
(2003) 02 BOM CK 0117

In the Bombay High Court

Case No : Notice of Motion No's. 361 and 362 of 2003 in Suit No's. 425 and 426 of 2003

Volition Investment Pvt. Ltd.

APPELLANT

Vs

Mrs. Madhuri Jitendra Mashroo and etc.

RESPONDENT

Date of Decision : 13-02-2003

Acts Referred:

Evidence Act, 1872 — Section 115
Specific Relief Act, 1963 — Section 20, 37
Transfer of Property Act, 1882 — Section 54

Citation : AIR 2003 Bom 360 : (2003) 5 BomCR 262

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : Janak Dwarkadas, instructed by S. Ashwinikumar and Co, for the Appellant; P.K. Samdani, instructed by Haridas and Co., for the Respondent

Judgement

R.J. Kochar, J.—The plaintiff, a company incorporated under the provisions of the Companies Act, 1956 has filed the present suit for specific performance of the agreement dated 24th July, 2002, alternatively and/or for damages to the tune of Rs. 15 Crores as set out in the particulars of claim with interest. The plaintiffs have prayed for a declaration that the termination of the aforesaid agreement viz., the Memorandum of Understanding (MOU) dated 24th July, 2002 is illegal, void and contrary to the terms of the contract and law. The plaintiffs have further sought declaration that the said agreement is valid, subsisting and binding on the defendants. There are other incidental prayers including the interim reliefs that have been prayed for by the plaintiffs,

2. In the present notice of motion, the plaintiffs have prayed for appointment of Court Receiver for the suit property and also an injunction against the defendants from creating any third party interest of any nature in the suit property and also injunction against the defendants from transferring any tenancy right or creating any new tenancy in respect of the existing tenants as set out in Exh. C to the plaint. An affidavit of the Director of the plaintiffs Shri H.

N. Shah is filed in support. The defendant has filed affidavit in reply dated 4th February, 2003.

3. I may mention that I have proceeded to dispose of the notice of motion finally realising the tendency of the matters consuming equal time even for ad interim orders. In the beginning, when I asked Shri Samdani the learned counsel for the defendant, whether he would like to file an affidavit in reply, he submitted that he would proceed on the basis of denials. He further submitted that he would convince the Court on the basis of the pleadings and documents on record filed by the plaintiffs that their suit is not maintainable and that no interim reliefs can be granted in such suits. I was inclined to grant some time to the defendant to file her affidavit in reply but Shri Samdani proceeded on the basis of denials. During the course of hearing Shri Samdani has filed the affidavit in reply dated 4th February, 2003 of the defendant. I may, however, further mention that Shri Samdani has valiantly made efforts to make his submissions against the plaintiffs from the record and from the various documents which he cited across the bar.

4. I have heard both the learned counsel at a length and both of them have extensively taken me through the proceedings and the case law.

5. The defendant as the owner of the suit property has entered into an MOU on 24th July, 2002 with the plaintiff who are described as the "developer" in the said MOU, on the stipulated terms and conditions mentioned in the said MOU. It appears that the plaintiffs had agreed with the owner-defendant to develop the suit property for the consideration as set out in the MOU which was required to be paid by the plaintiffs to the defendant in two installments of Rs. 10,50,000/- and Rs. 39,50,000/-. There are other terms and conditions in respect of construction of the building and the T.D.R. and also permanent alternative accommodation to be given to the old tenants/occupants and also the right to the plaintiffs to sell, assign, transfer, let, lease, charge, mortgage the balance construction of the shops, flats etc. The total consideration agreed was Rs. 1 Crore payable by the plaintiffs to the defendant. The plaintiffs were also obliged to give to the defendant free of cost tenement of an area equal to the premises presently in occupation and possession of the defendant. It was further agreed between them that the defendant owner shall within six months from the date of the MOU and prior to payment of consideration as per Clause 4(c) procure consent agreements from the tenants/occupants to surrender the tenancy, occupancy within six months and also for alternative permanent accommodation in the newly constructed building. The defendant was obliged under the M.O.U. to provide for accommodation of an area equivalent to the area in their respective occupation and possession subject to a minimum of 225 sft. carpet area under the MHADA scheme. It appears and it is an admitted fact that the plaintiffs paid to the defendants the first installment of Rs. 10,50,000/-. According to the conditions stipulated the balance payment was to be made was Rs. 39,50,000/- on the owner's procuring consent of all the tenants for vacating the premises in their respective possession and within fifteen days from the date

of the public notice. The balance payment of Rs. 50 lakhs was to be paid against all the tenants/occupants executing the necessary agreement with the owner/developer to vacate the premises in their occupation. According to the plaintiffs, after execution of the MOU they had taken all the steps for development of the property. According to the plaintiffs, the defendant was not ready and willing to perform her part of the contract under the MOU. According to the plaintiffs, the first step after receipt of Rs. 10,50,000/- from the plaintiffs, the defendant ought to have approached the tenants/occupants to obtain consent letters from them as provided under the MOU. According to the plaintiffs, the defendants did nothing towards the said direction to comply with the said mandatory term prescribed in the MOU. According to the plaintiffs, the defendant did not even approach the tenants requiring them to furnish their consent letters, and agreements from the tenants/occupants and enjoyed the amount of Rs. 10,50,000/-. The MOU provided six months period for completion of the terms. Since the defendant did not take any steps, the plaintiffs addressed a letter dated 23rd January, 2003 to the learned Advocate for the defendant forwarding to cheque for Rs. 39,50,000/- in her favour and requested him to hand over the said cheque to the defendant after the defendant's obtaining and furnishing to the plaintiffs the consent letters from the tenants/occupants for vacating the premises in their respective possession. Finally, however, the plaintiffs received a letter from the defendant's advocate dated 25th January, 2003 wherein it was recorded that the tenants were not responding satisfactorily and were not agreeable for permanent alternative accommodation and therefore she terminated the MOU. The defendant returned to the plaintiffs the cheque for Rs. 39,50,000/- and Rs. 10 lakhs paid by the plaintiffs as the earnest money under the MOU. The act of the defendant to terminate the MOU by the said letter dated 25th January, 2003 is under challenge in this suit on the grounds which are mainly enumerated in para 17 of the plaint and the plaintiffs have sought specific performance of the MOU at the first instance and for Rs. 15 Crores towards damaged in the alternative to the relief of specific performance of the MOU.

6. Shri Janak Dwarkadas, the learned Senior Counsel has very strongly urged for interim reliefs in the present notice of motion. He has taken me through the entire proceedings and has also placed his interpretation on the several Clauses of the MOU to contend that it was not a mere agreement for development but it was an outright sale of the property to the plaintiffs. In fact, submits the learned counsel, that it was an agreement for sale of the property on the terms and conditions mentioned therein, though the nomenclature given to the plaintiffs in the said MOU is that of developer. Shri Dwarkadas urged that by properly construing and interpreting the MOU, the intention of the parties would become clear that it was an agreement for sale of the property for a consideration of Rs. 1 Crore payable by the plaintiffs in three installments of Rs. 10,50,000/-, Rs. 39,50,000/- and Rs. 50 lakhs. The other part of the consideration was the TDR and the right to sell the additional flats at to the price that would be determined by the plaintiffs. In the bargain, the defendant also received in addition to the

aforesaid amount of Rs. 1 Crore, a residential flat of the equal area on ownership basis. Considering the entire MOU, which is for the sale of immovable property for which ordinarily time is not of essence in the contract, as has been laid down by the Supreme Court in various judgments, unless the parties specifically stipulated the time being the essence of contract in the case of immovable properties, submits Shri Dwarkadas. Shri Dwarkadas has cited the following judgments in support of his case:--

- (i) Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar,
- (ii) Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Another,
- (iii) Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.,
- (iv) K.S. Vidyanadam and Others Vs. Vairavan,

Shri Dwarkadas, therefore, has prayed for the grant of interim reliefs.

7. On the other hand Shri Samdani, the learned counsel for the defendant vehemently submitted that though he could proceed on the basis of bare denials of the averments made by the plaintiffs, he has put on record an affidavit in reply to the motion on the next day of the hearing. According to the learned counsel, the MOU was only for development of the property and that there was no actual sale and purchase of the land or the structure. The defendant had only given to the plaintiffs right to develop the property on certain terms and conditions set down in the MOU. In addition to a sum of Rs. 1 Crore as consideration, the plaintiffs had agreed to provide for residential accommodation to the tenants/occupants and also to the defendant on ownership basis without any cost. In lieu of this consideration, the plaintiffs were given the right to develop the property and consume the additional F.S.I. in accordance with the D.C. Rules and sell the additional flats and retain the sale proceeds for the plaintiffs themselves. Shri Samdani submits that such a contract cannot be directed to be specifically enforced under the law. He, therefore, submits that this Court should not pass any interim orders in favour of the plaintiffs. Shri Samdani added that if the plaintiffs finally succeed in the trial, they will get compensated by the Court by award of suitable amount as damages. In fact, there is no transaction of sale of the immovable property or there is no promise to sell the same by the defendant to the plaintiffs. The MOU was only an agreement for development and nothing can be inferred from the clauses of the MOU. Shri Samdani submits that such valuable right cannot be inferred from the documents and that we have to specifically find out as to what were the intentions of the parties reflected in the MOU. Shri Samdani further submits that the nomenclature used by the parties also acquire significance while interpreting the agreement. They are described as the "owner" and "the developer". In the entire body of the MOU, there is no Indication of sale of the immovable property to the plaintiffs. It was only the right to develop which was given to the plaintiffs, says the learned counsel. Shri Samdani has emphasised Clause 7 of the MOU and has submitted that since this crucial part of the MOU was not complied with, the

agreement come to an end. Since the defendant could not obtain the consent of the tenants/occupants, the MOU could not materialise within the stipulated period of six months and, therefore, the MOU has automatically come to an end and, therefore, there is no question of specific performance of such a contract. Shri Samdani pointed out that the plaintiffs were obliged to make payment of the balance amount of Rs. 39,50,000/- if they wanted the MOU to be continued. Since the plaintiffs did not make unconditional offer of Rs. 39,50,000/- on the expiry of the MOU to keep the MOU alive, it has come to an end by efflux of six months and that that was the intention of the parties, submits the learned counsel. Shri Samdani further submitted that it was clear from the MOU that if the defendant failed to obtain the consent from the tenants/occupants to agree to accept alternative accommodation within the stipulated period of six months, it was clearly understood that the MOU would come to an end and the defendant would become liable to refund the entire amount of earnest money and that there was no clause of forfeiture in the MOU. In any case, according to Shri Samdani, if the plaintiffs wanted the MOU to survive, they ought to have unconditionally offered the balance amount of Rs. 39,50,000/- irrespective of defendant getting consent or not from the tenants/occupants. Shri Samdani attacked the plaintiffs that though they had made the offer of Rs. 39,50,000/- on the last date it was a conditional offer that the defendant should obtain such consent as prescribed in the MOU. According to him, the conditional payment is no payment at all u/s 38 of the Indian Contracts Act. From 24th July, 2002 till 23rd January, 2003 the plaintiffs did not take any steps towards the development of the property. At the fag end of the expiry of the six months" period, the plaintiffs wrote a letter to the BMC on 6th January, 2003 and also gave a public notice on 18th January 2003. Even in the public notice, the plaintiffs have not uttered a word that they have purchased the property from the defendants. Shri Samdani further submits that the principle of time not of essence of contract in case of immovable property cannot be applied to the present case as it was not a transaction of sale of the immovable property. Shri Samdani submitted that the development agreement cannot be enforced by way of specific performance. Shri Samdani further submits that the MOU was not admissible in evidence as it was not properly and duly stamped as per the provisions of the Bombay Stamp Act. Shri Samdani has cited the following judgments in support of his contention.

(i) AIR 1922 P C 347, Narain Das v. Abinash Chandar;

(ii) AIR 1954 Mys 168 , Bank of Mysore Ltd. v. B. D. Naidu;

(iii) China Cotton Exporters Vs. Beharilal Ramcharan Cotton Mills Ltd.,

The learned counsel, therefore, has prayed for dismissal of the notice of motion.

8. In reply, Shri Dwarkadas submitted that the judgments cited by Shri Samdani were not applicable as the facts in all the cases were totally different. He also pointed out that in Clause 3(26) of the General Clauses Act, immovable property is defined as "to include interest in the immovable property" and therefore, the

MOU in fact was in respect of immovable property. He also pointed out that the plaintiffs were given right to collect rent from the defendants which according to the learned Counsel is a factor indicative of sale of the immovable property and putting the plaintiffs in the shoes of the defendant as a landlord. He also pointed out Section 55(6)(b) of the Transfer of Property Act in support of his contentions. Shri Dwarkadas submitted that at the stage of the decision at the prima facie stage, the admissibility of the documents need not be considered and if at the time of trial the deficiency of payment of stamp fees is pointed out, the party can always make payment of the deficient stamp fees along with penalty as provided for. Shri Dwarkadas submitted that all these circumstances would arrive at the final hearing stage.

9. The moot question for my consideration from the pleadings and the submissions is what is the nature of the MOU? Is it an agreement for sale of the immovable property or an agreement for development of the same? It is a fact that the MOU is silent in that respect and there is no specific use of language of sale and purchase of the property in the MOU. However, the real intentions of the parties can be gathered from the terms and conditions of the MOU. The clauses of the MOU speak out the intentions though the parties might have chosen to keep quiet literally. We, therefore, have to undertake the surgical performance of dissection of the MOU and analyse the several clauses of the same to construe its real character. Ex facie one fact is clear that it is not an agreement for development simpliciter. As it is not a pure and simple transaction of requiring the plaintiffs to develop the property for some consideration to be paid by the defendant and get back the developed property. And, therefore, this exercise of construction of the MOU is to be undertaken and performed very carefully and skillfully to lift the veil to pierce through the MOU to see the real intentions of the parties underneath the MOU.

10. There is little doubt or dispute that both the parties were dealing with the immovable property and interest in the immovable property. This intention of the parties appears crystal clear from the MOU. According to Shri Dwarkadas, the learned Counsel for the plaintiffs it was a transaction of sale of the Immovable property while according to Shri Samdani, the learned Counsel for the defendant, it was an agreement for development of the said property.

11. In ordinary and common parlance as understood a transaction for sale is an exchange of a commodity or service for cash or kind. The vendor or the seller barter away his property, movable or immovable, for valuable consideration in cash or in kind paid or payable by the buyer. Under the MOU under question, the plaintiffs have paid to the defendant a price in part of the total price agreed between the parties. The total price agreed was Rs. 1 Crore for the property. In return the plaintiffs were promised by the defendant-owner the rights and Interest in the property to be developed by them and to be sold by them in the open market the additionally constructed flats on permissible F.S.I. and to earn or retain the whole amount with them. They were also given all the rights of the

landlord qua the tenants/occupants of the suit premises. They were virtually put in the place of the owner-defendant of the building while dealing with the tenants in every respect as provided in the MOU, including the right to collect rent from the tenants-occupants. The plaintiffs have virtually stepped in the shoes of the landlord of the buildings, i.e. the defendant, under the MOU. Such a role cannot be assigned to a developer -- simplicitor of the structure. He will merely develop the building as per agreement and will get out after getting his price for the work. He will render his services and get his agreed amount and nothing more in the bargain. The tenants and their rights and liabilities will not be his problems. He will not be required to pay any amount to the owner of the building or to provide any permanent accommodation to the owner and the tenants in addition to the work of the development to be done by him for the owner, In the present case, the plaintiffs have to pay a sum of Rs. 1 Crore in addition to provision of permanent alternative accommodation for the defendant and her tenants and also do the work of development of the structure to earn out of the sale of the additionally developed area. It is, therefore, quite clear that the plaintiffs are to pay to the defendant a sum of Rs. 1 crore as consideration in cash and also to provide for her and her tenants permanent accommodation in return of the suit property with all the other appertaining rights and interest as also the obligations of the ownership of the property. The plaintiffs rights are not restricted to get only a sum of consideration out of the development but they actually step in the shoes of the owner of the property in every respect after they fulfill their obligation of payment of the agreed amount in cash and the consideration in kind in the form of provisions" of alternative permanent accommodation to the owner and to the tenants. In the bargain, he gets the right to sell the developed flats and also rent from the tenants and all other rights of the landlord-owner. Such a right never accrues to a developer simplicitor unless the whole property gets vested in the developer. In that case the developer ceases to be a developer as ordinarily understood. Ordinarily, it is the right of the owner of the property to sell or to deal with the property as he likes. No developer gets a right to sell or deal with the property unless he is given such right specifically and specially. All these ingredients of sale are present in the MOU. The intention of transfer of the Interest in the immovable property can be seen from the MOU if we pierce the curtain of the transaction. From the following terms mentioned in the MOU the real intention of the parties become further clear and visible.

i) The property is said to be free from all encumbrances and claims and that the owner is obliged at her own cost to obtain registration of the conveyance and necessary mutation in the records of the Collector within one month from the date of the MOU.

ii) The plaintiffs are allowed to take search etc. of the records and if they find that the property had encumbrances and claims, the same are to be removed by the owner subject to the existing tenants and occupants of the building;

iii) The plaintiffs are permitted to develop the property even by including

permissible T.D.R. and the plaintiffs are given right to sell, assign, transfer, let, lease, charge, mortgage the balance construction, shops, flats, garages, parking spaces as the case may be. This right given to the plaintiffs certainly is indicative of the fact that the plaintiffs are put in the shoes of the owner and it is not only an agreement for development of the property;

iv) The owner is obliged to obtain consent of all the tenants/occupants for vacating the premises in their respective possession and to execute necessary agreements to that effect with the owner-developer to vacate the premises in their occupation.

v) As a part of consideration, the plaintiffs have agreed to provide for permanent residential tenement of an area equal to that of the premises in the present occupation and possession of the owner and also the tenants/occupants;

vi) The plaintiffs were obliged to make payment per tenant/occupant an amount of Rs. 15,000/- to enable them to acquire transit accommodation;

vii) The plaintiffs further have right to receive the tenants from the tenants who were desirous of surrendering the tenancy and vacating the premises for monetary consideration at the rate of Rs. 5,500/- per sft. of the carpet area. The excess amount required is to be borne and paid by the defendant owner proportionately;

viii) The plaintiffs were obliged to take care of the requirements under various provisions of the law (Clause 12) of the MOU including the mutation entries in the revenue record in favour of the plaintiffs. There is no question of the developer getting the mutation entries in the revenue records to be made in his favour unless he enters in the immovable property as an owner or in other capacity as such.

ix) The plaintiffs were given full right to sell the additional construction on ownership basis to third parties and to retain the amounts for themselves. The plaintiffs and its directors. Executives have been given power of attorney by the defendant for carrying out smooth and speedy development of the proposed redevelopment of the property;

x) The plaintiffs have been given exclusive right to collect rent and permitted increases from the tenant;

xi) After demolition of the existing structure, the plaintiffs were entitled to salvage;

xii) The defendant owner has been prohibited from accepting, surrendering and/or transferring of tenancy as this right has been vested in the plaintiffs;

xiii) After completing of the development, it is the plaintiffs who are given right of conveyance of the property in favour of the society;

11A. From the aforesaid terms and conditions in the MOU and from the tenor of

the agreement between the parties, on closer scrutiny it becomes clear that the owner-defendant had intended to sell the property or at least the whole interest therein to the plaintiffs. It was not a simple agreement for development of the property. Had it been so, we must remember that the plaintiffs would not have been vested with the right of conveyance of the property to the society of the tenants/occupants and new buyers. Such rights would otherwise be exercised by the owner of the property. In the present case, the owner has transferred almost all the rights of the ownership of the property to the plaintiffs for the stipulated consideration. Prima facie, therefore, the plaintiffs have a very strong case in their favour that the MOU is not a mere agreement for development but is an agreement for sale of the whole interest in the immovable property.

12. Having held that it is an agreement for sale of the interest in the immovable property, the time as the essence of the contract in such transaction cannot be held to vitiate the contract if it is not performed in the given time frame. Clause 7 of the MOU further strengthens this interpretation that the parties never intended to lay down the term of the time as essence of the binding contract. Unless and until the owner was able to obtain the agreements from the tenants/occupants for vacating the tenants and for shifting them to the transit accommodation, no further steps for completion of the transaction could be taken. The period of six months is generally stated. However, Clause 7 further provides for whole payment to be made by the plaintiffs to the defendant and there is no stipulation in the said clause as to when the defendant would obtain consent agreements from the tenants. It was left to the defendant and the tenants, even after received of Rs. 50 lakhs from the plaintiffs. It is well established in the judgments cited hereinabove that the time is not held to be essence of contract in the transaction of the immovable properties.

13. In the case of Gomathinayagam Pillai and Others Vs. Pallanishwami Nadar, the Supreme Court in para 4 has observed as under :--

(4) The facts which have a material bearing on the first question have already been set out. Section 55 of the Contract Act which deals with the consequences of failure to perform an executory contract at or before the stipulated time provides by the first paragraph :--

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promises if the intention of the parties was that time should be of the essence of the contract."

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in

language which is unmistakable; it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding, default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In *Jamshed Kodaram Irani v. Burjorji Dhunjibhai*, ILR 40 Bom 29 : AIR 1915 PC 83 the Judicial Committee of the Privy Council observed that the principle underlying Section 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed :--

"Under the law equity, which governs the rights of the parties in cases of specific looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time."

In the case of *Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Another*, . The Supreme Court reiterates the normal presumption that the time was not of the essence of the contract relating to the sale of immovable property. The Supreme Court has observed in para 8 as under :--

".....It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract (vide *Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar*, . It may also be mentioned that the language used in the agreement is not such as to indicate, in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract."

In the present case, there are no circumstances which can be said to be sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract. Again in the case of *Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.*, , Supreme Court in paras 22 and 24 has repeated the proposition of law as under :--

"22..... The law is well settled that in transactions of sale of immovable properties, time is not the essence of the Contract."

24. From an analysis of the above case law, it is clear that in the case of sale of

immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are :--

i) from the express terms of the contract;

ii) from the nature of the property; and

iii) from the surrounding circumstances, for example; the object of making the contract."

In the case of K.S. Vidyanadam and Others Vs. Vairavan, , in para 11, considering the fluctuation in the prices of the real estate, particularly in the metropolitan cities and in the urban areas, the Supreme Court has toned down the rigor of the normal rule in the respect of the immovable property contracts but has not done away or varied the normal presumption laid down earlier, it is a caution to consider the circumstances in the developing context. The relevant portion of Para 11 reads as under :--

"11..... Indeed, we are inclined to think that the rigor of the rule evolved by Courts that time is not of the essence of the contract in the case of immovable properties -- evolved in times when prices and values were stable and inflation was unknown -- requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. Learned Counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its discretion, the Court should also bear in mind that when the parties prescribe certain time limit(s) for taking steps by one or the other party, it must have some significance and that the said time limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties)."

There is hardly any circumstance unmistakably shown from the MOU to depart from the above well established law that the time was not the essence of the contract, it is to the contrary which unmistakably suggests that the time was not the essence of the contract under the MOU. Everything was dependent upon the sweet will of the tenants/occupants to enter into a consent agreements with the defendant landlord as the tenants were not bound by the MOU as such. It was for the defendant landlord to persuade, to coax, to prevail upon them to sign such an agreement. Practically even one obstinate tenant could be sufficient to stall

the whole project. Though, the period of six months was given to the defendant landlord to get such agreements from the tenants, she appears to have nothing in that direction. She had in purse an amount of Rs. 10.50 lakhs for a period of six months. It was her obligation to fulfill that crucial part of the MOU without which nothing could materialise. The whole blame would be at her doorstep and she cannot be allowed to take advantage of her own wrongful conduct of breach of the MOU. It was she who threatened to kill the MOU if she were not to be paid the further sum of Rs. 39.50 lakhs to keep the MOU alive. She is, therefore, bound to perform her part of the MOU.

14. It is, therefore, not possible for me to agree with the submissions of Shri Samdani the learned Counsel for the defendant that since the plaintiffs had offered payment of Rs. 39.50 lakhs with a condition that the defendant-owner should obtain consent agreement from the tenants and, therefore, Clause 7 of the MOU came into operation to terminate the said MOU. According to Shri Samdani, the plaintiffs ought to have made payment of Rs. 39.50 lakhs only with a view to keep the MOU alive. This submission sounds rather strange. On the one hand the defendant has retained an amount of Rs. 10.50 lakhs and on the other hand the defendant wants the large amount of Rs. 39.50 lakhs without any condition and without fulfilling the obligation in the MOU in respect of the consent agreement from the tenants to get the tenants vacated for starting development of the structure. This has been a condition in the MOU and, therefore, it cannot be said that the plaintiffs had made a conditional offer that the defendant will obtain consent agreement from the tenants and get the tenants vacated as set out in the MOU.

15. Since the plaintiffs have offered the amount as stipulated in the MOU, Clause 7 cannot be said to have come into operation to terminate the MOU. I have already held that the MOU was for sale and transfer of interest in the immovable property under the MOU and, therefore, the principle of time is not essence of the contract in the present case of the transaction of immovable property. Shri Dwarkadas is right in his submission that if the MOU is not duly stamped and if there is deficiency that can always be fulfilled after payment of penalty at the time of trial as per the order passed by the Court. According to Shri Samdani the MOU is a commercial document and that it should be interpreted commercially. Even Shri Dwarkadas made the same submission. In my opinion, I have interpreted the MOU commercially. The commercial, moral or mercantile ethic is certainly not to breach the agreement to retain a large amount of Rs. 10.50 lakhs for doing nothing as contemplated in the MOU and thereafter again expect Rs. 39.50 lakhs without any commitment to perform the terms in the MOU. The plaintiffs even then made full payment of Rs. 39.50 lakhs but with a condition which was already incorporated in the MOU and no other new condition was attached to fall within the trap of Section 38 of the Indian Contracts Act. The commercial moral would have made the defendant to act as per the MOU and make all the efforts to get consent letters from the tenants failing which she would have requested the plaintiffs to bear with her for some more time.

Instead, she contends that under Clause 7 the MOU has come to end after using Rs. 10.50 lakhs for six months and she further expects the plaintiffs to pay Rs. 39.50 lakhs so that the death of the MOU can be put off without any assurance in return. This is no commercial interpretation of the commercial document in the world of commerce which certainly is not devoid of commercial ethics. The defendant is bound to perform the contract unless the plaintiffs desire to avoid it.

16. The plaintiffs have made out a very strong prima facie case for the interim reliefs in their favour. The notice of motion, therefore, is made absolute in terms of prayer Clauses (a), (b) and (e).

17. Liberty to the defendant to apply for modification of the order provided she gets the consent agreements from the tenants/occupants as per the MOU and she communicates the same to the plaintiffs. On receipt of such communication and verification and satisfaction, the plaintiffs shall promptly deposit Rs. 50 lakhs with the defendant and shall make further movements in the MOU.

18. Application for stay is refused.