SCW 198 relating to interpretation of the term " without prejudice" with regard to the correspondence and agreement would not be applicable to this case. Hence Issue No. (6) is answered in the negative.

50. Issue No. (7) : As aforesaid, in view of the resolution of the Defendant enjoining the two Directors to act jointly and authorising both those Directors to settle and finalise the documents for completion of the sale and to be present at the time of the execution of the conveyance and the Power of Attorney granted

to the Plaintiffs to do all acts, deeds, matters and things necessary for the purpose of completion of sale, it would be completely erroneous and even absurd to state or suggest that one of the Directors of the Defendant was unilaterally entitled to represent the Defendant or enter into any commitment or receive an amount without the consent or concurrence of the other Director. Each of these acts of representing the Defendant, entering into any commitment (be it to settle the Suit), or to receive any amount which would be part payment of the balance consideration, is the act which is necessarily to be performed for completion of the sale. All these acts had to be specially performed, under the resolution of the Company, by both the Directors. One Director cannot, therefore, unilaterally perform those acts. Mr. Parikh contended that the Defendant had not led any evidence and hence its case that the Defendant was necessarily required to act only jointly could not be accepted and, therefore, the Plaintiffs' case that an agreement was entered into after filing of the Suit, in terms of the without prejudice negotiations with the Attorneys of the Defendant who represented the Defendant and not only one of its Directors, was binding on the Defendant.

51. Mr. Parikh relied upon a judgment in the case of Iswar Bhai C. Patel @ Bachu Bhai Patel Vs. Harihar Behera and Another, in this regard. That was a Suit for recovery of money upon a plea that the Plaintiff had given the money from his bank account to the Defendant through his father who operated the Plaintiff's bank account on the suggestion of Defendant No. 1. That suggestion was not controverted by Defendant No. 1 by leading evidence. That evidence was material and hence upon the Defendant not being examined, an adverse inference was drawn u/s 114(g) of the Evidence Act. Further Mr. Parikh relied upon the judgment in the case of AIR 1927 230 (Privy Council) in which it was held that the Plaintiff not examining himself but calling the Defendant as his witness was the degrading practice. The reliance upon these judgments is completely misplaced because in this case it is essential for the Plaintiff alone to prove readiness and willingness as well as the actual performance of his part of the contract and to call upon the Defendant to perform its part. Consequently, issue No. (7) is answered in the negative.

52. Issue No. (8) : The Plaintiffs were the tenants of the large portion of the suit property which is entirely tenanted and completely built upon. The Plaintiffs also obtained rights of another tenant mentioned in the list of tenants annexed to the Agreement for sale being one M/s. Capco Private Limited. It would be in the interest of the Plaintiffs to pay the municipal taxes to avoid the auction and sale of the premises in their possession and occupation even as tenants and whilst they continued to be so. Payments made to the Municipality, albeit in the name of the Defendant who was the owner of the suit property in the revenue records, cannot, therefore, be taken towards part payments of the said Agreement for sale. Hence issue No. (8) is answered in the negative.

53. Issue No. (9) : The Plaintiffs may be taken to be entitled to file or prosecute the Suit. This issue is not seriously pressed. Hence it need not be answered.

54. Issue No. (10) : Time of the performance of the contract is not stated to be extended by the Defendant by the act of the two Directors who are both authorised to do all acts, deeds and matters necessary for completing the sale. The extension of time, if at all granted, was so granted by one of the Directors acting singly . The Plaintiffs have not shown the act of both the Directors in that behalf. This would be one of the acts towards the completion of the sale. Since for want of its extension the agreement would come to an end on 23.2.1982, it is for the Plaintiffs to prove that time was extended by both the Directors who were authorised to act by the Company. That has not been proved. For whatever reason the time extended by one of the Directors of the Defendant acting singly is immaterial. Issue No. (10) is answered accordingly.

55. Issue No. (11) : The Agreement for sale dated 23.4.1981 required the Plaintiffs to complete the sale within 10 months from the execution of the agreement subject to the Defendant's marketable title and the permission for transfer to be obtained by the Defendant u/s 27 of the ULC Act. The 10 months' period was expired on 23.2.1982. The Defendant admittedly had marketable title. The Plaintiffs were their tenants. The Defendant was the landlord. The Plaintiffs are estopped from contending that the Defendant does not have title. The clause relating to showing marketability of title was the usual clause which was redundant in this case. The entire property was built upon. There were 10 tenants shown in the list annexed to the agreement. There was no vacant land. Hence permission u/s 27 of the ULC Act was also not required. This clause, which is also a usual clause, is redundant in this case. The Plaintiffs had to pay balance consideration to complete the sale within 10 months. That was Rs. 19.5 Lakhs. It was for the Plaintiffs to pay that amount to complete the sale. That was the most essential part of the contract and indeed the only part of the contract actually required to be performed other than, of course, obtaining the tax clearance certificate u/s 230A of the Income Tax Act by the Defendant, but which was not a condition precedent to the payment of consideration and which, if not obtained, required only Rs. 25,000/- to be deposited with the Plaintiffs' Advocate. That certificate could be obtained only upon the final draft of the conveyance being tendered to the Income Tax Authority which the Plaintiffs would be required to send for completion of the sale.

56. The entire contract was, therefore, only relating to the payment of the consideration by the Plaintiffs.

57. The Defendant contends that time was of the essence because the Plaintiffs had to make payment of consideration for a large portion of the property already in their possession as the tenants. The Defendant contends that the Plaintiffs not having made payment on or before 23.2.1982, they were entitled to terminate the contract which they did by their notice of the very next day being 24.2.1982.

58. Clause 18(b) of the contract sets out that the Defendant would be entitled to make time the essence of the contract by giving 15 days' notice to complete the transaction and on failure of the Plaintiffs to complete the sale, it would be

entitled to terminate the agreement and forfeit the earnest and the Plaintiffs would be liable to pay costs, charges and expenses incurred by the Defendant under the agreement and the Defendant would be entitled to deal with and dispose of the property agreed to be sold to the Plaintiffs.

59. This clause, therefore, sets out specifically that time was not of the essence in the contract itself. It was to be made of the essence. The Defendant could make it of the essence. It had to be made of the essence by giving the stipulated notice. That was notice of 15 days upon failure of performance. Under such a notice, the Defendant would be entitled to terminate the contract. Consequently, time cannot be taken to be of essence in that agreement.

60. The Defendant's Notice of termination dated 24.12.1982 does not give the Plaintiffs 15 days' time to make the payment. It does not make time of the essence. It simpliciter terminates the agreement. Hence though, as discussed in relation to issue No. (2) above, the Defendant was entitled to terminate the agreement, that would have been only upon and after giving 15 days' notice to make time the essence of the contract and thereafter if the contract remained unperformed, to terminate it.

61. It is settled law that time is not of the essence of the contract of immovable properties per se. See : (1) Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Another, and (2) Smt. Swarnam Ramachandran and Another Vs. Aravacode Chakungal Jayapalan, It has to be made of the essence expressly.

62. Mr. Parikh on behalf of the Plaintiffs drew my attention to the Law of Contract in Halsbury, Vol. 9, page 481 at page 338 which lays down the settled law thus:

The modern law, the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence unless : (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

Further in paragraph 126 at page 498 of Vol. 9 of Halsbury, the importance of date of completion is set out thus:

126. Date of completion. A date is usually fixed by the conditions of sale for the completion of the purchase, but, in the absence of express stipulation to that effect, or unless an intention that it should be so can be implied from the circumstances, that date is not of the essence of the contract. However, although time is not originally of the essence of the contract in this respect, it may be made so by either party giving proper notice to the other to complete within a reasonable time, provided that at the time of the notice there has been some default or unreasonable delay by that other. Even where time is not originally of the essence a party who through his own default fails to complete on the

contractual date commits a breach of the contract and is liable in damages. In a suitable case, a decree of specific performance can also be obtained before the contractual date for completion if the other party repudiates the contract.

63. Further Mr. Parikh argued that the contract to be completed within 10 months could be completed within any reasonable time after 10 months because time is not of the essence. See : Jamshed Khodaram Irani v. Burjorji Dhunjibhai ILR (1915) Bom 289 P.C. That is the correct proposition of law. However, in this case, the Plaintiffs have not shown that within a reasonable time after 23.2.1982 the Plaintiffs actually sought to complete the contract. The Plaintiffs instead filed this Suit on 9.3.1982 within a fortnight of the notice of termination and without offering to complete the contract within any reasonable time of the initial period of 10 months having expired.

64. In this case, though it is contended on behalf of the Plaintiffs that the initial period of 10 months was extended only for a period of 7 further weeks which was, in any event, a reasonable time for completion of the sale the Plaintiffs have not shown their willingness to complete by offering consideration which was the only part to be performed for completion of the sale within such extended time also.

65. The Defendant has not accepted any extension of time. This was essential because two Directors of the Defendant were to act jointly as aforesaid.

66. However, it may be mentioned that even if the Plaintiffs relied upon the unilateral act of one of its Directors in contending that time was extended for a reasonable period of 7 weeks after the period of the contract expired, the Plaintiffs could have been granted equitable and discretionary reliefs but only upon the Plaintiffs actually showing how they were to complete the sale which, in this case, was only by tendering consideration therefor. Issue No. (11) is, therefore, answered in the negative.

67. Issue No. (12) : This issue is not pressed and hence it need not be answered.

68. Issue No. (13) : The Defendant has taken up this contention in the amended Written Statement. The agreement does not provide for filing of Form No. 37EE under Chapter XXA of the Income Tax Act. Forms 37 EE and 37 I under Chapters XXA and XXC of the Income Tax Act are required to be filed upon transfer of any immovable property being made. The word " transfer" shows that parties have actually executed a draft conveyance, mortgage, exchange, gift or lease constituting transfer under the Transfer of Property Act. It is only upon the ultimate contract between the parties to transfer the immovable property from one party to another that the Income Tax Authority could be required to be informed as per the forms set out in the Act. This would be to enable the Income Tax Authority to acquire the immovable property itself if the consideration that passes thereunder is not accepted by the Authority and a certificate to that effect granting its no objection to transfer the property is not given. Any transfer effected without informing the Income Tax Authority by filling the aforesaid

forms, would be void.

69. The stage of transfer would come only when the draft conveyance duly settled by the parties is shown to the Income Tax Authority. This would be only at the last stage before the actual execution of the document. Hence though it would be a stage in showing the readiness and willingness on the part of the Plaintiffs non-filing of the form simpliciter would not render the agreement for sale invalid. This contention if taken separately and by itself as a question of law, would come up for consideration only when the draft deed of conveyance is prepared and sent by the Plaintiffs to the Defendant for execution. Since that was not done and the Suit was filed, the invalidity of the contract on that score would not come up for consideration. Hence though required by law, the suit contract would not ipso facto become invalid for want of Form 37EE or 37I. Hence this issue to that extent is answered in the negative.

70. Issue No. 14 : The reliefs to be granted to the Plaintiffs are essentially under the liability relating to specific performance under the Specific Relief Act, 1963 (the Act) and the various precedents based upon the aforesaid admitted facts and documents of the parties. The suit contract is a contract which would fall u/s 10 of the Act since it is not barred u/s 14 of the Act. However, the jurisdiction to grant the decree of specific performance is discretionary u/s 20 of the Act. The Court would, therefore, not be bound to grant reliefs merely because it is lawful to do so, but to exercise reasonable discretion guided by judicial principles to grant or refuse the reliefs of specific performance. Decree of specific performance as per Section 20(2)(a) of the Act after the Plaintiffs' non-action within the stipulated period under the contract or within a reasonable period thereafter would give the Plaintiffs an unfair advantage over the Defendant in terms of the price payable under the contract entered into about 30 years ago and which has since much escalated. Besides, the Court could exercise discretion to decree specific performance if the Plaintiffs had done substantial acts or suffered losses in consequences of the suit contract as a contract capable of specific performance u/s 20(3) of the Act. In the instant case, the Plaintiffs have done nothing after entering into the agreement and paying the earnest of Rs. 50,000/-. The Plaintiffs have also not suffered any losses. The Plaintiffs have continued in possession. The Plaintiffs have only paid municipal taxes to avoid the property in their possession being auctioned or sold off. The Plaintiffs have never tendered consideration or even shown or offered to tender consideration within a reasonable time after the initial period of the contract also. It is argued on behalf of the Plaintiffs by Mr. Parikh that the Court may take into account the various amounts paid to the Defendant (which were actually at the behest or request of and to one of the Directors of the Defendant and not accepted or acknowledged by the Defendant) as also amounts by way of taxes which were otherwise payable by the Defendant as the owners of the property. The very premise is unreasonable, if not egregious. The Plaintiffs are required to make payment of the consideration agreed. Had the Plaintiffs made that payment within 10 months or within a reasonable time thereafter, the Plaintiffs would have

become owners of the suit property. They would then be required to incur all other costs, including the payment of taxes, etc. in respect of the suit property. The Defendant notionally continued as owner though it agreed to give up its ownership rights to the Plaintiffs under the said Agreement and was hence not liable to pay the municipal taxes. It is only because of the Plaintiff's default in completing the transaction that the Plaintiffs paid taxes though they were not entered as owners in the record of rights. Since the Plaintiffs were already in possession of a large portion of the suit property as tenants, the Plaintiffs in fact had an unfair advantage over the Defendant. The Defendant could not deal with or dispose of the property to another partly in view of the Plaintiffs' occupation and possession. It would be most inequitable to consider the amounts paid by way of taxes for preservation of the property towards the sale price.

71. In fact a strange position has arisen. The amount paid by the Plaintiffs towards the taxes by now (as shown by the Plaintiffs in their statement of such payment) far exceeds the consideration to be paid by the Plaintiffs agreed under the said Agreement to the Defendant to complete the sale. If the Plaintiffs' claim has to be accepted, it would tantamount to the Court requiring to decree the Suit for specific performance without the Plaintiffs having to pay a single rupee to the Defendant and in fact the Defendant having to reimburse the Plaintiffs of what the Plaintiffs called the excess amount paid by the Plaintiffs after the filing of the Suit and which is not even brought on record as an amendment to the Plaint.

72. Even rejecting completely the appropriation sought by the Plaintiffs towards the purchase price for the sale consideration, it has to be seen whether the Plaintiffs could be at all entitled, in view of the answers to issue Nos. (1), (3) and (4) that the Plaintiffs be allowed to pay only the agreed balance consideration of Rs. 19.5 Lakhs to complete the sale 28 years after the agreement was entered into. Knowing the inequities of such a relief, Mr. Parikh has contended that the Plaintiffs may be directed to pay such higher amount as the Court may deem fit in its discretion to grant the discretionary relief of specific performance upon such enhanced payment. Mr. Parikh has conceded that in view of the lapse of time and non-payment of consideration coupled with the rise in prices, it would be inequitable to grant the relief of specific performance to the Plaintiffs. See : K.S. Vidyanadam and Others Vs. Vairavan, . However, Mr. Parikh argued that relief of specific performance could not be refused merely because the prices have risen. See : S.V.R. Mudaliar (Dead) by Lrs. and Others Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Others, .

73. Consequently, Mr. Parikh essentially relied upon a judgment in the case of Nirmala Anand Vs. Advent Corporation (P) Ltd. and Others, to contend that any higher amount be determined by the Court to grant specific performance. The case of Nirmala Anand (supra), though for specific performance, is based upon a wholly different premise. She was one of the flat purchasers in a building. For whatever reason the builders could not and did not complete the construction of the flat after receiving payments from the flat purchasers, including Nirmala.

Others settled with the builders. Nirmala did not. She tenaciously litigated for a number of years when the relevant permission could be obtained by the builders to complete the construction. Nirmala agitated her right of specific performance for being granted the flat for which she had paid the entire agreed consideration. She was not a party who would obtain an unfair advantage by escalation of prices. She had performed her part of the contract completely. She had made payment of the entire consideration. She did not fall u/s 20(2)(a) of the Act as do the Plaintiffs in this Suit. She would not obtain any unfair advantage over the Defendant in that case merely because she would obtain possession of her flat by the Defendant specifically performing the agreement of the flat purchasers. The terms of the contract and the conduct of the parties is, therefore, material to exercise discretion to decree specific performance. In this regard, the specific mandate of Section 20 which makes relief discretionary and enjoins the Court to exercise discretion judiciously and reasonably and not arbitrarily is to be seen.

74. The relevant portion of Section 20 of the Specific Relief Act runs thus:

Discretion and powers of Court 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)....

(c)....

The terms of the contract in this case show, as aforesaid, that the Plaintiffs had only to make payment of the balance consideration to complete the sale. The Defendant had to perform no other part. No action of the Defendant was condition precedent to the Plaintiffs paying the balance consideration. In a simple contract such as this the Plaintiffs must actually tender or at-least show that they were prepared to tender the balance consideration within the period allowed under the contract or within a reasonable period thereafter. Suing instead of and without tendering the balance consideration or without offering to tender it in Court or deposit in Court upon such suing would give the Plaintiffs an unfair advantage over the Defendant. The conduct of the Plaintiffs in view of the terms of the suit contract and the following circumstance of suing as soon as the Plaintiffs received the notice of termination without even requiring the Defendant to accept their performance within a reasonable time thereafter shows that even

if the contract is not voidable at the instance of the Defendant, (since it did not make time the essence of the contract and give the Plaintiffs the 15-day agreed notice of termination before terminating the contract,) the Plaintiffs would obtain an unfair advantage over the Defendant if after 28 years the contract is allowed to be performed albeit upon additional consideration. This is a case in which the Plaintiffs simpliciter refrained from performing their part of the contract, their averment of readiness and willingness notwithstanding. That averment came to be only made but not shown or substantiated. Hence the observation in the case of *Nirmala Anand (supra)* that the Plaintiffs could not be denied the relief of specific performance merely on account of phenomenal increase in price during the pendency of the litigation, though it is one of the considerations, cannot be applied to this case where the Plaintiffs, unlike *Nirmala Anand (supra)*, would otherwise not be entitled to the discretionary reliefs as having performed their part of the contract.

75. The case of *Nirmala Anand (supra)* has been clarified in the case of *P. D'Souza Vs. Shondrilo Naidu*, . The ruling in the case of *Nirmala Anand (supra)* is held not to be the law in absolute terms in all such cases also requiring the Court to either refuse to grant specific performance or to direct the Plaintiff to pay higher sum, that being the case where the Defendant did not foresee the hardship. Explanation-1 to Section 20 relating to mere inadequacy of consideration not constituting an unfair advantage was applied. In that case the Defendant was the landlord of the Plaintiff. He had accepted part payment from time to time without any demur whatsoever. He had redeemed the mortgage upon receipt of the requisite payment. Immediately prior to the Suit he had accepted the further payment. Under those circumstances, the Plaintiff was granted specific performance without payment of any further amount upon escalation of prices. The time for specific performance of the contract was held not to be of essence when the Defendant accepted part payment and also sought extension of time for registering the saledeed as in the case of *P. D' Souza (supra)*. Hence in the case of *P. D' Souza (supra)*, the Supreme Court held when the Plaintiff was seen to be ready and willing to perform his part of the contract and had performed the contract and in fact the Defendant had accepted part payment and applied for extension of time, specific performance was rightly granted without ordering the Plaintiff to pay any higher price than that agreed in the agreement executed 27 years prior to the date of that order.

76. It can be seen that determination of the discretionary reliefs depends upon the facts of the case rather than upon the analogy drawn from other cases based on dissimilar facts. Consequently, where there was an inaction on the part of the purchasers for two and half years in violation of the terms of the agreement, considering the rise in prices specific performance was refused in the case of *K.S. Vidyanadam (supra)*. Where the Plaintiff had performed her part of the contract by paying consideration and required possession to be granted of the flat agreed to be purchased by her, in view of the large lapse of time specific performance was granted albeit on slightly a larger amount directed to be paid by the Plaintiff

" Rs. 6.25 Lakhs instead of Rs. 60,000/- (Rs. 35,000/- + Rs. 25,000/-] as previously agreed before the escalation in prices - in the case of Nirmala Anand (supra) and the specific performance was granted without having to pay any additional amount by way of escalation of prices in the case of P. D" Souza (supra).

77. This is a case for rejection of the relief of specific performance for want of performing the only part of the contract which had to be performed by the Plaintiffs alone.

78. Hence the Suit is dismissed. No order as to costs.