

(2012) 07 BOM CK 0056

In the Bombay High Court

Case No : Jurisdiction First Appeal No. 1653 of 2011

Shri Pradeep Shankar Walvekar, Mrs. Sona Pradeep Walvekar, APPELLANT
Miss Tejasvini Pradeep Walvekar and Shri Pavitra Pradeep
Walvekar

Vs

Shri Anil Narsinha Annachhatre and Shri Archis Anil RESPONDENT
Annachhatre

Date of Decision : 18-07-2012

Acts Referred:

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 10, 11, 12, 14, 15

Citation : (2013) 1 ABR 380

Hon'ble Judges : Shrihari P. Davare, J;A.S. Oka, J

Bench : Division Bench

Advocate : G.S. Godbole with Mr. Manoj S. Mhambrey, for the Appellant;
Prashant P. Chavan a/with Mr. Prabhakar M. Jadhav and Mr. Ravindra Chile, for
the Respondent

Final Decision : Dismissed

Judgement

Oka, J.—The appellants who are the original defendants have taken an exception to the judgment and decree dated 7th April, 2011 passed by the learned Joint Civil Judge, Senior Division, Pune. The respondents/plaintiffs who had admittedly paid a consideration of Rs. 90,00,000/-out of the agreed consideration of Rs. 1,10,00,000/-filed a suit for specific performance of the agreement dated 18th October, 2007 which was styled as an agreement of development or a development agreement. The said agreement was executed by the present appellants in favour of the respondents. The appellants were the owners of the property bearing Plot No. 15 admeasuring 522 square meters together with a bungalow constructed thereon, more particularly described in paragraph 1 of the plaint. (The said property is hereinafter referred to as "the suit property"). It is alleged in the plaint, which is not disputed, that the 1st appellant has 10% undivided share in the suit property. The share of the 2nd appellant is also 10%

and the shares of 3rd and 4th appellants are respectively 40% each. It is pointed out in the plaint that, the first two appellants in the capacity as the partners of M/s. Decal Industries had obtained loan from the Rupee Co-operative Bank Ltd., where under the suit property was mortgaged in favour of the said Bank. The Bank had kept a charge on the suit property. According to the case of the respondents, the appellants had represented that on payment of a sum of Rs. 29,00,000/-, the said Bank shall release the property from the charge. The case made out in the plaint is that till the date of execution of the agreement dated 18th October, 2007 (hereinafter referred to as the suit agreement), the total consideration of Rs. 90,00,000/-was paid by the respondents to the appellants. It is not in dispute that the appellants have received a sum of Rs. 90,00,000/-from the respondents. The suit agreement was duly registered in the office of the Sub-Registrar after payment of Rs. 1,10,000/-by way of stamp duty. Reliance is also placed on a registered power of attorney executed by the appellants in favour of the respondents which has been duly registered. The case made out in the plaint is that respondents took further steps by appointing Architects, Structural Engineers and got the building plans prepared. It is alleged that the respondents received various enquiries from the prospective purchasers and one prospective purchaser Mrs. Archana Ajit Gulwani has paid a sum of Rs. 10,00,00/-to the respondents by way of an advance towards consideration of price of the flat in the proposed building.

2. The appellants pointed out that further consideration of Rs. 19,00,000/-was made payable under the suit agreement within 120 days for execution of the said agreement. It is alleged that post-dated cheques in the names of the appellants aggregating to Rs. 19,00,000/-were issued by the respondents. It is pointed out that a sum of Rs. 1,00,000/-was to be paid at the time of execution of the final conveyance. In the plaint, it is contended that the 4th appellant tried to encash the post dated cheque of Rs. 7,60,000/-drawn on Bank of Baroda on 10th June, 2008. The cheque was dated 16th February, 2008. It is pointed out that though the suit agreement contemplated delivery of possession, the appellants avoided to deliver the possession. It is alleged that the respondents did not permit the appellants to encash the said cheque without seeking necessary clarification. It is alleged that, in June, 2008, the appellants visited the office of the defendants, but the defendants did not hand over the possession.

3. The further case made out in the plaint is that the appellants represented to the respondents that they were willing to execute a conveyance in favour of the respondents, and therefore, respondents were told to prepare a draft of the conveyance. It is alleged in the plaint that a draft of conveyance was prepared by the respondents which was approved by the appellants. Stamp duty of Rs. 5,50,000/-was paid by the respondents on 3rd July, 2008 on the final conveyance deed. Four demand drafts totally amounting to Rs. 20,00,000/-were purchased by the respondents in the names of the petitioners towards balance consideration. However, the appellants did not come forward to execute the sale deed, and therefore, on 1st January, 2009 the respondents were forced to apply

to the Joint District Registrar, Stamps, Maharashtra State, for refund of the stamp duty of Rs. 5,50,000/-. After deducting 10% of Rs. 5,50,000/-, refund was ordered. The respondents relied upon legal notice dated 5th November, 2009 issued by their advocate to the appellants calling upon the appellants to execute the conveyance and to hand over the possession of the suit property. Though the said notice was delivered to the appellants, there was no reply by the appellants. Therefore, on 11th December, 2009, the suit for specific performance was filed by the respondents.

4. The suit was contested on the basis of a written statement filed by the 1st to 3rd appellants. A contention was raised that, one of the post dated cheques bearing date of 16th February, 2008 was deposited by the appellants on 10th June, 2008 which was dishonoured. It is alleged that thereafter, two cheques were deposited by the appellants which were dishonoured. It is alleged that the cheques were deposited by the appellants at the instance of the respondents. Therefore, it was contended that the respondents were never ready and willing to perform their part of the agreement. It is contended that though the suit agreement records that possession of the suit property was handed over to the respondents, it is an admitted position that possession was in fact not handed over. The appellants did not dispute receipt of payment of a sum of Rs. 90,00,000/- from the respondents. Apart from denying various averments made in the plaint, the appellants denied the case made out in the plaint that draft sale deed was sent for their approval by the respondents and that the same was approved by the appellants. They also denied that, as per their suggestion, demand drafts in the sum of Rs. 20,00,000/- were purchased by the respondents.

5. The appellants contended that the balance consideration of Rs. 19,00,000/- was payable on or before 17th February, 2008 and the post-dated cheques were bearing the date of 16th February, 2007. It is contended that the respondents avoided to pay the said amount and as per the request of the respondents, the post dated cheques were deposited by the respondents which were dishonoured. Thus, it is contended that the respondents have committed the breach of the contract. It is, therefore, submitted that the respondents were not entitled to any of the reliefs claimed in the plaint.

6. The respondents examined the 1st respondent as a witness. No other witness was examined by the respondents. The appellants examined only the 1st appellant as a witness. The parties led documentary evidence. The Trial Court decreed the suit by directing the respondents to deposit the balance consideration of Rs. 20,00,000/- within a period of one month from the date of the decree and further directed the appellants to execute the sale deed within a period of two months.

7. The learned counsel appearing for the appellants has taken us through the pleadings, notes of evidence and other relevant documents on record. His first submission is that the suit agreement is not an agreement for sale but is a pure and simple agreement for development which is not specifically enforceable. He

pointed out relevant recitals and clauses in the suit agreement. He pointed out that, initially in recital (d) there was a reference to sale of the suit property but the word "sale" in Marathi has been struck out. He pointed out various other clauses of the development agreement which according to him show that the suit property was not to be sold to the respondents but ultimately the suit property was to be sold to the Association of Apartment Holders or to the body of flat purchasers after development of the suit property. He made reference to clause Nos.8 and 14 of the suit agreement. He pointed out clause 27 of the agreement which shows that the agreement was purely a development agreement and the necessary stamp duty payable on development agreement was paid and not the stamp duty for an agreement of sale. He pointed out sub-clause 5 of Clause 1 of the suit agreement which provided time limit for 120 days from the date of the execution of the suit agreement to pay the consideration of Rs. 19,00,000/-. He submitted that the fact that the post dated cheques totally amounting to Rs. 19,00,000/-were issued by the respondents/plaintiffs, shows that time of 120 days was the essence of the contract. The learned counsel fairly stated that the appellants could prove dishonour of only one post dated cheque issued in favour of the appellants. He submitted that the dishonour of the said cheque clearly shows that the respondents were not ready and willing to perform their part of the agreement. He submitted that though the respondents were aware of the dishonour of the cheque in June, 2008, they never offered to pay the amount covered by the dishonoured cheque to the appellants, which shows that the respondents were never ready and willing to pay balance consideration of Rs. 19,00,000/-. He submitted that, at no stage after execution of the suit agreement that the balance consideration was even offered by the respondents. He submitted that, in order to succeed in the suit for specific performance, the plaintiffs must show readiness and willingness right from the date of the suit agreement till the date of passing the decree. He submitted that though one cheque in the sum of Rs. 7,60,000/-was dishonoured, the respondents/plaintiffs did not produce any evidence including the bank statement to show that on that day they were possessing necessary funds. He submitted that the Trial Court has committed an error by relying upon the documents which were not even marked as exhibits. He submitted that though the respondents claim that they purchased demand drafts in the sum of Rs. 20,00,000/-, but no evidence was adduced to show that the demand drafts were purchased by them. He submitted that only the photo copies of the demand drafts were produced which were not exhibited. He submitted that there is no evidence to show that they purchased demand drafts and mere productions of the statements of accounts of the respondents will not prove the said fact. He criticized the judgment of the Trial Court by pointing out that even the Article-A which was relied upon, was not proved in accordance with the law of evidence.

8. The learned counsel for the appellants relied upon various decisions in support of his plea that the respondents have failed to prove readiness and willingness to perform their part of the agreement. He relied upon various decisions in support

of his contention that an agreement which is a simplicitor development agreement is not enforceable in law.

9. The learned counsel appearing for the respondents supported the impugned judgment and decree. He submitted that, in the case of contract in question, the presumption is that time was never the essence of contract. He submitted that, if sub-clause (5) of clause (1) of the suit agreement is read with clause (25), it is apparent that the post dated cheques were issued only by way of security and the appellants were not supposed to encash the said cheques. He submitted that the balance consideration payable was subject to accounting in view of clause (25) as well as clause (16) of the suit agreement. He submitted that, without notice to the respondents, one post-dated cheque was deposited by the respondents. He submitted that, after dishonour of the cheque, no grievance was made by the appellants. He submitted that no attempt was made by the appellants to make the time of 120 days as essence of the contract. He submitted that the appellants have never terminated the agreement and the said agreement continued to be valid and subsisting. He submitted that, admittedly, a sum of Rs. 90,00,000/-, out of the total consideration of Rs. 1,10,00,000/-, was paid to the appellants and in fact the appellants committed the breach by not handing over the possession of the suit property to the respondents. He, therefore, submitted that no case for interference is made out.

10. Before proceeding with the issues which arise based on factual contention raised by the parties, it is necessary to deal with the first contention raised by the appellants that the suit agreement being a pure and simple development agreement is not specifically enforceable. Reliance has been placed on various decisions by both the sides. In this behalf, it will be necessary to deal with the relevant provisions of the Specific Relief Act, 1963 (hereinafter referred to as the said Act of 1963). Chapter II of the said Act of 1963 under the heading Specific Performance of Contract is relevant on this aspect. We may note here that though the word "contract" has not been specifically defined under the Act of 1963, clause (e) of Section 2 of the said Act of 1963 provides that, all words and expressions used therein but not defined, and defined in the Indian contract Act, 1872 (9 of 1872), have the meaning respectively assigned to them in that Act. We may note here that Chapter II of the said Act is applicable to all categories of contracts whether they relate to movable or immovable property. The said fact is clear from Section 10 forming part of Chapter II which also deals with the agreement relating to movable property. It is also pertinent to note that Chapter II does not confine itself only to the contracts relating to sale or purchase of movable or immovable property. Section 10 deals with contracts which may be specifically enforced. Section 10 reads thus -

Section 10: Cases in which specific performance of contract enforceable. -Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced -

(a) when there exists no standard for ascertaining the actual damage caused by

the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation: Unless and until the contrary is proved, the Court shall presume -

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

Thus, what is laid down in Section 10 is that specific performance of a contract, in the discretion of the Court, may be enforced in a case where there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or in the case when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. The clause (I) of the Explanation to the section is a rule of evidence which provides that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. The clause (ii) of Explanation shows that Chapter II deals with all contracts including the contracts relating to movable property. Section 11 deals with cases in which specific performance of contracts connected with trusts is sought. Section 12 deals with specific performance of a part of contract. Another material section in this behalf is Section 14, which reads thus

Sec. 14. Contracts not specifically enforceable.

(1) The following contracts cannot be specifically enforced, namely:

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the Court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the Court may enforce specific performance in the following cases:

(a) where the suit is for the enforcement of a contract,

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once;

Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract;

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for, -

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:

(i) the building or other work is described in the contract in terms of sufficiently precise to enable the Court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

Clause (a) of sub-section (1) is converse of clause (b) of Section 10. Clause (a) provides that the contract for non-performance of which compensation in terms of money is an adequate relief is not specifically enforceable. Clause (b) of sub-section (1) of Section 14 is another category of non-enforceable contracts which run into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature are such, that the Court cannot enforce specific performance of its material terms.

Clause (c) deals with the contract which is in its nature determinable. Clause (d) deals with the contract the performance of which involves the performance of a continuous duty which the Court cannot supervise.

11. Sub-section (2) of Section 14 deals with the contract to refer disputes of arbitration. Sub-section (3) is in two parts, the first part deals with suits for enforcement of a contract to execute a mortgage or furnish any other security for securing the repayment of the loan and to take up and pay for any debentures of a company. Sub-section (3) is an exception to sub-section (1) of Section 14. The clause (b) of sub-section (3) deals with suits for execution of formal deed of partnership and the clause (c) deals with enforcement of a contract for the construction of any building or the execution of any other work on land. Thus, Clause (c) deals with pure and simple building contracts under which a person appoints any other person to carry on construction of a building or to carry on execution of a particular work on a land. Clause (c) provides that such contract can be specifically enforced provided that, (i) the building or other work in the contract is described sufficiently to enable the Court to determine the exact nature of the building or work, (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in terms of money for non-performance of the contract is not an adequate relief, and (iii) the defendant has, in pursuance of the contract, has obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed. Therefore, even in the case of pure and simple building contract, in certain cases, the contract is specifically enforceable. Section 15 deals with the person who may obtain specific performance. Section 16 deals with personal bars to relief of specific performance. Section 17 deals with contract to sell or let property by one who has no title. Section 18 deals with non-enforcement except with variation. The persons against whom a contract can be enforced are set out in Section 19. It must be noted here that though under the aforesaid sections, a contract may be specifically enforceable, the relief of specific performance being a discretionary and equitable relief, the Court retains discretionary power to refuse a decree for specific performance. The said discretionary power is found in Section 20 of the Act of 1963. On plain reading of provisions of Chapter II, it cannot be laid down as a matter of law that a development agreement is not specifically enforceable. Such a contract is enforceable if it falls within the clauses (a) or (b) of Section 10 provided such contract does not fall in any of the prohibited categories u/s 14. On plain reading of provisions of Chapter II, it can be said that they do not support an argument that only an agreement for sale of immovable property is enforceable and an agreement for development is not specifically enforceable.

12. The Transfer of Property Act, 1882 recognizes an agreement for sale. However, the concept of the development agreement is a broad and flexible concept. There can be different categories of development agreements. One category of development agreement can be, where the developer proposes to subject the property subject matter of contract either to the provisions of The

Maharashtra Ownership of Flats (Regulation of the Promotion of Construction., Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the MOFA) or to the provisions of The Maharashtra Apartment Ownership Act, 1970 (hereinafter referred to as the said Act of 1970). If the property is to be developed in accordance with the said enactment, several obligations are created under the said statutes. The said two statutes create rights in favour of the flat purchasers and also create corresponding obligations which are required to be performed by a developer. Under the MOFA, the breach of provisions by a developer/promoter leads to prosecution of the developer. In all such cases, the owner invariably executes an irrevocable general power of attorney empowering the developer to sell the land with building or to execute a lease in respect of the same. Such power of attorney creates irrevocable agency. The second category of development agreement can be where the developer does not subject the property either to the MOFA or the said Act of 1970, but agrees to execute the sale deed in favour of flat purchasers in respect of their respective flats along with proportionate undivided right, title and interest in the land on which the building is constructed. There can be another category of development agreement where a developer is supposed to construct building at his own cost and recover the cost of construction by leasing out some of the premises in the newly constructed building. In such a case, there cannot be any clause regarding execution of any sale deed or lease in respect of the land as the title is to be retained by the owner of the property. These are only illustrations. The development agreements can be in some other forms also. In case of breach of certain contracts of development, the monetary compensation cannot be adequate relief and it may not be possible to ascertain actual damage caused by non-performance. The first category of development agreement where the developer proposes to subject the property either to the provisions of MOFA or the said Act of 1970 may be a category of agreement which may be specifically enforceable.

13. Therefore, the answer to the question whether an agreement which is styled as a development agreement is specifically enforceable under the said Act of 1963 depends upon the nature of the agreement. The said question is required to be decided by applying relevant statutory provisions in Chapter II and especially Sections 10 and 14 of the Act of 1963. As we have narrated earlier, Section 10 lays down as to which contracts are enforceable and Section 14 lays down that certain contracts are not enforceable. Therefore, it cannot be laid down as a proposition of law that an agreement styled as a development agreement is not specifically enforceable under the said Act of 1963. The aspect of enforceability depends on facts of each case.

14. On this aspect, several decisions have been relied upon. The first decision is in the case of *Asso Nihalanig v/s Wilfred D'Souza*, which is an order dated 15th January, 1988 in Notice of Motion No. 2716 of 1987 in Suit No. 2673 of 1987. The learned Single Judge of this Court was dealing with the notice of motion for interim relief taken out in a suit for specific performance. In paragraph 7, the

learned Single Judge dealt with a submission that the suit agreement was not an agreement to sell but it is an agreement to develop the property. A submission was made that having regard to the provisions of Section 14 of the said Act of 1963, such an agreement cannot be specifically enforced. Dealing with this argument, the learned Single Judge has observed in paragraph 7 thus

7. ... Prima facie, I am inclined to agree with the submissions made by Mr. Muchala in this behalf. I must mention that the property belongs to the Society which has imposed various restrictions as to development of this property. Therefore, prima facie, it is difficult for a member of the Society to enter into an agreement and to have the property sold to a non-member. I must, therefore, necessarily proceed on the assumption that it is an agreement to develop. If one has regard for the terms of this agreement with regard to the requirement as to the tenants vacating the property and the tenants and the owners being accommodated in a suitable alternative accommodation temporarily elsewhere and having regard to various other conditions of this agreement, it must prima facie beheld that it is not an agreement which could be specifically enforced. Therefore, even from that point of view, no relief can be given to the plaintiff at this stage.

Thus, the learned Single Judge has recorded only a prima facie opinion by observing that he was inclined to agree with the submissions advanced by the concerned counsel that the agreement could not be specifically enforced. In the facts of the case, the learned Single Judge observed that the property belongs to the Society which has imposed various restrictions on the development of the property. Thus, what is expressed is only a prima facie view and the said decision cannot be read as a decision laying down the proposition of law that a development agreement is not specifically enforceable.

15. The second decision relied upon is dated 9th February, 1988 by which the learned Single Judge decided Notice of Motion No. 76 of 1987 in Suit No. 3419 of 1986 (Narayan Ramchandran v/s Mahabhodi Society & ors.). It will be necessary to make a reference to paragraph 7 of the said order, which reads thus :-

7. I need not go into this controversy for the simple reason that the Charity Commissioner has not given any sanction so far. Mr. Chinai points out that the trustees have not yet applied to the Charity Commissioner for obtaining sanction and he therefore, submits that the suit is for compelling them to comply with the said agreement which will necessarily include their applying to the Charity Commissioner for the necessary sanction. Trustees do not want to obtain such a sanction. They proceeded on the footing that the agreement has been terminated because of a breach of the agreement. Assuming that the trustees were wrong in their approach, the fact remains that the agreement becomes enforceable, only after obtaining the sanction from the Charity Commissioner. Therefore, the plaintiff's remedy, if any, could be by way of damages and not by way of specific relief.

Thus, even the said decision does not lay down any proposition of law. The said decision of the learned Single Judge dated 9th February, 1988 was challenged in Letters Patent Appeal No. 285 of 1983 before the Division Bench of this Court. The judgment of the Division Bench is dated 7th March, 1988. The judgment is very short which reads thus

In essence the suit agreement where the aim of the professional builder contractor (appellant) is to make a profit by completing building and selling the flats at a profit.

A breach of such an agreement can be compensated byway of damages.

Merely because a temple and a guest house for devotees were also to be constructed within the plot makes no difference to the essence of the development agreement, while we applaud the pious zest of the professional builder contractor in seeking to ameliorate the spirits and material comforts of the devotees, the essence of the contract still remains a building contract entered into with the aim of making profits by the expedient of constructing the building and selling the flats at a profit; we agree with the learned Single Judge that damages for breach of such a contract would be the adequate remedy.

On plain reading of the said judgment, it is apparent that again this Court has not laid down a proposition of law that development agreement of every type is not specifically enforceable. At this stage, we may note that another Division Bench of this Court had an occasion to deal with the said decision of the Division Bench dated 7th March, 1988. We are referring to a decision of the Division Bench dated 25th September, 1991 in the case of Mrs. Pallavi R. Karani v/s M/s. Dadhawala Builders Pvt. Ltd. & ors. (Appeal No. 784 of 1991). The decision in Letters Patent Appeal No. 285 of 1983 was relied upon before the Division Bench in support of the submission that a development agreement is not specifically enforceable. The Division Bench specifically referred to the order dated 7th March, 1988 in L.P.A. No. 285 of 2003 and held that the order of the Division Bench cannot be read as laying down that specific performance of a development agreement can never be granted or that interim relief in a suit for enforcing such agreement should always be refused.

16. Therefore, we are of the considered view that, none of the aforesaid decisions specifically decide the issue whether an agreement styled as a development agreement is specifically enforceable under Chapter II of the said Act of 1963. Today, when the appeal is fixed for delivery of judgment, the learned counsel appearing for the appellants relied upon another unreported decision of Division Bench of this Court dated 19th January, 2004 in First Appeal No. 1543 of 2003 (M/s. Runwal Constructions v/s P.K. Velu & Co. Pvt. Ltd.). Paragraph 7 of the said decision reads thus -

7. Admittedly, the Memorandum of Understanding dated 8th August, 1988 is not an agreement of sale. In fact, the defendant No. 1 could not have agreed to sell the suit property as it was not the owner thereof but, was only a lessee. The

Memorandum of Understanding is an agreement to develop the property. In a catena of decisions, this Court has held that no specific performance can be granted in respect of an agreement of development. In Notice of Motion No. 3302 of 2000 decided by one of us (D.K. Deshmukh, J.), this Court reiterated that no decree for specific performance of development can be granted. The said decision was affirmed by the Division Bench in Appeal No. 142 of 2003 decided on 17th July, 2003. In the circumstances, we are satisfied that no decree for specific performance could have been granted in favour of the appellants/plaintiff.

Perusal of paragraph 7 shows that the Division Bench has not laid down that a development agreement is not enforceable. The Division Bench has simply stated that in a catena of decisions this Court has held that development agreement is not enforceable. The Division Bench has made a reference to a judgment of a learned Single Judge of this Court which was affirmed in an appeal. Therefore, even this decision will not help the appellants.

17. In the case of Gurudev Developers v/s Kurla Konkam Niwas Co-op. Hsg. Society (1999 Bom C.R. 257 (OOCJ)), a learned Single Judge dealt with the same issue. However, it is not necessary to go into the said decision as there is one decision of the Division Bench which directly deals with the issue. The said decision is in the case of Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid and Others, . It appears that one of the contentions raised before the division Bench was that an agreement for development cannot be specifically enforced. This Court made a reference to various decisions of this Court including the first four decisions which we have referred to above. In para 12 of the said decision, the Division Bench has held thus :-

12. In our opinion from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be :

- (a) An agreement only entrusting construction work to a party for consideration;
- (b) An agreement for entrusting the work of development to a party with added rights to sell the constructed portion to flat purchasers, who would be forming a Co-operative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements.
- (c) A normal agreement for sale of an immovable property.

An Agreement of the first type normally is not enforceable as compensation in money is an adequate remedy. An agreement of the third type would normally be specifically enforceable unless the contrary is proved. A mere agreement for development, which creates no interest in the land would not be specifically enforced.

We are however dealing with a case of the second type. Courts for construing such a contract in this State will have to take into consideration, the Maharashtra

Ownership Flats (Regulation of the Promotion of construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the Act, 1963 apart from the Specific Relief Act. Under that Act, a local Act, there is an obligation cast on the owners of the land to convey not only the constructed portion but also his interest in the land beneath the construction. Under the Act an owner of the land who causes the construction to be put up becomes the promoter. Such construction can be put up by a developer or builder, who in turn sells the constructed portions to various persons by entering into Agreements. These provisions, in our opinion would be relevant in determining the true character of the document. Can such a contract be specifically enforced. Let us, therefore, consider some of the arguments advanced by the respondents to contend that the agreement is a development agreement. Reliance was placed by the 10th respondent on Clause 6 of the Agreement to contend that no specific performance can be claimed and that payment of interest is sufficient remedy. In our opinion, such a contention is misplaced. The clause, correctly construed prima-facie would be a clause for liquidated damages in addition to specific performance. The other contention is that, considering the agreement was stamped and stamp duty paid as a Development Agreement and it must be so held. In our opinion, mere payment of stamp duty on an instrument will not change or alter the nature of the Agreement. The Agreement will have to be read considering its terms. Reliance is placed on the judgment in *The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another*, . The ratio of that judgment is that, in a case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible and that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and evidence of the acts done under it, is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument. In our opinion, the learned Single Judge has construed the various terms of the agreement and the other material on record and at the prima facie stage has come to the conclusion that the Agreement can be specifically performed. An Appellate Court, more so a Court considering an interim order which involves exercise of discretion normally will not interfere with the finding of fact recorded by the trial Court and the exercise of discretion unless the finding is perverse. Nothing has been brought on record to hold that the findings are perverse. The document on the face of it, cannot be an agreement for security. It can only be construed as an agreement to sell or a development agreement. In our opinion in this case, the finding recorded by the learned Single Judge was a finding eminently possible on the material on record. We are, therefore, clearly of the opinion that the Agreement prima facie is an agreement which can be specifically enforced and consequently the appellants have made out a prima facie case. The other predicates for grant of an injunction will be answered in the discussion that follows.

18. On plain reading of the provisions of Chapter II of the said Act of 1963, we reiterate that it cannot be laid down as a proposition of law that every agreement

which is styled as a development agreement is not specifically enforceable. We may also note here that Chapter II does not indicate that only an agreement for sale of immovable property is specifically enforceable under which the vendor agrees to convey the immovable property to the purchaser. Chapter II applies to various types of Agreements. The answer to question whether a development agreement is enforceable in law will ultimately depend upon facts of each case.

19. Before dealing with submissions on merits, it will be necessary to have look at the development agreement in the present case and the power of attorney for deciding the question whether the agreement is hit by Section 14 of the said Act of 1963. It must be noted that, out of agreed consideration of Rs. 1,10,00,000/-, a sum of Rs. 90,00,000/-was already received by the appellants on the date of execution of the agreement. In fact, the total amount of Rs. 27,00,000/-was received by the appellants from April, to July, 2006. It will be necessary to make a reference to the recitals of the suit agreement and in particular recital (d). It is true that, in the recital (d), initially, there the word "sale" was typed which was struck out. But it will be necessary to refer to second part of recital (d). It notes that an offer was made by the respondents to pay consideration of Rs. 1,10,00,000/-and the appellants found the said offer consistent with the market value and reasonable, and therefore, the appellants agreed to execute the development agreement which cannot be cancelled. Thus, there is a specific recital that what was agreed was to execute a development agreement which cannot be cancelled. We may also note that, apart from the development agreement (the suit agreement at Exh.36), there is a power of attorney at Exh.37 executed by the appellants in favour of the 1st and 2nd respondents conferring all the powers including the power to execute the sale deed. All pervasive powers have been conferred on the respondents. Clause (15) thereof records that the power of attorney was irrevocable. Thus, the aforesaid recital in the development agreement as well as the execution of irrevocable power of attorney shows that what was agreed to confer on the respondents was an irrevocable right to develop the suit property. The other clauses and facts borne out from the record are consistent with what is set out in clause (d) of the recitals.

20. Apart from aforesaid relevant clauses of the suit agreement, clauses (8), (11) and (14) thereof and clause 9 of the Power of Attorney indicate that the respondents were intending to take recourse to the provisions of either MOFA or the said Act of 1970, and therefore, there is a provision for execution of the sale deed in favour of incorporated body. Moreover, on the basis of the irrevocable power of attorney, the respondents could have obtained sale deed in favour of any person.

21. Thus, this was a case where the intention on the part of the appellants to confer irrevocable right in respect of the suit property on the respondents is clearly reflected from the recitals in the suit agreement as well the power of attorney admittedly executed by the respondents. Moreover, the development

was proposed to be carried out by subjecting to the property either to the provisions of MOFA or the said Act of 1970.

22. In the circumstances, it is not possible to come to the conclusion that for non-performance of the said contract, compensation in terms of money can be adequate relief as irrevocable rights in respect of the immovable property were created by the agreement. Though the agreement was styled as a "development agreement", there is a provision therein for transfer of the property. Therefore, presumption under clause (i) of Explanation to Section 10 will apply in this case which has not been rebutted. Apart from the said clause (i) of Explanation to Section 10, it cannot be said that, considering grant of irrevocable right in respect of the immovable property, compensation in terms of money can be adequate relief to the respondents. Considering the nature of the agreement and various rights created there under, at least one of the two clauses (a) and (b) of Section 10 of the said Act of 1963 and in any event, clause (b) will squarely apply.

23. Hence, it is not possible to accept the submission of the appellants that the suit agreement is not specifically enforceable in accordance with the provisions of the said Act of 1963.

24. Sub-clause (5) of Clause 1 of the said agreement provides that, by way of security for payment of Rs. 19,00,000/-, four post-dated cheques were handed over by the respondents to the appellants and what remained payable was only an amount of Rs. 1,00,000/-which is even less than 1% of the agreed consideration which was to be paid at the time of execution of sale deed after obtaining Occupation Certificate from the builder. Clause (5) of the agreement clearly provides that the four post-dated cheques issued were by way of security. Clause (16) provides that the appellants assured that area of the suit property was 522 square meters. However, it is recorded that, if the area is found to be less, corresponding deduction will have to be made from the consideration amount. Clause (25) provides that the appellants have paid all taxes, outgoings, but if any amount is found due and payable, the same will be paid by the respondents and the amount so paid was to be adjusted against the balance consideration. It is specifically provided therein that if the said amount exceeds the amount of last installment payable, the same shall be adjusted against the payment of amount of Rs. 19,00,000/-payable as per sub-clause (5) of clause (1) of the agreement. That is the reason why in sub-clause (5), it is stated that the post dated cheques were issued by way of security. The conduct of the parties is also consistent with the said interpretation. Though the appellants admittedly could not substantiate that the three out of the four post dated cheques were deposited and all of them were dishonoured, it is established that in June, 2008 one cheque was deposited which was dishonoured. However, there is no communication in writing by the appellants on the basis of said dishonour of the cheque. There is no protest made. No attempt has been made to call upon the respondents to pay the amount and there is no attempt even to terminate

the suit agreement.

25. Now, the other issue is regarding readiness and willingness. The learned counsel for the appellants has relied upon a decision of the Apex Court in the case of J.P. Builders & anr. v/s A. Armadas Rao & anr. (2011 (5) ALL MR 899 (S.C.)). The submission in short is that, in view of Section 16(C) of the said Act of 1963, the readiness and willingness has to be shown right from the date of execution of the suit agreement till the date of passing the decree. In the facts of the case, the issue of readiness and willingness is connected with the other issue, namely, whether time of 120 days stipulated by sub-clause (5) of clause 1 of the suit agreement was the essence of the contract. As far as the contract regarding immovable property is concerned, the law is well settled. Mere stipulation of time incorporated in the agreement does not make the stipulation as to time the essence of the contract. If the contract does not make the time essence of the contract, by a giving notice, the time can be always made essence of the contract. The learned counsel for the respondents relied upon a decision in the case of Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, . As we have held earlier that the post dated cheques referred to in sub-clause (5) of clause (1) were issued by way of security. There is no stipulation in the suit agreement that in case the post-dated cheques are dishonoured either the agreement stands cancelled or that appellants will get right to terminate the same. In fact, the intention is to confer irrevocable right on the respondents. Therefore, on plain reading, sub-clause (5) of clause (1) appears to be a mere stipulation of time which cannot be the essence of the contract. The conduct of the parties, as pointed out earlier, is also consistent with this. Though one of the four post-dated cheques was dishonoured, there is not even an attempt made by the appellants to make any protest. There is no termination made by the appellants by either contending that the time was essence of the contract or by making the time essence of the contract. Therefore, it cannot be said that the stipulation of 120 days provided in sub-clause (5) of clause (1) was a stipulation making the time essence of the contract.

26. We may note here that clause (19) records that possession of the suit property has been handed over to the respondents. However, it is an admitted position that possession has not been handed over. This aspect has to be considered in the context of the fact that nearly 82% of the consideration was received by the appellants apart from the post-dated cheques in respect of entire balance consideration, save and except, a small balance amount of Rs. 1,00,000/-. We have already held that post-dated cheques were issued by way of security. One cheque was attempted to be encashed even without handing over possession of the suit property to the respondents. The cheque which was deposited was strictly not towards the consideration but it was by way of security. Dishonour of the said cheque, in the facts of the case, cannot militate against the readiness and willingness pleaded by the respondents. We may also note one more factual aspect which is virtually an admitted position that the suit notice dated 5th November, 2009 was issued by the respondents to the

appellants making an offer to pay balance consideration and calling upon them to perform their part. Admittedly, the suit notice was received by the appellants but no reply was issued to the suit notice.

27. Now turning to the impugned judgment, it is true that, in paragraph 18 of the judgment, the learned Judge has referred to the draft sale deed (Art. A). It is true that the said draft sale deed was not proved, and therefore, could not have been read in evidence but the reference to the said sale deed in the judgment is in the context of the averments made in the plaint and what is stated in paragraph 15 of the examination-in-chief regarding the preparation of the draft sale deed. It is also true that the fact that four demand drafts were purchased by the respondents is not specifically proved. However, there are statements of the bank accounts of the respondents which are marked as Exhibit Nos. 39 to 42 which show that demand drafts were purchased and in any case, sufficient funds were available to pay the balance consideration. There is an order produced at Exh.38 passed by the Deputy Inspector General of Stamps, Pune, which is dated 26th November, 2009. The said order shows that stamp duty on the sale deed was paid by the respondents and subject to deduction of 10%, refund was granted. The said order is specifically referred to in paragraph 16 of the examination-in-chief of the 1st respondent. Perusal of the cross-examination shows that there is not even a suggestion put to the witness that the stamp duty was paid on some other document and not on the sale deed in respect of the suit property. Thus, the said order at Exh.38 can be safely said to be an order relating to the refund of the stamp duty paid on the conveyance in respect of the suit property got prepared by the respondents. It is true that the respondents have not established that the said draft conveyance was approved by the appellants, but the fact that substantial amount of stamp duty on the sale deed was paid and the fact that the respondents had sufficient funds to purchase demand drafts in the sum of Rs. 20,00,000/- clearly proves the readiness and willingness on the part of the appellants. On the other hand, the agreement has not been terminated by the appellants. The appellants have neither made any correspondence with the respondents at any stage, nor offered to refund the Rs. 90,00,000/- received by them.

28. Considering the conduct of the parties, the discretion u/s 20 of the said Act has been rightly exercised by the Trial Court. Therefore, it is not possible to find fault with the findings recorded by the Trial Court and the decree for specific performance passed by the said Court. Accordingly, we pass the following order:-

ORDER

Appeal is dismissed with no order as to costs.

On the prayer made by the learned counsel for the appellants, interim relief granted in the appeal will continue to operate for the period of 12 weeks from today subject to condition that appellants will not create any third party rights or part with the possession of the suit property.