
(2020) 02 BOM CK 0079
In the Bombay High Court
Case No : First Appeal No. 897 Of 2014

Pravin D. Thakker HUF And Ors	Vs	APPELLANT
Rita J. Shah And Anr		RESPONDENT

Date of Decision : 11-02-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 96
Specific Reliefs Act, 1963 — Section 16(c), 20, 20(2)
Limitation Act, 1963 — Section 54
Transfer of Property Act, 1882 — Section 52
Limitation Act, 1963 — Article 54

Citation : (2020) 02 BOM CK 0079

Hon'ble Judges : Anuja Prabhudessai, J

Bench : Single Bench

Advocate : Vishal Kanade, Mahesh Menon, Zain Mookhi, Chintan Shah,
Dharmapal Dave, Naik Patil Salvi

Final Decision : Dismissed

Judgement

1. The Appellants have challenged the judgment and decree dated 18/02/2014 whereby the learned Judge, City Civil Court, Mumbai decreed the Civil

Suit No.8509 of 1994 filed by the Respondent No. 1 for Specific performance of Contract and other consequential reliefs.

2. The Respondent No.1 was the Plaintiff whereas the Respondent No.2 and Appellants were the Defendant Nos.1 to 4 in the Suit and shall be

hereinafter referred to as 'the Plaintiff' and 'the Defendants' respectively. The subject matter of the suit for specific performance is the Shop No.9

admeasuring 430 ft. situated at the ground floor of the building proposed to be constructed by the Defendant No.1 at Sanduwadi, Chembur. The said

shop shall be hereinafter referred to as the 'Suit shop'.

3. The case of the Plaintiff in brief is that by an oral agreement entered in or about May, 1988, the Defendant No.1 agreed to sell the suit shop for a total consideration of Rs.2,58,000/-. The Defendant No.1 received a sum of Rs.10,000/-, towards booking amount and assured to hand over possession of the suit shop within one year from the date of booking. The balance sale consideration of Rs.2,48,000/- was to be paid at the time of handing over of the possession of the suit shop.

5. The Plaintiff claims that the construction of the suit shop was completed in the year 1990. The grievance of the Plaintiff is that despite repeated requests, the Defendant No.1 refused to hand over possession of the suit shop. Hence, by legal notice dated 07/06/1993 and 07/07/1993 Plaintiff called upon the Defendant No.1 to hand over possession of the suit shop. The Plaintiff claims that though she was ready and willing to pay the balance amount and perform her part of the contract, the Defendant No.1 avoided and neglected to hand over possession of the suit shop. The Plaintiff therefore filed a suit for specific performance of the contract of sale of the suit shop.

6. In the affidavit-in-reply filed in the Notice of Motion, the Defendant No.1 relied upon several letters to contend that despite several requests the Plaintiff neither signed the Agreement nor paid the installment. The Defendant No.1 disclosed that the suit shop was sold to the Defendant Nos.2 to 4 for sale consideration of Rs.6,00,000/- and that the Defendant No.4 is in possession of the suit shop. The Plaintiff therefore amended the plaint and claimed that the Defendant No.1 has fabricated the said letters to defeat her claim. She further claimed that the Defendant Nos.2 to 4 have entered into an Agreement with full knowledge of the existence and subsistence of the Plaintiff's right and claim in respect of the suit shop. The Plaintiff averred that the Defendant Nos.2 to 4 are not bonafide purchasers and that the Agreements are sham and fraudulent. Based on these pleadings, the Plaintiff sought a declaration that the agreement for sale dated 21/07/1995 is sham, illegal and bogus.

7. The Defendant No.1 filed their written statement inter alia claiming that the Plaintiff had approached them for purchase of the suit shop for total consideration of Rs.3,51,000/-. The Plaintiff paid sum of Rs.10,000/- towards the booking amount. The Defendant No.1 has alleged that there was no

concluded contract and despite several letters, the Plaintiff did not pay the earnest money and sign the agreement. The Defendant No.1 claimed that since the Plaintiff was not ready and willing to sign an agreement and pay the balance amount, they sold the suit shop to the Defendant Nos.2 to 4 for a total sale consideration of Rs.6,00,000/-. The Defendant No.1 has stated that they have received full consideration and have put the Defendants in possession of the suit shop.

8. The Defendant Nos.2 to 4 have filed their written statement contending that they were not aware of any previous transaction between the Plaintiff and Defendant No.1. These Defendants claim that they have purchased the suit shop for total sale consideration of Rs.6,00,000/-. It is averred that they are bonafide purchasers for value without notice and being the owners in possession of the suit shop, the Plaintiff cannot seek any relief against them.

9. Based on the aforesaid pleadings, the Trial Court framed the following issues:-

1(a) Does the Plaintiff prove that defendant No.1 had agreed to sell suit shop No.9, admeasuring 430 sq.ft at Sandu Wadi, Chembur for total consideration of Rs.2,58,000/-?

1(b) Does the Defendant No.1 prove that there was no valid and subsisting contract between the Plaintiff and Defendants?

2. Does the Plaintiff prove that she was always ready and willing to perform her part of agreement?

3. Does the Plaintiff prove that the agreement dtd.21.07.1995 entered into between Defendant No.1 and Defendant No.2 to 4 in respect of suit shop is sham and bogus and illegal?

4. Does the Plaintiff prove that he is entitled for specific performance of the agreement of sale of said suit shop?

5. What order and decree?

10. The learned trial Judge held that the pleadings in paragraphs 4 and 6 of the written statement filed by the Defendant No.1 clearly indicate that the Defendant No.1 had agreed to sell the suit shop to the Plaintiff and had accepted Rs.10,000/- as booking price. The learned Judge therefore held that there was a concluded contract between the Plaintiff and the Defendant No.1 in respect of the suit shop. The learned Judge has further held that

despite letters dated 7/6/1993 and 7/7/1993 (exhs.9 and 10) the Defendant No.1 did not transfer the suit shop in favour of the plaintiff, who was ready and willing to perform her part of the contract. The learned Judge further observed that the Defendant No.1 has sold the suit shop to the Defendant Nos.2 to 4 during pendency of the suit, after service of notice in the Notice of Motion in the suit. It is further held that the Defendant Nos.2 to 4 have failed to adduce any evidence to prove that they are bonafide purchasers for value without notice. The learned Judge has observed that the transaction between the Defendant No.1 and the Defendant Nos.2 to 4, which is hit by principle of lis pendens is not valid and legal. Based on the aforesaid findings the learned Judge has decreed the suit as under:-

1. The suit is decreed with costs.
2. It is hereby declared that the impugned agreement dtd.21.07.1995 executed between Defendant No.1 and Defendant No.2 to 4 in respect of suit shop is sham, bogus and illegal and is hereby cancelled.
3. The Plaintiff is entitled for specific performance of the contract in respect of the suit shop between himself and Defendant No.1 and the Defendants shall execute Sale Deed of suit shop No.9 at Sanduwadi, Chembur, Mumabi in favour of the Plaintiff and the remaining amount of consideration be paid to Defendant No.1.
4. The Plaintiff shall deposit the remaining amount of consideration of Rs.2,48,000 in Court within a period of four weeks and the same shall be paid over to Defendant No.1 after the execution of Sale Deed as directed above.
5. The Defendants No.1 to 4 shall deliver vacant and peaceful possession of the suit shop to the Plaintiff immediately, after the execution of Sale Deed.
6. The Defendant nos.2, 3 and 4 shall not create any type of third party interest in respect of the suit shop before handing over the possession of the suit shop to the Plaintiff.
7. The enquiry into mesne profit is hereby directed to be made in respect of the suit shop for the period from the date of institution of suit till the date of actual delivery of the possession against the Defendant No.1 only.
11. Aggrieved by the impugned judgment and decree the Defendant Nos.2 to 4 have preferred this appeal under Section 96 of the Civil Procedure

Code. Shri Vishal Kanade, the learned counsel for the Defendants contends that the learned trial Judge has recorded a finding that these Defendants

are not bonafide purchasers without framing issue in that regard. He further submitted that the Plaintiff has not challenged the registered deed of

confirmation dated 26/08/1996 executed by the Defendant No.1 in favour of these Defendants. He contends that the Plaintiff has failed to prove that

she was ready and willing to perform her part of the contract. He submits that the subsequent purchasers can also raise the plea that the Suit is barred

under Section 16 (c) of the Specific Reliefs Act, 1963. In support he has relied upon the decisions of the Apex Court in *Ram Avadh and Ors. vs.*

Achhaibar Dubey and Anr. (2000) 2 SCC 428 and *Ritu Saxena vs. J.S. Grover* (Civil Appeal No.7268-7269 of 2019)

12. Mr. Vishal Kanade, the learned counsel for the Defendants further submits that in terms of Section 54 of the Limitation Act, the suit ought to have

been filed within three years from the date fixed for performance or from the date performance was refused. Referring to the averments in the plaint,

he contends that the Defendant No.1 was required to hand over possession of the suit shop within one year from the date of the agreement, which is

alleged to be of the year 1988. The plaintiff did not take any steps to perform her part of contract though the building was constructed in the year

1990. Relying on the decision of the Apex Court in *Ramzan Vs/ Hussaini* (1990) 1 SCC 104 he contends that the suit is ex facie barred by law of

limitation.

13. Mr. Zain Mookhi, the learned counsel for the Plaintiff submits that the Defendant No.1, who was the vendor, has accepted the Decree. He

submits that the Defendant Nos.2 to 4 have purchased the suit shop during the pendency of the suit. Relying upon the decision of the Apex Court in

M.M.S. Investments, Madurai and ORs. Vs. V. Veerappan and Ors. (2007) 9 SCC 660 he contends that these Defendants cannot raise the defence

of readiness and willingness as provided under Section 16(c) of the Specific Reliefs Act. He has also relied upon the decision in *B. Vijaya Bharti vs.*

P. Savitri and Ors. (2018) 11 SCC 761. He submits that after execution of a conveyance, the only question to be adjudicated is whether the

subsequent purchaser was bonafide purchaser for value without notice. It is urged that the Defendants No. 2 to 4 have failed to prove that they are

bonafide purchasers. The learned counsel for the Plaintiff refutes that the suit is barred by limitation. He contends that by letters dated 7/6/1993

and 7/7/1993 the Plaintiff had called upon the Defendant No.1 to hand over possession of the suit shop. He contends that cause of action to file the suit

accrued on failure by the Defendant No.1 to hand over possession of the suit shop in response to the said letters and hence the suit is within limitation.

14. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties. It is not in dispute that the

Defendant No.1- the Original Owner has transferred the suit shop in favour of the Defendant Nos.2 to 4 during the pendency of the suit. The sale in

favour of the Defendant Nos.2 to 4 is therefore subject to the doctrine of lis pendens under Section 52 of Transfer of Property Act which makes

transfer pendente lite subservient to the rights of the parties. Keeping these principles in mind, I propose to decide the following questions:

i) Whether there was a concluded contract between the Plaintiff and the Defendant No.1.

ii) Whether the Plaintiff was ready and willing to perform her part of the contract as required under section 16 (c) of the Specific Relief Act 1963 .

iii) Whether the suit is within the prescribed period of limitation.

iv) Whether the Plaintiff is entitled for discretionary relief?

15. The claim of the plaintiff is based on an oral agreement. It is well settled that in a suit for specific performance of oral agreement, the Plaintiff has

to expressly plead the essential terms and conditions of the agreement. In *Brij Mohan And Ors vs Smt. Sugra Begum And Ors* (1990) 4 SCC 147 , the

Apex Court has observed that:

“there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. However, in a case where

the Plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement

alone, heavy burden lies on the Plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral agreement for sale of

immovable property. Whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and

circumstances of each individual case. It has to be established by the Plaintiffs that vital and fundamental terms for sale of immovable property were

concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement.

16. In the instant case, the Plaintiff has vaguely stated that the agreement was entered sometime in the year 1988. The relevant averments in the

plaint are that the Defendant no.1 had agreed to sell the suit shop for price of Rs.2,58,000/- and accepted Rs.10,000/- as booking amount. It is also

averred that the balance sale consideration was agreed to be paid on the date of handing over of possession of the suit shop, which was to be within

one year from the date of the agreement. These are the only averments on which the contract allegedly stood confirmed.

17. The plaint lacks other material particulars as to the nature of title of the Defendant No.1, details of the plan, license and location of the suit shop,

amenities to be provided, payment of earnest money, mode of and time frame of payment of sale consideration, liability of each party to pay probable

cost of conveyance/registration charges or stamp duty, consequences of nonpayment of consideration or breach of terms and conditions of the

agreement etc. The pleadings also do not spell out whether the alleged oral agreement was preceded by negotiations or whether the terms and

conditions of the agreement were finalized in presence of any witness. The averments in the plaint are vague, ambiguous and do not contain material

particulars.

18. The trial Court has not adverted to these discrepancies but has drawn an inference of concluded contract mainly on the basis of the averments in

paragraph 3, 4 and 6 of the Written Statement. It is to be noted that in paragraph 3 of the written statement the Defendant No.1 has averred that there

is no valid contract for purchase of suit shop as alleged. It is averred that the Plaintiff had approached them to purchase the suit shop and offered to

pay the booking amount of Rs.10,000/-. The Defendant No.1 has admitted having received the booking amount of Rs.10,000/-. The Defendant No.1

had stated that the receipt of booking amount does not constitute a valid contract. In paragraph 4 of the Written Statement, the Defendant No.1 had

averred that it was obligatory for the Plaintiff to pay the entire earnest money aggregating to 15% of the total consideration for the said shop and only

thereafter, there could be a valid contract or agreement. The Defendant No.1 has

further averred that vide several letters, they had called upon the Plaintiff to sign the agreement and pay the earnest money despite which the Plaintiff did not come forward to sign the agreement. Hence, no agreement was signed in respect of the suit shop. It is averred that the Plaintiff did not evince any interest in entering into an agreement and hence the they were entitled to forfeit the booking amount. In paragraph 6 of the written statement, the Defendant No.1 has averred that the total agreed consideration was Rs.3.51 lakhs and not Rs.2.58 lakhs as asserted in the plaint. It is further reiterated that there was no contract/agreement between the parties.

19. A holistic reading of the written statement reveals that the Plaintiff had agreed to purchase the suit for Rs.3,51,000/-, and paid advance of Rs.10,000/-. The averments in the written statement indicate that the terms of the agreement could not be settled and finalized for want of payment of earnest money equivalent to 15% of the sale consideration, which was a pre-requisite of binding and enforceable contract. The pleadings read as a whole do not contain any admission of a concluded contract, on the contrary, there is a specific denial of an oral agreement as pleaded by the Plaintiff. It is but evident that the trial judge has read the pleadings out of context and in isolation and treated the disputed question of fact as having been admitted. To say the least, the approach is totally erroneous.

20. The Defendant having disputed the factum of oral agreement, the burden was on the Plaintiff to prove her case by adducing cogent and convincing evidence. Apart from the affidavit in evidence, which is nothing but a reproduction of the averments in the plaint, the Plaintiff has not adduced any independent evidence in support of her claim. The trial court has laid much emphasis on the fact that the Defendants had not cross-examined the Plaintiff and not adduced any evidence in support of their case. Suffice it to say, the question whether there was an enforceable contract or not had to be established by the Plaintiff on the strength of her own case rather than the weaknesses or deficiency in the case set up by the Defendants. A decree for specific performance cannot be granted merely because the Defendants have failed to controvert the evidence of the Plaintiff. The essential question to be addressed by the court is proof of a valid and enforceable contract, the breach of the terms and conditions of the

agreement, readiness and willingness on the part of the Plaintiff to perform her part of the contract and whether the Plaintiff is entitled for discretionary relief.

21. The trial court has also relied upon the admission of the Defendant No.,1 that the agreed sale price was Rs.3,51,000/- and that he had received booking amount of Rs. 10,000/ which was to be adjusted towards sale consideration. There is absolutely no material on record to indicate that the said amount was paid and received as a security for due performance of the contract and that the same was intended to be forfeited for breach of terms and conditions of the agreement. Thus the advance amount, which was to be adjusted towards sale consideration without any intention to bind the contract, cannot be construed as earnest money. The evidence adduced by the Plaintiff may at the most prove that there were talks between the parties in respect of sale of the suit shop. According to the Plaintiff the agreed sale consideration was Rs.2,58,000/-. She had admittedly paid an advance amount of Rs.10,000/- which was to be adjusted against the sale consideration to be paid at the time of handing over of the possession. It need not be emphasized that settlement of price is only one of the terms of the contract and the agreement cannot be considered as enforceable contract unless all the other essential terms and conditions are concluded between the parties. As stated earlier, the Plaintiff has failed to prove the terms and conditions of a concluded contract. Apart from the bare statement, the Plaintiff has not adduced any independent evidence to prove that there was consensus ad idem between the parties for a concluded contract. Hence, the fact that the Defendant no.1 had received token amount Rs.10,000/-, as advance of sale consideration would not per se be a constituent of a concluded contract. The Plaintiff having failed to prove existence of a valid and enforceable contract is not entitled for an order of specific relief.

22. The next question is whether the Plaintiff has satisfied the statutory requirement of the Section 16(c) of the Specific Relief Act, as it stood prior to 2018 amendment. This Section envisages that in a suit for specific performance, the Plaintiff must plead and prove that he has always been ready and willing to perform his part of the contract. The factum of readiness and willingness is to be adjudged with reference to the conduct of the party and the attending circumstances. In Ram Avadh (supra) a three Judge Bench of the

Apex Court has held that :-

The obligation imposed by Section 16 is upon the Court not to grant specific performance to a Plaintiff, who has not made the requirements of

clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a Plaintiff, who has failed to aver and to prove that he has performed or has

always been ready and willing to perform his part of the agreement, the specific performance whereof he seeks. There is, therefore, no question of

the plea being available to one Defendant and not to another. It is open to any Defendant to contend and establish that the mandatory requirement of

Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and, depending upon its

conclusion, decree or decline to decree the suit.

23. The scope and ambit of Section 16(c) has been considered and explained by the Apex Court in A Kanthimani vs. Nasrin Ahmed (2017) SCC 654

as under:-

24. The expression "readiness and willingness" has been the subject matter of interpretation in many cases even prior to its insertion in Section 16

(c) of the Specific Relief Act, 1963. While examining the question as to how and in what manner, the plaintiff is required to prove his financial

readiness so as to enable him to claim specific performance of the contract/ agreement, the Privy Council in a leading case which arose from the

Indian Courts (Bombay) in Bank of India Limited & Ors. Vs. Jamsetji A.H. Chinoy and Chinoy and Company, AIR 1950 PC 9, 0approved the view

taken by Chagla A.C.J., and held inter alia that " it is not necessary for the plaintiff to produce the money or vouch a concluded scheme for financing

the transaction to prove his readiness and willingness."

25) The following observations of the Privy Council are apposite: Their Lordships agree with this conclusion and the grounds on

which it was based. It is true that the plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and

that no definite arrangements had been made for finding it at the time of repudiation. But in order 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. The question is one of fact, and in the present

case the Appellate Court had ample material on which to found the view it

reached. Their Lordships would only add in this connection that they fully concur with Chagla A.C.J. when he says:

“In my opinion, on the evidence already on record it was sufficient for the court to come to the conclusion that plaintiff 1 was ready and willing to

perform his part of the contract. It was not necessary for him to work out actual figures and satisfy the court what specific amount a bank would

have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury--if the matter was left to the jury in

England-- would have come to the conclusion that a man, in the position in which the plaintiff was, was not ready and willing to pay the purchase

price of the shares which he had bought from defendants 1 and 2.

For the foregoing reasons, their Lordships answer question(4) in the affirmative.” (Emphasis supplied)

30) This Court in Sukhbir Singh & Ors. Vs. Brij Pal Singh & Ors., AIR 1996 SC 2510=(1997) 2 SCC 20 followed the aforesaid principle with these

words:

“5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-

Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove

that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is

sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the

money with them from the date of the suit till the date of the decree. It would, therefore, be clear that the courts below have appropriately exercised

their discretion for granting the relief of specific performance to the respondents on sound principles of law.”

24. In Mehboob-Ul-Rehman v/s. Ahsanul Ghani, Civil Appeal No.8199 of 2009 the Apex Court has reiterated that :-

15. Such a requirement, of necessary averment in the plaint, that he has already performed or has always been ready and willing to perform the

essential terms of the contract which are to be performed by him being on the Plaintiff, mere want of objection by the Defendant in the written

statement is hardly of any effect or consequence. The essential question to be

addressed to by the Court in such a matter has always been as to whether, by taking the pleading and the evidence on record as a whole, the Plaintiff has established that he has performed his part of the contract or has always been ready and willing to do so. In this regard, suffice it would be to refer to the principles enunciated by this Court in the case of Umabai (supra) as under:-

30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the Plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the Plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.

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45. It was for the Plaintiff to prove his readiness and willingness to pay the stipulated amount and it was not for the appellants to raise such question?

25. The pleadings and the evidence, examined with reference to the aforesaid principles, indicate that the alleged agreement was entered into in the year 1988 whereunder possession of the suit shop was to be given within one year of the agreement. The Plaintiff had paid a nominal advance of Rs.10,000/- at the time of execution of the alleged agreement and the balance sale consideration of Rs. 2,48,000/ was to be paid on the date of execution of the sale deed. The records indicate that the Plaintiff did not take any steps to give effect to the agreement though she was aware that the construction of the building was completed in the year 1990. It was for the first time in the year 1993, by letters dated 7/6/1993 and 7/7/1993 that the Plaintiff called upon the Defendant no.1 to hand over possession of the suit shop. The unexplained prolonged silence during this interregnum period gives rise to an inference that the Plaintiff was not willing to perform her part of the contract. Furthermore, in these two letters which are at Exh.9 and 10 the Plaintiff has not expressed that she has been ready and willing to pay the balance amount of Rs.2,48,000/-. Though the Plaintiff is not

expected to have ready cash in the pocket at all the time, the onus is on the Plaintiff to prove her financial capacity to pay the balance sale

consideration. In the instant case, apart from the bald assertion that she was ready and willing to perform her part of contract, the Plaintiff has not

adduced any evidence to prove that she had financial capacity to pay the balance sale consideration of Rs.2,48,000/-. She has neither given her source

of income nor produced bank account, income tax returns or any other document to prove that she had financial capacity to go ahead with the alleged

transaction. In the absence of such supporting evidence regarding availability of funds, the bald self-serving assertion of the Plaintiff carries no weight.

Thus, the Plaintiff has not only failed to prove a concluded contract but she has also failed to discharge the onus of proving that she has all along been

ready and willing to perform her part of the contract, which is a sine qua non for grant of relief of specific performance.

26. It is also pertinent to note that Section 20 of the Specific Relief Act, as it stood prior to 2018 amendment, provides that specific performance is a

discretionary remedy and the Court is not bound to grant such relief merely because it is lawful to do so. Sub-Section 2 of Section 20 stipulates that in

the following cases the court may exercise its discretion not to grant relief of specific performance:

20. Discretion as to decreeing specific performance.â?

(1) â?!

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:â?

(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; or

(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.â?" 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.â?" 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.

27. In *K.S. Vidyanadam v. Vairavan*, (1997) 3 SCC 1, the Hon'ble Supreme Court has held that in case of delay/inaction on the part of the Plaintiff

for two and a half years, it would be inequitable to give a relief of specific performance to the Plaintiff. The Supreme Court has observed thus:

13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the Plaintiff for 2½ years in clear violation of the terms of

agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the

delay is coupled with substantial rise in prices according to the defendants, three times - between the date of agreement and the date of suit notice.

The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the Plaintiff.

28. In *Saradamani Kandappan vs. Mrs. S. Rajalakshmi*, 2011 (12) SCC 18h as considered the aspect of payment of a nominal advance price by the

Plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Paras 37 and 43 of the judgment in the

case of *Saradamani Kandappan* (supra) read thus:

37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep

increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to

complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer

take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches,

breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in

regard to immovable properties, may no longer apply, not because the principle

laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.

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43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanandam.

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for

taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) The courts will apply greater scrutiny and strictness when considering whether the purchaser was ""ready and willing"" to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits

stipulated in the agreement. The courts will also ""frown"" upon suits which are not filed immediately after the breach/refusal. The fact that limitation is

three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended

to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has

been delivered in part-performance, where equity shifts in favour of the purchaser.

29. It is thus well settled that general rule is against exercise of discretion in favour of a proposed purchaser, who has paid a nominal ad-vance price

inasmuch as by the lapse of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date. In the instant case the Plaintiff had paid Rs.10,000/- as advance of sale consideration. The said nominal amount, which is less than 5% of the alleged sale consideration, was paid in the year 1988 and the balance amount of Rs. 2,48,000/- was to be paid on the date of execution of the sale deed. The averments in the plaint as well as evidence on record indicate that the Plaintiff was aware that the suit shop was available for sale in the year 1990 despite which the Plaintiff did not offer to pay the balance amount or get possession of the suit shop. The Plaintiff has sought to enforce the agreement in the year 1994 at the sale price allegedly agreed in the year 1988. It is to be noted that even if time is not the essence of contract, it has to be performed within a reasonable time to obviate unfair advantage to one party or disadvantage to the other. In the facts of the case, prolonged inaction and wanton delay on the part of the Plaintiff, escalating price coupled with dwindling value of money, would prejudice and cause hardship to the defendant no.1 as compared to the Plaintiff. Hence, even if it is assumed that there was a valid contract, it is inequitable to pass a decree of specific performance in favour of the Plaintiff.

30. The defendants have contended that the suit for specific performance is filed beyond the prescribed period of limitation under Article 54 of the Limitation Act. Article 54 of the schedule to the Limitation Act provides the period of limitation for specific performance of contract as three years from the date fixed for the performance, if no such date is fixed, when the plaintiff has noticed that performance is refused.

31. In *Ramzan vs. Hussein* (supra) the sale deed was to be executed upon redemption of the mortgage. The Apex Court has observed that the agreement was a contingent contract within the meaning of Indian Contract Act and was enforceable as soon as the redemption happened. Hence though a particular date was not mentioned in the document and the date was not ascertainable originally, but as soon as the plaintiff redeemed the mortgage, it became an ascertained date. The period of limitation thus would run from the said date and the case would be covered by the first part of

Article 54.

32. In the instant case, the plaintiff has stated that the building/suit shop was to be constructed within one year from the date of the agreement and the sale deed was to be executed at the time of handing over of the possession of the suit shop. These averments do not indicate that any specific date was fixed for the performance of the contract and the date on which the agreement was to be enforced was not ascertainable. Hence, the suit would not be covered by the first part of Article 54. The plaintiff has stated that she learnt about the refusal only after the defendant no.1 refused to enforce the agreement even after receipt of the notice dated 7.6.1993 and 7.7.1993. The plaintiff had filed the suit in the year 1994 that is within a period of three years from the date of accrual of cause of action. Be that as it may, in the absence of specific pleadings, issue and evidence in this regard, the Defendants cannot be permitted to raise the issue of limitation, which is otherwise a mixed question of law and fact.

33. Having regard to the findings on facts and the discussion supra, the plaintiff has failed to prove a concluded contract, that she was ready and willing to perform her part of the contract and she is not entitled to the equitable relief. Hence, the Appeal is allowed with no orders as to costs. The impugned judgment and decree dated 18/02/2014 passed by the learned Judge, City Civil Court, Mumbai in Civil Suit No.8509 of 1994 is quashed and set aside. Consequently the Civil Suit No. 8509 of 1994 stands dismissed.

.The Civil Application is dismissed in view of dismissal of the suit.

(SMT. ANUJA PRABHUDESSAI, J.)

At the request of the learned Counsel for the Plaintiff and in the interest of justice, the defendants are directed to maintain status quo in respect of the suit flat for a period of six weeks from the date of uploading of the order.

(SMT. ANUJA PRABHUDESSAI, J.)

13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 112 years in clear violation of the term of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times - between the date of agreement and the date of suit notice.

t the plaintiff having shown his inaction is not entitled to seek the discretionary relief of specific performance. There is no merit in the suit filed by the plaintiff and the suit is dismiss