

(2005) 04 KAR CK 0023

In the Karnataka High Court

Case No : Regular First Appeal No. 931 of 2002

Smt. Saraswathamma

APPELLANT

Vs

H. Sharad Shrikande and Others

RESPONDENT

Date of Decision : 01-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Contract Act, 1872 — Section 29, 63
Evidence Act, 1872 — Section 58
Karnataka Municipal Corporations Act, 1976 — Section 310 (2)
Specific Relief Act, 1963 — Section 10, 20

Citation : AIR 2005 Kar 292 : (2005) 4 KarLJ 181 : (2005) 3 KCCR 1881

Hon'ble Judges : B.S. Patil, J;A.M. Farooq, J

Bench : Division Bench

Advocate : L.M. Chidanandaiah, for the Appellant; S. Shekar Shetty, for Respondents-1 and 2, Indu R. Raj, for Respondent-3(A) and Mohammed Nasiruddin, for Respondent-4, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Patil, J.—There is delay of 40 days in filing the appeal. The application for condonation of delay is taken up along with the main matter.

2. The respondents 1 and 2 have filed objections to the IA for condonation of delay and has strongly objected for the same. We have considered the reasons assigned by the appellant in the affidavit filed by her in support of the prayer for condonation of delay. We are of the view that sufficient cause is made out and the delay of 40 days in filing the appeal deserves to be condoned in the facts and circumstances of this case. Hence, application I.A. I of 2002 is allowed and delay of 40 days in filing the appeal is condoned. The matter is heard for final hearing with the consent of the parties.

3. Suit for specific performance of the contract filed by respondents 1 and 2 herein has been decreed. The defendants 1 and 2 (appellant and respondent 3 in

this appeal respectively) are directed to execute registered sale deed in respect of the suit property and to deliver vacant possession of the same in favour of the plaintiffs. Defendant 1 being aggrieved by the said judgment and decree has filed this regular first appeal. The parties in this appeal will be referred to by their ranks as obtained in the Trial Court, for the sake of convenience.

4. The facts which are relevant for the disposal of this appeal as pleaded by the respective parties are that plaintiffs 1 and 2 are husband and wife. Defendant 1-Saraswathamma is the owner of the suit schedule property. The 2nd defendant is the developer with whom the 1st defendant has entered into an agreement to develop the suit property. The 3rd defendant is the brother of the 1st defendant. The suit schedule property is described as property bearing No. 77/1 measuring 45 ft. x 75 ft. (350 sq. yards) situated at 4th Main, Malleshwaram, Bangalore.

5. Defendant 1-Saraswathamma is the absolute owner of the property in question. The 2nd defendant has entered into an agreement and has joined hands with the 1st defendant to develop the schedule properties on certain terms and conditions set out in the agreement dated 6-2-1988 entered into between them. As per the said agreement, a building consisting of 6 flats along with six car parking spaces was required to be constructed and the premises to be constructed was known as Rajsa Apartments. Out of the six flats and six car parking spaces, the defendant 1 was to be given one flat bearing flat No. 3 and the corresponding car parking space and the remaining were agreed to be sold to third party, the profits to be shared between defendants 1 and 2, after defraying the expenses.

6. It is pursuant to this agreement that the defendants 1 and 2 being desirous of selling the flats and the car parking spaces, offered to sell flat No. 4 along with the car parking space in favour of the plaintiffs herein. An agreement for sale was entered into on 21-10-1989 whereunder the plaintiffs agreed to purchase the property in question for a total consideration of Rs. 3,90,000/-. The plaintiffs paid a sum of Rs. 90,000/- by way of cheques dated 21-10-1989 and 25-10-1989 drawn in favour of defendant 2. The balance consideration of Rs. 3 lakhs was agreed to be paid after obtaining loan from the Canfin Homes Limited. The balance amount was required to be paid at the time of registration of sale deed. It was agreed that the 1/6th undivided share in the suit property was required to be handed over in favour of the plaintiffs with the constructed flat completed in all respects and with all facilities and amenities in a habitable condition. The defendants were required to complete the construction of the apartments and deliver the possession to the plaintiffs within ninety days from the date of agreement. The time was agreed to be the essence of the contract.

7. The plaintiffs applied and obtained loan of Rs. 3,00,000/- from Canfin Homes Limited well-within the stipulated period of 90 days. Loan was sanctioned on 9-11-1989. The defendants 1 and 2 were not in a position to hand over the possession of the premises completed in all respects as possession certificate was not issued and the premises was not complete in all respects. Electricity,

water and sewerage connections were not obtained as the Corporation raised objection regarding the deviations in the construction. The loan sanctioned by the Canfin Homes Limited was cancelled on 22-2-1991 as the same was not availed.

8. Plaintiffs made several visits to the defendants and requested for complying with their part of the contract. The defendant 2 wrote a letter on 14-9-1993 intimating the plaintiff about the receipt of the occupancy certificate and admitting the inordinate delay in obtaining the occupancy certificate and other amenities like water, electricity and sewerage connection. Having received the said letter, plaintiffs wrote a registered letter to defendants 1 and 2 on 27-9-1993 requesting them to forward certain documents which were required to avail fresh loans from Canfin Homes Limited. Plaintiffs once again made arrangements to avail loan of Rs. 2 lakhs from Canfin Homes Limited. The said loan was sanctioned again on 25-3-1995 subject to the condition that defendants 1 and 2 confirmed the subsistence of the agreement dated 21-10-1989 and that there was no other valid agreement to sell with any other person in respect of the property. Defendants 1 and 2 wrote to Canfin Homes Limited on 25-3-1995 confirming that the agreement of sale dated 21-10-1989 still subsisted and was valid. Plaintiff prepared draft sale deed. The same was approved by defendants 1 and 2. This made the plaintiffs to purchase the stamp paper worth Rs. 31,000/- on 24-3-1995. The sale deed was got typed on the stamp paper on 29-3-1995. Defendants were intimated of the same. It is only thereafter that the plaintiffs learnt confidentially that there were some misunderstanding between defendants 1 and 2 and therefore they were not willing to execute the sale deed.

9. Two legal notices dated 22-8-1995 and 19-9-1995 were issued by the plaintiffs calling upon the defendants 1 and 2 to execute the sale deed. Only the 2nd defendant replied on 14-9-1995 stating inter alia that it was defendant 1 who was avoiding to execute the sale deed. Defendant 2 further stated that the 1st defendant broke open the lock of the premises and handed over the possession without the knowledge of the 2nd defendant to the 3rd defendant, Mr. Anand, who was none other than the brother of defendant 1. It is in these circumstances, the plaintiffs' claim that they were constrained to approach the Court filing the suit for specific performance and in the alternative, claiming compensation.

10. Defendants 1 and 2 have filed separate written statements. The 1st defendant has contended that the suit was barred by time. It is her case that the entire transaction was required to be completed within 90 days from the date of agreement i.e., to say from 21-10-1989. If for any reason, the same did not fructify within the prescribed period, the plaintiffs ought to have approached the Court within 3 years from the date of default. The suit having not been filed on or before 21-7-1993, was therefore barred by time. The defendant 1 has denied the very execution of the agreement. It is her case that she has never entered into any kind of agreement to sell the suit property to the plaintiffs nor was she

ever a party to the agreement for sale dated 21-10-1989 along with 2nd defendant. The receipt of the amount was also denied. It is her further case that Corporation-authorities issued the occupancy certificate as back as on 18-2-1992 and all the units were provided with electricity, water and other amenities and facilities. The defendant denied the receipt of any letter dated 27-9-1993 written by the plaintiffs and as also the letter dated 21-6-1994. However, the 1st defendant admits the receipt of registered letters dated 22-8-1995 and 19-9-1995 and claims that she sent a suitable reply to the same. She has admitted that she has put the 3rd defendant in possession and enjoyment of the schedule property on lease basis in her own right as owner thereof. In sum and substance, this defendant has denied the entire transaction and has claimed that there is absolutely no cause of action against her and therefore the suit was required to be dismissed both on merits and also as barred by limitation.

11. The 2nd defendant who has filed separate written statement has admitted the suit agreement. She has further admitted the fact that the plaintiffs had approached defendants 1 and 2 for a letter affirming the subsistence of the agreement of sale between them. This defendant has also categorically admitted the confirmation letter issued by them confirming the subsistence of the agreement to sell addressed to Canfin Homes Limited on 25-3-1995. Admitting the letter written by her on 14-9-1993 calling upon the plaintiffs to get the sale deed registered and to take possession of the property, the 2nd defendant has stated that on 24-3-1995 officers from Canfin Homes Limited visited the flat for inspection obtaining the keys of the flat from defendant 2 and on the same day, the plaintiffs got prepared the sale deed for registration but defendant 1 did not agree to execute the document in violation of the agreement entered into and that she was always ready and willing to execute the sale deed. The 2nd defendant further goes on to State that defendant 1 broke open the lock and illegally inducted the 3rd defendant in the premises. The 2nd defendant has further prayed that it was defendant 1 who was required to bear the damages and direction has to be issued to defendant 1 to register the sale deed in respect of the suit property and to handover the possession of the same to the plaintiffs upon registering the sale deed. Defendant 3 has adopted the written statement filed by defendant 1. On the basis of the respective pleadings of the parties, the Court below has framed as many as 14 issues.

12. The plaintiff in support of her case got examined in all 3 witnesses and produced and marked as many as 23 documents. The 2nd defendant examined herself as D.W. 1 and another witness H. Venkatesh was examined as D.W. 2. On their part, the defendants produced as many as 21 documents and marked them as Exs. D. 1 to D. 21. The Court below answered issues 1 to 4 in the affirmative holding that the agreement of sale dated 21-10-1989 was proved; that the defendants 1 and 2 were unable to put the plaintiff in possession within the stipulated time; that plaintiffs were always ready and willing and that the defendant 1 has inducted defendant 3 illegally into the property. As regards the issue raised regarding limitation, the Court below has held that the suit was

within time. Thus, the suit filed by the plaintiffs was decreed holding that they were entitled for specific performance of the contract from defendants 1 to 3 in respect of 1/6th undivided share in the property and defendants were directed to put the plaintiffs in possession of the same.

13. Learned Counsel appearing for the appellant Sri L.M. Chidanandaiah submits, at the first instance, that the suit is barred by time. It is his contention that the agreement of sale is dated 21-10-1989. The period prescribed under the agreement as per Ex. P. 3 is 90 days for completion of construction and for executing the sale deed. Ninety days expired on 21-1-1990. The agreement itself recited that time was the essence of the contract. Occupancy certificate was issued by the Corporation as back as on 18-2-1992. The suit is filed on 13-2-1997. Hence, the same was barred by limitation.

14. Learned Counsel for the appellant would further submit that Ex. P. 14, a letter allegedly written by defendants 1 and 2 to the officer of the Canfin Homes Limited confirming the subsistence and the validity of the agreement of sale as per letter dated 25-3-1995 cannot be construed to have the effect of extending the period of limitation. It is his submission that Ex. P. 14 is not between the parties to the agreement. It cannot be construed as a fresh contract which can have the effect of giving rise to a fresh cause of action nor can it have the effect of novation of the previous agreement. If it is to be construed as a fresh contract, then the ingredients of offer, acceptance and consideration are necessary which are lacking in the said document Ex. P. 14. Therefore, the appellant's learned Counsel contends that Ex. P. 14 cannot save limitation for the plaintiffs. At any rate, the learned Counsel submits that execution of Ex. P. 14 itself is denied.

15. The next point that the learned Counsel for the appellant has canvassed is that the Court below was in error in holding that the execution of the agreement by defendant 1 was proved and in further holding that Ex. P. 14 bore the signature of defendant 1.

16. The third contention that the learned Counsel for the appellant canvassed is that even if it is construed that Ex. P. 14 was signed by the appellant herein even after the issue of legal notices dated 22-8-1995 and 20-9-1995, the suit is not brought immediately and is filed nearly after two years from the said date and therefore, the plaintiffs are not entitled for the discretionary relief of specific performance.

17. Elaborating his first contention regarding the bar of limitation, inviting the attention of the Court of Article 54 of the Limitation Act, 1963, learned Counsel submits that time starts to run from the date fixed for performance of the contract and in the instant case, the date fixed is 3 months from 21-10-1989. If the sale deed is not executed within the said period, then limitation starts to run, for specific enforcement of the agreement upon the expiry of three months. In this regard, learned Counsel has relied on judgments rendered in the cases of

Ramzan Vs. Hussaini, and Venkappa Gurappa Hosur Vs. Kasawwa c/o. Rangappa Kulgod, . As regards the requirement of the purchaser under an agreement to initiate the proceedings within a reasonable time without waiting till the expiration of the period of limitation, the learned Counsel relies on the judgment rendered in the case of Ranganatha Gounder v. Sahadeva Gounder and Ors. 2004 4 LW 807. Drawing the attention of the Court to Section 20 of the Specific Relief Act, 1963, the appellant's learned Counsel submits that this is not a case where decree for specific performance can be granted having regard to the fact that the value of the property has increased rapidly during the relevant period.

18. Learned Counsel appearing for respondents 1 and 2 (plaintiffs) Sri Shekhar Shetty would submit as under:

That there are 3 agreements entered into between the owner-defendant 1 and the developer-defendant 2. The first agreement is Ex. D. 20, dated 6-2-1988 and the second agreement is dated 12-2-1988. The third agreement being Ex. D. 1, dated 1-3-1988. They disclose the arrangement between the defendants 1 and 2 inter se with regard to the construction of the building on the land in question. It is his submission that the first agreement is between the developer, the owner and the contractor. As per this agreement Clause (5), the second party developer is given absolute right to deal with the schedule land and the superstructure put up thereon. The first party-landowner has agreed not to have any right, title or interest over the schedule land or over the construction proposed. The entire project was required to be completed by the developer and the contractor in all respects. The profits derived out of the project and the site value, after defraying the costs was required to be shared between the landowner and the developer in the ratio of 50:50 as agreed earlier. Another agreement dated 12-12-1988, Ex. D. 4 entered into between defendants 1 to 3 is relied upon by the learned Counsel for the plaintiff to contend that as per this agreement dated 12-12-1988, the landowner authorised the second party developer to issue necessary receipts and to take all steps required to dispose of the 5 flats and 5 car parking slots in the property in question. Thus, placing reliance on the 3 agreements, Sri Shekhar Shetty contends that it was the developer-defendant 2 who was totally authorised to deal with the third party purchasers and to take all steps necessary and the 1st defendant has raised only untenable contentions. She was only required to join the 2nd defendant to execute the sale deed once the construction was complete and other amenities to the building were secured.

19. Referring to the agreement of sale, Ex. P. 3, learned Counsel Sri Shekhar Shetty states that there were 3 prerequisites which were required to be satisfied for enforcing the agreement: (i) the plaintiffs were permitted to obtain loan from Canfin Homes Limited; (ii) the sellers had taken upon themselves the obligation to deliver vacant possession of the constructed premises with all facilities; (iii) the building was to be completed in all respects within 90 days. He submits that if one looks at the terms of these agreements, it cannot be blindly said that the cause of action for enforcing specific performance arose after the expiry of 90

days. The time-limit of 90 days fixed therein has to be understood with reference to and having due regard to the other terms and conditions that are laid down in the agreement which were required to be complied by the sellers themselves. Elaborating this argument, Sri Shekhar Shetty contends that one of the conditions which the sellers have undertaken is to complete the construction and deliver the vacant possession of the building which has to be made ready in all respects. What is purchased under the agreement is the flat possession of which is to be delivered and only thereafter the question of getting the sale deed registered would arise.

20. Drawing the attention of the Court to Section 310(2) of the Karnataka Municipal Corporations Act, Mr. Shekhar Shetty would contend that without occupancy certificate, no building can be occupied and no amenities like water, electricity connection would be secured. When the defendants 1 and 2 themselves did not discharge their part of the contract by completing the construction and offering the vacant possession to the plaintiffs, the question of placing the blame on the plaintiffs does not arise and the limitation did not start to run. Referring to the events that have happened thereafter, learned Counsel relies on Ex. P. 5 namely cancellation of loan facility granted by the Canfin Homes Limited as it was not utilised. Ex. P. 6, letter dated 14-9-1993 written by the developer for the first time informing the purchaser stating that the occupancy certificate was obtained and the subsequent series of correspondence whereunder the plaintiffs have called upon the defendants to furnish certain documents. Particular emphasis is made to Ex. P. 14 which has emanated in the usual course of correspondence whereunder both defendants 1 and 2 have written to the Canfin Homes Limited stating that the agreement was alive and in force and was valid. In other words, Mr. Shekhar Shetty would contend that the agreement has been kept alive by the parties. The expression date fixed as mentioned in Article 54 of the Limitation Act has to be understood with reference to various other terms of the contract, the conduct of the parties and the events that have taken place. The date fixed in the instant case should necessarily mean the date on which the entire building is completed in all respects and is ready for delivery of vacant possession and occupation.

21. In support of his contention, learned Counsel Sri Shekhar Shetty relies on the decisions rendered in the cases of K. Venkoji Rao Vs. M. Abdul Khuddur Kureshi, , Smt. Parvathamma Vs. K.R. Lokanath and others, , Mahboob Pasha Vs. Syed Zaheeruddin and Others, ; Lakshminarayana Reddiar Vs. Singaravelu Naicker and Another, and Keshavlal Lallubhai Patel and Others Vs. Lalbhai Trikumlal Mills Ltd., Thus, the learned Counsel submits that the suit filed is well-within time.

22. As regards the proof of the suit agreement and of Ex. P. 14, letter confirming the subsistence of the agreement by defendants 1 and 2, learned Counsel Sri Shekhar Shetty referring to the evidence on record has highlighted the following aspects:

(a) The defendant 1 having not entered the witness-box, has contended that the signatures found on the suit agreement and as also on Ex. P. 14 did not belong to her. Therefore, adverse inference has to be drawn against her in this regard.

(b) Her husband who has been examined has expressed his ignorance and has said that he does not remember when the building was completed. He also does not speak of the knowledge of the refusal to perform the contract.

(c) He admits that he has not issued any legal notice to defendant 2 to settle her account nor any public notice is issued.

(d) He further admits that if defendant 2 settles his wife's account, the property could be sold to the plaintiffs.

23. Learned Counsel Sri Shekhar Shetty has highlighted the fact that both the attesting witnesses to the agreement have been examined and in this regard placing reliance on *Fakhruddin v. State of Madhya Pradesh* AIR 1967 SC 1326 : 1967 Cri. L.J. 1197 he has submitted that when attesting witnesses are examined, no other evidence is necessary for proof of the valid execution of the document. Drawing the attention of the Court to Section 58 of the Indian Evidence Act, 1872, Counsel for the respondent-plaintiff submits that the facts admitted need not be proved. The developer has admitted the entire case of the plaintiffs and therefore question of proof of the agreement does not arise.

24. As regards Ex. P. 14, for proof of the same, the Bank Officer is examined as P.W. 2 and he has not been cross-examined. Therefore, Ex. P. 14 stands proved is what is submitted by the learned Counsel. He further submits that D.W. 1 in his evidence says that he is not aware of Ex. P. 14. A reported decision in *Vidhyadhar Vs. Manikrao and Another*, is relied on to convince the Court that adverse inference has to be drawn for not entering the witness-box. The conduct of defendant 1 is also commented upon particularly highlighting the fact that she has put the third defendant, her brother in possession of the property. Learned Counsel Sri Shekhar Shetty further refers to Explanation to Section 10 and the Explanation to Section 20 of the Specific Relief Act to support his contentions and urges that the Court below has rightly decreed the suit filed by the plaintiffs.

25. The legal representatives of respondent 3, the developer are represented by learned Counsel Smt. Indu and she has supported the case of the plaintiff. It is her contention that although, earlier, it was agreed between defendants 1 and 2 that after defraying the expenditure, out of the sale proceeds of the property after constructing 6 flats, each one of them should get 50% each, but latter, in lieu of this, parties (defendants 1 and 2) agreed that instead of 50% profit, the defendant 1 should be given one flat namely flat No. 3 in lieu of her claim and that admittedly flat No. 3 is already given to the possession of defendant 1. In that view of the matter, there was absolutely no claim whatsoever from defendant 1 against defendant 2. Had it been her case that there were any dues from defendant 2 to her, she would have issued any notice seeking payment of such dues from defendant 2 and therefore, it is contended by the learned

Counsel that refusal on the part of defendant 1 to execute the sale deed and her conduct in inducting defendant 3 into possession of the premises was unjustified, illegal and deserved to be deprecated. She has drawn support from the provisions of Order 41, Rule 33 of the CPC and has relied on the judgment of the Supreme Court in the case of K. Muthuswami Gounder Vs. N. Palaniappa Gounder, and has sought for a direction to order payment of the balance sale consideration to the L.Rs of defendant 2 (the developer).

26. Having regard to the respective contentions urged by the learned Counsels appearing for the parties, the points that arise for our consideration in this appeal are:

"(i) Whether the suit filed for specific performance of the agreement dated 21-10-1989 was barred by time?

(ii) Whether the judgment and decree passed by the Court below decreeing the suit for specific performance is vitiated being illegal or perverse warranting interference by this Court in the appellate jurisdiction?"

27. Point No. 1.--Article 54 of the Limitation Act is the relevant article applicable regarding the limitation to file suit for specific performance. It reads thus:

Description Period of Time from which period of Suit Limitation begins to run 54. For Three years The date fixed for the specific performance, or, if no such performance date is fixed, when the of a contract plaintiff has notice that performance is refused

28. The meaning of the expression "date fixed for the performance" has to be understood in the context of the agreement, the obligations undertaken by the respective parties in the agreement. Even if a date is fixed initially for the performance of the contract and if the performance itself is dependent on the discharge of several other obligations undertaken by the promisor himself what should happen is a question to be considered.

29. If in a given case, the promisor himself has not performed the obligations undertaken by him, so as to enable the specific enforcement of the agreement, is it open for him to contend that whether he performs his part or not and whether or not the agreement has become enforceable or not limitation starts once the date fixed is over. As has happened in this case, the promisor (vendor) has herself undertaken to put up the construction and complete the same within 90 days in all respects and execute the sale deed. If the construction is not completed, the question of the promisee enforcing specific performance of the contract does not arise. If the conduct of the parties reveal that the promisor took time to complete the construction, secure the occupancy certificate and also electricity, water and other necessary requirements at a later date, then it cannot be said that the time fixed (90 days) for performance of the contract would have the effect of setting the period of limitation to run. Limitation starts to run when the flat is ready, vacant possession is kept ready to be handed over to the

promisee and if despite the same the promisor fails to handover the same.

30. The promisor having committed default in not putting up the construction and keeping ready in all respects within 90 days, say that a compulsory cause of action had in fact arisen to the promisee after the lapse of 90 days when he did not complete the construction, to enforce the agreement. The agreement entered into is not for enforcing the construction of the building by the purchaser. The specific enforcement contemplated is the sale of a constructed flat. Therefore, until the construction is completed in all respects, as agreed, the promisor cannot be heard to say that the delay and default committed by him set the limitation to run for the purpose the vendee to initiate the suit for specific performance:

31. Looking from the other developments that have taken place even after the lapse of 90 days, it cannot be said in this case that the period of 90 days fixed was the date from which the limitation starts to run. The promisee who had availed the loan of Rs. 3,00,000/- from Canfin Homes Limited was ready with his money but the sale deed could not be executed as the building was not ready. The Canfin's loan sanctioned was cancelled as it was not availed within the period permitted. The plaintiff went on insisting for completing the building and for handing over the possession. The developer writes to the plaintiffs stating that possession certificate is obtained and other requirements are satisfied. Thereafter, the plaintiff applied for loan again and secures the loan. It is to be stated that obtaining loan was in itself one of the conditions as per the agreement of sale. The loan was sanctioned subject to the condition that the owner and the developer were to submit a letter to the Canfin Homes Limited confirming the existence and subsistence of the agreement of sale and that they had not entered into any other agreement with any other person. Defendants 1 and 2 have written a letter to the Bank stating that the agreement was still subsisting and that there was no other agreement with any other person. This conduct of the parties as reflected in the various correspondence exchanged between them and as also the Canfin Homes Limited would unmistakably show that the limitation did not start to run after the expiry of 90 days.

32. It is further clear from Ex. P. 14, the letter written by defendants 1 and 2 to Canfin Homes Limited that the agreement was kept alive and was subsisting. The defendants did not either refuse to execute the sale deed or exhibit any such conduct so as to create any doubt or suspicion in the mind of the plaintiffs that the defendants were denying the execution of the sale deed.

33. In the case of K. Venkoji Rao, this Court has held while dealing with the effect of the expression "date fixed for performance" as used in Article 54 of the Limitation Act that where the date is fixed for performance, irrespective of the question whether time is the essence of the contract or not, limitation would begin to run from the date fixed. But the expression "date fixed" will have to be understood in the context of the case and the conduct of the parties. If the time stipulated for performance is extended by conduct subsequently, then it cannot

be said that limitation starts to run from the date fixed.

34. The extension of time fixed for performance of the agreement though cannot be made unilaterally by the promisee, it could be the result of consensus as reflected in the transaction between the parties. The extension of time need not also be given in writing but may be proved even by leading oral evidence.

35. Useful reference can be made in this regard to the decision in Keshavlal Lallubhai Patel's case, wherein, dealing with Sections 63 and 29 of the Contract Act, 1872, pertaining to extension of time for performance of contract, the Apex Court has observed that both the promisor and the promisee must agree to extend time for performance of the contract. The agreement to extend time need not necessarily be reduced into writing. In some times, it may be proved by evidence of conduct. In Parvathamma's case, Division Bench of this Court has had an occasion to deal with the situation where the promisor had kept the agreement alive by mentioning the same in the Will executed. In that case, a period of one year was fixed for performing the agreement. However, the promisor did not execute the sale deed within the said period. He executed a Will and in the said Will he referred to the agreement for sale and stated that after receiving from the purchaser the balance amount sale has to be executed. Referring to the recitals in the Will, this Court held that the agreement was kept alive and the limitation did not start to run. In paragraph 10 of the said judgment, it is observed thus:

"Therefore it is contended that refusal on the part of the plaintiffs 2, 3 and defendant 2 to perform the agreement must be deemed to have been taken only on 15-10-1977 when the present suit is filed. It is not possible to accept this contention. No doubt, in the agreement the period of one year was fixed for performance but thereafter Ramarudraiah Shetty kept alive the agreement by mentioning the same in the Will and also gave liberty to the legal representatives to rescind the agreement by forfeiting a sum of Rs. 2,500/- in the event the 1st defendant failed to pay Rs. 13,000/- and have the sale deed executed".

36. In the instant case also, by their letter Ex. P. 14, the defendants 1 and 2 have made it clear that the agreement was kept alive. In this view of the matter, it has to be held that in the instant case, limitation did not start upon the expiry of 90 days from the date of the suit agreement. There was no question of the plaintiffs initiating the suit for specific performance seeking execution of the Registered Sale Deed of flat No. 4 as agreed until the flat was constructed and was ready for occupation in all respects. After the receipt of the letter dated 14-9-1993 vide Ex. P. 6 from the developer informing the plaintiffs that the flat was ready, plaintiffs have availed loan. Both defendants 1 and 2 have confirmed the subsistence of the agreement on 25-3-1995 vide Ex. P. 14. The suit is filed on 13-2-1997. Therefore, it is clear from the above facts and the discussion made that the suit is well-within time. The rulings relied on by the learned Counsel for the appellant in this regard are not relevant to the facts and circumstances involved in this case.

37. Point No. 2.--The next contention urged by the appellant is that the suit agreement is a created and a concocted one and so also Ex. P. 14. Trial Court has negated the contentions of defendant 1 and has held that the agreement is proved. Though defendant 1 denied the execution of the agreement, she has not stepped into the witness-box to deny her signature or to narrate what actually happened at that time. The plaintiffs on their part have examined the attesting witnesses who have corroborated the evidence of P.W. 1. The Trial Court has compared the signatures on the disputed documents with that of the admitted signatures and has found that there is absolutely no reason to doubt the same or to infer any concoction or creation. As regards Ex. P. 14 the letter that is written by both defendants 1 and 2, addressed to the officer of the Canfins, it is seen that the Officer of the Canfin Homes Limited is examined and he has clearly stated about the receipt of the said letter. This witness is not cross-examined. Therefore, there is absolutely no error or illegality in the finding recorded by the Trial Court holding that the suit agreement stood proved and as also the letter/communication Ex. P. 14 addressed to the Bank admitting the existence and subsistence of the valid agreement between defendants 1 and 2 and the plaintiffs.

38. The next contention urged by Sri Chidanandaiah is that occupancy certificate was given as back as in the year 1992 and the communication was sent by the developer to the plaintiff during the year 1993 followed by the letter Ex. P. 14, dated 25-3-1995 and even assuming that the suit was filed within limitation after the premises was kept ready in all respects for occupation, the suit was not brought soon thereafter and there was considerable delay on the part of the plaintiffs. This delay on the part of the plaintiff, having regard to the fact that the property in question is situated in Bangalore City and is enjoying steep rise in its value quickly and rapidly over a period of time disentitles them for a decree for specific performance. He submits that the discretion exercised by the Court in this regard is not judicious. It is his submission that the value of the property is nearly Rs. 20 lakhs whereas the same is sold at Rs. 3,90,000/-.

39. It is to be seen here that there are absolutely no pleadings in this regard. Apart from the same, the defendant 1-owner under the agreement between himself and the 2nd defendant-developer has admittedly taken possession of one flat bearing 3 in consideration of the understanding reached between them. The agreement entered into between them inter se would disclose that the developer is given rights to deal with the other flats with the third parties. If at all, it was the case of defendant 1 that there was any misunderstanding regarding the sharing of the profits realised out of the joint venture they had entered into, it was open for defendant 1 to issue notice laying any such claim against defendant 2 and produce any material in this regard before the Court below. On the other hand, the husband of defendant 1 has admitted in his evidence that no such notice or claim was made against defendant 2. The evidence of the D.W. 1 would further reveal that defendant 1 had no objection for the sale of the property in question in favour of the plaintiff provided the dues of the 1st defendant were satisfied. What are the dues which the 2nd defendant owed to the 1st defendant

and how they could be interlinked with the performance of the obligations arising under suit agreement executed in favour of the plaintiff is nowhere pleaded nor spoken to by defendant 1.

40. The conduct of the 1st defendant-owner of the premises in not entering the witness-box and in not disclosing the true state of affairs coupled with the additional fact that she has gone on to deny the very agreement and the subsequent correspondence made by her along with defendant 2 with Canfin Homes Limited would show that she intends to defeat the legitimate rights of the plaintiffs under the agreement. Though it is stated, on her behalf that a reply was submitted by her to the legal notice, for reasons best known to her, copy of the said reply is not produced before the Court. Had it been her case that she was not a party to the suit transaction, she would have definitely denied the same in her reply given to the legal notice. The fact that the said reply is not produced lends credence to a reasonable suspicion about the version of defendant 1. In addition to this, it is seen that defendant 1 has forcibly taken possession of flat No. 4 by breaking open the lock and has inducted her brother the 3rd defendant. This has led to a complaint being lodged by defendant 2. In this background, the Court below has directed, while decreeing the suit for specific performance to put the plaintiffs in possession of the property and defendant 3 has also suffered the said direction. These facts would unmistakably show that defendant 1 and her brother defendant 3 have tried to defeat the rights of the plaintiffs and have put up unnecessary hurdles and obstacles in their way in getting the document registered. Learned Counsel for the respondent-Sri Shekhar Shetty has rightly brought to the notice of the Court explanation to Section 10 and the explanations to Section 20 of the Specific Relief Act to contend that discretion is rightly exercised by the Court below keeping in mind the statutory principles while decreeing the suit. We are in full agreement with the reasons assigned and the conclusion arrived at by the Court below in the matter of exercise of the discretion and in decreeing the suit for specific performance.

41. Finally, coming to the contention urged by the learned Counsel Smt. Indu who appears for the legal representatives of respondent 3-developer, it is to be stated that the subject-matter of these proceedings pertains to the specific performance of the agreement of sale and the Court below has rejected the plea of the 2nd defendant-developer to direct the plaintiffs to pay the balance sale consideration to the L.Rs of the developer. It is her case that flat No. 3 is admittedly handed over to the owner and there are absolutely no dues owed by defendant 2 to defendant 1. In these circumstances, she contends that this Court shall have to modify the judgment and decree passed by the Court below and issue a direction in exercise of the powers under Order 41, Rule 33 to direct the plaintiffs to pay the balance sale consideration in favour of the legal representatives of defendant 2. It is to be seen here that no issue is framed with regard to this aspect of the matter. The parties have not gone to trial on this question. In fact, the scope of the suit is confined to the question of specific

performance of the suit agreement. Having regard to the pleadings, the evidence adduced and the issue raised, in our opinion, the Court below has rightly not gone into this aspect of the matter and has reserved liberty to the developer-defendant 2 to take such appropriate legal course that is permissible for her in this regard. Hence, we are not inclined to disturb the said findings.

42. In the result and for the foregoing reasons, we pass the following.--

ORDER

The appeal is dismissed. In the circumstances of the case, the parties to bear their respective costs.