

(2014) 06 BOM CK 0067
In the Bombay High Court
Case No : First Appeal No. 162/2008

Shaikh Hidayat

APPELLANT

Vs

Maria Elvina Das Neves Ferreira Trindade

RESPONDENT

Date of Decision : 27-06-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 14

Citation : (2014) 06 BOM CK 0067

Hon'ble Judges : Z.A. Haq, J

Bench : Single Bench

Advocate : S.S. Kantak, Senior Advocate, Amira A. Razaq, M.S. Joshi, Bhupesh Bandeda Advocates, Advocate for the Appellant; Sudin Usgaokar, Advocate and Kishan Padgaokar, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Z.A. Haq, J.—This appeal arises out of the judgment and decree passed by the learned 3rd Additional Civil Judge Senior Division at Margao in Special Civil Suit No.181/96/III on 30th April, 2008 by which the civil suit filed by the original plaintiff praying for specific performance, is dismissed with costs.

2. The case of the plaintiff is that :-

The plaintiff filed the suit praying for decree for specific performance of the agreement in respect of the property admeasuring about 11920 Sq. Mtrs. surveyed under chalta No.20 of PT Sheet No.133 known as Palmar E Varzea Natibata situated at Borda of Margao. The plaintiff prayed for the decree for specific performance of the agreement in respect of the above mentioned property along with the areas reserved for two mundkars. The plaintiff prayed for the decree for specific performance in respect of the suit property against all the defendants. By way of an amendment, the plaintiff made alternative prayer and submitted that if the Court comes to the conclusion that the agreement was not enforceable against the defendant no.2 or the defendant no.13 then the decree

for specific performance as against the remaining defendants be granted in respect of their shares in the suit property. Similarly, by amendment the plaintiff added prayer clause seeking decree for refund of the amount of Rs.8,00,000/- with interest at 21% per annum from July, 1993 till the payment. By way of amendment the plaintiff also prayed for the decree for an amount of Rs.50,00,000/- as compensation and/or damages.

The plaintiff is a builder and being interested in setting up construction project over the suit property he had entered into an agreement with defendants on 31st December, 1992 and in pursuance of the above mentioned agreement, the defendants had handed over the suit property to the plaintiff and permitted him to develop the same and carry out construction and to sell and transfer the suit property. According to the plaintiff the area occupied by two mundkars namely Camilo Pereira and Joao Pereira was excluded from the agreement. According to the agreement the price of the suit property was fixed at Rs.34,00,000/-. The plaintiff had paid an amount of Rs.2,00,000/- to the defendants at the time of execution of the agreement as the part payment towards the purchase price. The plaintiff stated that at the time of execution of the agreement the defendants had not produced the relevant documents to show the source of their title to establish a clear and marketable title. As per clause (4) of the agreement the defendants were required to give all the relevant documents to establish their title in support of the suit property along with a certificate of title issued by their lawyer and the other relevant certificates to show a clear, marketable and subsisting title of the defendants in respect of the suit property. The defendants, who are foreign nationals, agreed to secure the required permission from the Reserve Bank of India for the sale of the suit property. If any defect was found in the title of the defendants then the defendants were required to take all necessary steps to prove their title over the suit property at their costs. The plaintiff was permitted to apply for and obtain the permissions for development over the suit property and for this the defendants agreed to execute the power of attorney in favour of the plaintiff as per clause (9) of the agreement. The plaintiff was entitled to start the development over the suit property and to enter into agreements with the third parties for the sale of the suit property or portion/ portions thereof or built up area of the building proposed to be erected in the suit property. The only restriction which was imposed on the plaintiff was that he should not part with the possession of any part of the building erected in the suit property to any third party without paying the consideration payable to the defendants in respect of the suit property. The defendants committed default by not giving the documents of title and the certificate of title issued by their lawyer. The defendants had not executed the power of attorney in favour of the plaintiff for making necessary application for seeking permissions for undertaking the development over the suit property. The plaintiff had got prepared the plans for proposed construction of the project over the suit property and incurred huge expenditure in the process but could not submit the plans to the Authorities for approval for want of the power of attorney. Many customers were interested to

book and/or purchase flats, shops and other premises in the proposed project, however, the plaintiff was unable to take any bookings in absence of approval and permissions from the concerned Authorities for undertaking the construction of the project.

Though the period of 6 months lapsed, the defendants had not given the title documents and the lawyer's certificate and had not executed the power of attorney but the defendants insisted for payment of the 2nd instalment and because of their insistence the plaintiff paid the 2nd instalment of Rs.8,00,000/- on or about 26th July, 1993. The plaintiff was surprised to see the notice in the news paper daily "Navhind Times" dated 17th January, 1994 published under the name of Advocate Vilas A. Naik from Margao, Goa on behalf of M/s Balaji Construction Company stating that the Special Civil Suit No.246/1993/A praying for decree for specific performance, permanent injunction and appointment of Receiver with an alternative prayer for damages was filed in the Court of Civil Judge Senior Division at Margao, Goa in respect of the suit property. The plaintiff contacted the defendants and their representative Advocate Caitan Xavier and pointed out the publication of the above mentioned notice. The plaintiff was told that the suit was frivolous and likely to be dismissed. The plaintiff was given the photocopy of the power of attorney dated 16th December, 1993, however, the defendants insisted that the plaintiff should sign a letter agreeing that the plaintiff would make the payment of instalments towards the purchase price to the defendants in spite of the suit filed by M/s Balaji Construction Company. The defendants further insisted that the fees payable to the advocate of the defendants and the expenses incurred for defending the defendants in that suit should be borne by the plaintiff. The plaintiff had no option but to agree to sign the letter as asked for by the defendants and accordingly the letter dated 2nd February, 1994 signed by the plaintiff was given to Advocate Caitan Xavier. After this the plaintiff was given the original of the power of attorney executed by the defendants in favour of the plaintiff and the plaintiff got it stamped by the Additional Collector of South Goa at Margao and then immediately submitted the plans for the proposed project to the Southern Planning and Development Authority for approval. The plaintiff was desirous of issuing advertisement for provisional bookings and therefore, he requested the defendants to hand over the title documents but the defendants and Advocate Caitan Xavier requested the plaintiff for not issuing the advertisement as according to them it would have affected their interest adversely in Special Civil Suit No.246/1993/A filed by M/s Balaji Construction Company and in view of this, the plaintiff had not taken any steps to issue the advertisement. In the meantime the plaintiff got knowledge that (a) Smt. Cristalina Fereira (b) Shri Santanio Fereira (c) Shri Custodio Fereira (d) Shri Joao Diniz Fereira (e) Smt Idalina Miranda (f) Shri Salvador Fereira (i) Smt. Catarina Fereira (j) Shri Sevastino Fereira (k) Shri Inacio Fereira and (l) Shri Lawrence Fereira were claiming mundkarial rights in the suit property. The plaintiff made inquiries with the defendants and on that the defendants informed the plaintiff that the above mentioned persons had mundkarial rights in the suit

property, however, the defendants assured the plaintiff to sort out the matter. The plaintiff was ready and willing throughout to perform his part of the contract, however, the defendants delayed to comply with the requirements of the agreement. Surprisingly the defendants issued the letter dated 21st December, 1995 through Advocate Caitan Xavier alleging that the plaintiff had committed default in making payment in spite of several demands and therefore the said agreement was rescinded and the general power of attorney dated 16th December, 1993 executed in favour of the plaintiff was revoked. The plaintiff had sent the letter dated 29th December, 1995 to advocate Caitan Xavier requesting the defendants to perform their part of the agreement and the plaintiff was ready and willing to pay the remaining amount at any time. Advocate Caitan Xavier received the above mentioned letter of the plaintiff and had not given any reply therefore the plaintiff tried to contact the defendants and their representative Advocate Caitan Xavier but the plaintiff was told that the suit agreement was revoked and cancelled. In these circumstances the plaintiff filed the civil suit praying for the decree for specific performance of the agreement. Subsequently, the plaintiff amended the plaint and prayed that if the Court comes to the conclusion that the agreement was not enforceable against the defendant no.2 or defendant no.13, the decree for specific performance of the agreement as against the remaining defendants to transfer their shares in the suit property be passed. By the amendment, the plaintiff also prayed for decree for Rs.8,00,000/- with 21% per annum interest from July 1993 till payment of the amount. By the amendment the plaintiff also prayed for the decree for Rs.50,00,000/- towards compensation and/or damages.

3. The defendant nos.1, 3 to 10 filed their common written statement. The case of these defendants is as under :-

These defendants raised the preliminary objection that the defendant no.2 had expired before the suit was filed and the suit was required to be dismissed as the legal heirs of this defendant were not impleaded or brought on record in the civil suit. The plaintiff had not filed the original agreement dated 31st December, 1992 along with the plaint and therefore the suit was required to be dismissed for non-compliance of the provisions of order VII Rule 14 of the Civil Procedure Code. The defendant nos.7, 8, 9 and 13 were not the parties to the agreement and therefore the suit for specific performance was not maintainable against these defendants. The defendant no.13 was minor at the time of execution of the agreement and neither the guardian of the minor nor the defendant no.13 could have executed the agreement without permission of the Court. These defendants denied all the averments made by the plaintiff in the plaint and prayed for dismissal of the suit. By the additional written statement, these defendants stated that the plaintiff had committed default in making the payment of the instalments as per the agreement. These defendants denied that the plaintiff had incurred expenditure of about Rs.10,00,000/- for obtaining license or permissions and for preparation of the plans. These defendants stated that the claim made by the plaintiff for Rs.8,00,000/- with interest at 21% per annum

and for Rs.50,00,000/- towards the compensation and/or damages was barred by the limitation. The defendants prayed for dismissal of the suit.

4. The learned trial Judge framed the issues on 13th November, 1998 and additional issues were framed on 2nd March, 2006 and after conducting the trial the judgment is passed. The learned trial Judge concluded that the plaintiff has failed to prove that he is entitled for the decree for specific performance and to get executed the sale deed in respect of the suit property on payment of balance amount of Rs.24,00,000/- to the defendants. The learned trial Judge concluded that the plaintiff has failed to prove that he is alternatively entitled for refund of amount of Rs.8,00,000/- with interest at the rate of 21% per annum and for the amount of Rs.50,00,000/- towards the compensation and/or damages. The learned trial Judge concluded that the defendants have proved that the suit was bad for non-joinder of the legal representatives of defendant no.2. The learned trial Judge has held that the defendant no.13 was not party to the agreement and that the defendant no.13 was minor at the time of the agreement and there is nothing on record to show that the permission was obtained by the defendant no.10 from the Court to deal in respect of the property of defendant no.13. The learned trial Judge dismissed the suit with costs.

5. Shri Kantak the learned Senior Advocate assisted by Ms Amira A Razaq has submitted that the execution of the agreement dated 31st December, 1992 is not disputed and the payment of amount of Rs.2,00,000/- and Rs.8,00,000/- i.e. Rs.10,00,000/- by the plaintiff to the defendants is also not disputed. The learned Senior Advocate has submitted that the readiness and willingness of the plaintiff throughout, to perform his part of the agreement and to make the payment is also not disputed. It is submitted that the defendants have not disputed the financial position of the plaintiff. The learned Senior Advocate has brought to my notice the relevant clauses from the agreement, which are as follows :-

"3. That in the event of default on the part of the purchaser to effect payment of the first instalment of Rs.8,00,000/- (Rupees eight lakhs only) within a period of one month after the stipulated period, the vendors shall be entitled to serve a notice upon the purchaser to rescind this Agreement, in which event the purchaser shall forfeit out of the said amount a sum of Rs.50,000/- (Rupees fifty thousand only) and the balance amount shall be returned to the purchaser without any interest within a period of 90 days from the date of such rescission.

5. That the vendors are foreign Nationals, namely Portuguese Nationals and hold a permission from the Reserve Bank of India to hold the said property vide Permissions No.EC.CO.FCS(iii)460/F-55-81 dated 06/08/1981.

8. That the balance instalments of consideration shall be paid by the purchaser in the manner set out in clause 2 of this agreement. The time stipulated hereinabove for payment shall be of the essence of this contract. Any default in payment of any of the instalments on due date shall entitle the vendors to

interest on the instalment/s as the case may be at the rate of 18% per annum as from the date of default until effective payments, as the case may be. The purchaser proposes to acquire the said part for the purpose of development. As such the vendors have no objection that the purchaser applies for permissions for development of the said part from the concerned authorities exclusively at the cost of the purchaser.

9. That the vendors shall on entering into this Agreement execute in favour of the purchaser a Power of Attorney conferring the due powers to the purchaser to apply for in the name of the vendors for necessary permissions from the concerned authorities for conversion of land under the provisions of Land Revenue Code from agricultural to non-agricultural, for permission from the Southern Planning and Development Authority and the Margao Municipal Council for development of the said part. In the event of termination however, under the proceedings foregoing clause, the fact that such permissions have been obtained by the purchaser shall not confer on them any claim for expenses incurred towards securing the said permissions."

Relying on the above mentioned clauses, Shri Kantak the learned Senior Advocate has submitted that the conclusions arrived at by the learned trial Judge that the plaintiff is not entitled for the specific enforcement of agreement dated 31st December, 1992 are unsustainable. The learned Senior Advocate has submitted that the learned trial Judge has committed an error in not examining the illegality of the action of defendants in rescinding the agreement and revoking the power of attorney and not advertng to the relevant clauses of the agreement. It is submitted that the agreement could have been rescinded only if the plaintiff had defaulted in payment of the first instalment of Rs.8,00,000/- as per clause (3) of the agreement and in that case, defendants could have forfeited an amount of Rs.50,000/- from the amount paid by the plaintiff to the defendants and the defendants were under an obligation to return the balance amount to the plaintiff without any interest within 90 days from the date of rescinding the agreement. It is submitted that as per clause (8) of the agreement the time stipulated for making the payment of the instalment was not the essence of the agreement and in case of default on the part of the plaintiff to pay all instalments on the scheduled date, the defendants were entitled for interest at the rate of Rs.18% per annum from the date of the default till the payment. In this background, the learned Senior Advocate has submitted that the plaintiff is ready and willing to pay the interest at the rate of Rs.18% per annum on the balance amount to the defendants and the decree for specific performance of the agreement may be passed. The learned Senior Advocate has submitted relying on Sub-clause (A-1) below clause (2), and clause (5) of the agreement that the defendants have not complied with the requirements and have not given the documents of title and the certificate of their lawyer showing the clear and marketable title of the defendants and that the defendants who are foreign nationals i.e. Portuguese nationals have not obtained the required permission from the Reserve Bank of India to sell the property. The learned

Senior Advocate has submitted that the defendants have raised an untenable ground that the defendant no.13 was minor at the time of execution of the agreement and they have not produced any evidence on record in support of their claim. It is submitted that in the alternative decree for specific performance of the agreement can be passed in respect of the shares of other defendants excluding the share of the defendant no.2. Shri Kantak the learned Senior Advocate has submitted that the defendants 8 and 9 had given the power of attorney in favour of defendant no.7 on the basis of which the defendant no.7 has executed the agreement on their behalf. In support of his submission he has pointed out from the copy of the agreement Exh.72/C, the last page of which shows that the agreement is executed by the holder of power of attorney. It is submitted that in view of these facts, the plaintiff is entitled for the decree for specific performance of the agreement in respect of the shares of defendants 8 and 9. The learned Senior Advocate has pointed out that the pleadings and the evidence of the plaintiff regarding his readiness and willingness to perform his part of contract are consistent and are not controverted. The application (Exh.78/C) submitted by the plaintiff for obtaining the construction license on 16th April, 1995 is relied upon to show that the steps were taken by the plaintiff pursuant to the agreement dated 31st December, 1992. In the alternative, it is submitted that the plaintiff is entitled for the refund of amount of Rs.10,00,000/- paid by him to the defendants. It is submitted that the defendants are not entitled to forfeit the entire amount and at the most the defendants could have forfeited the amount of Rs.50,000/- as per clause (3) of the agreement, however, as the first instalment of Rs.8,00,000/- is paid by the plaintiff and accepted by the defendants as required by clause (3) of the agreement; the defendants cannot forfeit any amount and there is no provision for forfeiture of the amount. The learned Senior Advocate has relied on clause (8) of the agreement and submitted that at the most the defendants are entitled for interest at the rate of Rs.18% per annum from the plaintiff on the balance amount. Submission is made, on instructions, that the plaintiff is ready to pay the interest at the rate of absolutely prohibited from disposing Rs.18% per annum on the remaining amount. It is submitted that if for any reason the decree for specific performance is not granted then the plaintiff is entitled for interest at the rate of Rs.18% per annum from the defendants applying clause (8) of the agreement which shows the intentions of the parties about the rate of interest.

6. Shri Sudin Usgaokar the learned advocate for the defendants has submitted that the defendants 8 and 9 are not parties to the agreement dated 31st December, 1992. The learned advocate has submitted that though it is mentioned on the last page of the agreement that it is executed by the holder of power of attorney, the alleged power of attorney said to have been executed by the defendants 8 and 9 in favour of respondent no.7 is not produced on record and in absence of it and in view of the specific defence of the defendants 8 and 9 it cannot be said that the plaintiff has proved that the agreement was properly executed by the defendant no.7 on behalf of defendants 8 and 9. It is further

submitted that undisputedly the defendant no.13 was minor at the time of the execution of agreement and prior permission of the Court was not obtained for entering into the agreement in respect of the share of defendant no.13 and consequently, it is unenforceable against the share of the defendant no.13. Shri Usgaokar the learned advocate has relied on the provisions of Article 244 of the Family Laws of Goa, Daman and Diu and has submitted that the guardian is absolutely prohibited from disposing of the property of the minor. The learned advocate for the defendants has submitted that the reason given by the plaintiff for not performing his part is that the defendants have not given documents of title and the certificate of lawyer and it is self-created by the plaintiff to suit his purpose. It is submitted that the plaintiff has paid the second instalment of Rs.8,00,000/- and as per clause (4) of the agreement the defendants were required to give the documents of title and the certificate of lawyer within 6 months from 31st December, 1992 i.e. till 30th June, 1993 and it is undisputed that the plaintiff has paid the amount of Rs.8,00,000/- towards the second instalment as per clause (3) of the agreement on 26th July, 1993. On the basis of these facts, the submission is made that the plaintiff has paid the amount of second instalment after receiving the documents of title and the certificate of the lawyer. Shri Usgaokar the learned advocate has further pointed out from the communication dated 16th April, 1995 (Exh.78/C) sent by the plaintiff to the Municipal Engineer Margao Municipal Council in which the plaintiff has stated that he is submitting the ownership document, certified copy of survey plan and Form (B) from City Survey, Margao and according to the defendants this shows the falsity in the case of the plaintiff. It is submitted that the defence as raised by the plaintiff that he was not having knowledge about occupation of suit property by more mundkars than two is also a false defence raised by the plaintiff. The learned advocate has submitted that the plaintiff has shown his willingness to purchase the suit property along with the rights of the mundkars, in the proceedings before the Court and therefore, the plaintiff cannot raise the defence in this respect as sought to be raised. Shri Usgaokar the learned advocate has relied on the judgment given in case of Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others, and has submitted that the suit property is situated within the area of municipal council and the prayer as made by the plaintiff for grant of the decree for specific performance after period of almost 22 years is unjustified. The learned advocate has also relied on the judgment given in case of Mr. Joe Mathias V/s. Mr. Caletan S. Cordeiro and others reported at 1997 (1) GLT 22 in support of his submissions.

7. In reply, Shri Kantak the learned Senior Advocate has submitted that the defendants 8 and 9 have jointly contested the civil suit along with other defendants and therefore, the submission that the defendants 8 and 9 had not given power of attorney to the defendant no.7 cannot be accepted. The defendants including the defendants 8 and 9 have filed joint written statement. It is submitted that the communication dated 16th April, 1995 (Exh.78/C) is being misread by the defendants and the reference of the ownership document in the

above mentioned communication is the reference to some other documents and not all the required documents. It is further submitted that the defendants have not pointed out that the lawyer certificate in support of the claim of the defendants regarding the clear and marketable title of the defendants is given to the plaintiff. It is submitted that the agreement does not provide for termination after the payment of the second instalment and therefore, the termination of the agreement by the defendants is illegal. It is reiterated that the plaintiff is ready to purchase the suit property with the liability of the rights of the mundkars and ready to pay interest at the rate of 18% per annum.

8. With the assistance of the learned advocates for the respective parties I have examined the record. Considering the submissions made on behalf of the respective parties the following points arise for consideration.

(i) Whether the plaintiff is entitled for the decree for specific performance of the agreement ?

(ii) Whether the plaintiff is entitled for the amount of Rs.10,00,000/- paid by him along with interest on it ?

(iii) Whether the plaintiff is entitled for the claim for damages/compensation of Rs.50,00,000/- as claimed ?

(iv) Whether the judgment and decree passed by the learned trial Judge is proper ?

9. As per clause (2) of the agreement the first instalment of Rs.8,00,000/- should have been paid by the plaintiff to the defendants on or before 30th June, 1993. The case of the plaintiff is that the defendants were required to give the documents of title and the certificate of title issued by the advocate as per clause (4) of the agreement within 6 months from 31st December, 1992 i.e. till 30th June, 1993, however, the defendants did not comply with the requirements and therefore, the default is on their part. It is undisputed that the plaintiff has paid the first instalment of Rs.8,00,000/- to the defendants on 26th July, 1993 i.e. 26 days after 30th June, 1993. In addition to this, the document dated 16th April, 1995 (Exh.78/C) shows that the plaintiff had submitted the ownership documents to the Municipal Council Margao. There is no explanation from the plaintiff as to why the payment of first instalment of Rs.8,00,000/- was made 26 days after the scheduled date without obtaining the documents of title and the certificate of title issued by the lawyer of the defendants. In view of these facts on record, it is not possible to accept the submission made on behalf of the plaintiff that there is default on the part of the defendants. It is clear from the record that plaintiff swayed into action and made attempts to get the sale deed only after he got knowledge about the filing of Special Civil Suit No.246/1993/A by M/s Balaji Construction Company. Further the facts on record show that the plaintiff has not taken any effective steps to get the sale deed executed till defendants sent the letter through Advocate Caitan Xavier on 21st December, 1995 rescinding the agreement and revoking the power of attorney given by the

defendants to the plaintiff. Though the plaintiff has given some explanations for the default on his part, in my view, they are only excuses which cannot be accepted considering the facts and the material on the record. The plaintiff has not given any explanation for not paying further instalments of Rs.8,00,000/- as required by clause (2) of the agreement.

10. The defendants have raised specific plea that the defendants 8 and 9 had not given power of attorney to the defendant no.7 in respect of their shares in the suit property. The plaintiff has relied on the agreement, last page of which shows that the defendant no.7 has executed the agreement as the holder of power of attorney for the persons whose names are shown and the names of the defendants 8 and 9 are also shown but the plaintiff has neither produced nor has taken any steps to secure the production of the alleged power of attorney stated to have been executed by the defendants 8 and 9 in favour of the defendant no.7. The unauthorized action of the defendant no.7 in signing the agreement as the holder of power of attorney of the defendants 8 and 9, in the absence of the alleged power of attorney on record makes clear that submission made on behalf of the plaintiff in that regard cannot be accepted.

11. The submission made by Shri Usgaokar the learned advocate for the defendants relying on the provisions of Article 244 of the Family Laws of Goa, Daman and Diu requires consideration. Article 244 reads as follows :-

"ARTICLE 244

The guardian is absolutely prohibited :

- (1) To gratuitously dispose of the properties of the minor;
- (2) To lease, buy and bid in the auction of the properties of the minor;
- (3) To become a transferee of rights or creditor as against his ward, except in cases of legal subrogation;
- (4) To accept gifts from the minor, either inter vivos or by way of will, or from the emancipated or major ex-ward, save after having rendered the accounts of the management, and having obtained general discharge;
- (5) To enter into contracts in the name of the ward which binds the later personally to perform certain acts, except when such an obligation is necessary to give him/her education, settlement or occupation ."

It is undisputed that the defendant no.13 was minor at the time of execution of the agreement. Plaintiff has neither pleaded nor has brought on record any material to show that the agreement in respect of the share of the defendant no.13 could have been validly executed when she was minor and that the agreement binds the defendant no.13 after she becomes major. Perhaps faced with this situation, the plaintiff had amended the prayer and has prayed for the decree for specific performance in respect of the suit property excluding the share of the defendant no.13.

12. Similarly, the defendants have specifically raised the plea that the defendant no.2 died before filing of the civil suit and in absence of the legal heirs of the defendant no.2, the agreement was not enforceable. The plaintiff again faced with the adverse situation has by the amended prayer sought decree for the specific performance of the agreement in respect of the suit property excluding the share of the defendant no.2.

13. Thus, in view of the finding that there is a default on the part of the plaintiff in performing his part as per the terms of the agreement and that the agreement is not enforceable in respect of the shares of the defendants 2, 8, 9 and 13, in my view, it will not be proper to grant the decree for specific performance of the agreement in respect of the shares of the remaining defendants.

14. It is undisputed that the suit property is situated in the municipal limits and now almost more than 21 years have lapsed from the date of the execution of the agreement. According to clause (3) of the agreement the first instalment of Rs.8,00,000/- was to be paid till 30th June, 1993, the second instalment was to be paid till 31st December, 1993, the third instalment of Rs.8,00,000/- was to be paid till 31st June, 1994 and the last instalment of Rs.8,00,000/- was to be paid on the date of execution of the sale deed. It is undisputed that the plaintiff has paid the first instalment of Rs.8,00,000/- on 26th July, 1993 i.e. 26 days after the scheduled date and payment of further instalments is not made till the filing of the civil suit and till today. Though it cannot be strictly construed that the plaintiff has to be non suited for the delay in the payment and though as per the clause (8) of the agreement the plaintiff is liable to pay interest at the rate of Rs.18% per annum on the balance amount, in my view the plaintiff cannot take benefit of clause (8) of the agreement in the present situation and make a claim for specific performance of the agreement by filing civil suit in June 1996 when as per the agreement the last instalment of Rs.8,00,000/- should have been paid till 31st December, 1994 and the sale deed should have been got executed. The plaintiff has given unacceptable explanations for this delay on the part of the plaintiff in making the claim. Shir Usgaokar the learned advocate for the defendants has rightly relied on the judgment of the Hon'ble Supreme Court given in the case of Mrs. Saradamani Kandappan V/s. Mrs. S. Rajalaxmi and Ors. (cited supra). Considering the escalation in the prices of the immovable property, in my view, it would be unjust and improper to grant the decree for specific performance of the agreement in favour of the plaintiff, specifically in the facts of the case that when the agreement is not enforceable in respect of the shares of the defendants 2, 8, 9 and 13 in the suit property. The learned trial Judge has rightly exercised discretion and refused to grant the decree for specific performance of the agreement.

15. However, the plaintiff is entitled for refund of the amount of Rs.10,00,000/- paid by him to the defendants as per the clause (1) of the agreement. The agreement does not enable the defendants to forfeit the amount paid by the plaintiff, after the payment of the first instalment of Rs.8,00,000/-. The

defendants could have forfeited the amount as per clause (3) of the agreement only if the first instalment of Rs.8,00,000/- was not paid by the plaintiff within 6 months of the execution of the agreement and the defendants could have forfeited the amount of Rs.50,000/- only and the balance amount was required to be returned to the plaintiff without any interest within 90 days from the date of rescission of the agreement. Considering the intention of the parties as reflected in the agreement, the defendants cannot forfeit the amount of Rs.10,00,000/- paid by the plaintiff and the defendants who received the amount of Rs.2,00,000/- and Rs.8,00,000/- from the plaintiff as per details given in clause no.1 of the agreement, are directed to refund the same in equal proportion to the plaintiff. The agreement is rescinded by the defendants on 21st December, 1995 and as per clause (3) of the agreement the defendants were liable to pay the interest if the amount received by them is not returned to the plaintiff within 90 days from the date of the recession of the agreement. Hence the defendants 1, 3, 5, 7, 8 and 10 shall pay the above said amount along with interest at the rate of 9% per annum, calculated from 20th March, 1995 till the amount is paid to the plaintiff. The amount of interest as mentioned above is also to be paid by the above defendants 1, 3, 5, 7, 8 and 10 individually. The plaintiff has not placed any material on the record regarding his claim for damages/compensation of Rs.50,00,000/-. In absence of any pleadings and evidence on the record it is not possible to consider the claim of the plaintiff regarding the damages/compensation.

16. The appeal is allowed partly.

The defendants 1, 3, 5, 7, 8 and 10 are directed to refund the amount of Rs.10,00,000/- to the plaintiff along with interest at the rate of 9% per annum, calculated from 20th March, 1995 till the amount is paid to the plaintiff in equal proportion. The claim of the plaintiff regarding the compensation/damages is rejected. The judgment and decree passed by the learned trial Judge is modified accordingly. In the circumstances, the parties to bear their own costs.