Rathnavathi & Anr vs Kavita Ganashamdas on 29 October, 2014

Equivalent citations: 2014 AIR SCW 6288, 2015 (5) SCC 223, 2015 (1) AIR BOM R 60, 2015 (1) AIR KANT HCR 421, (2015) 1 CIVILCOURTC 164, (2015) 1 ANDHLD 115, (2015) 1 ICC 770, (2014) 12 SCALE 386, (2015) 1 WLC(SC)CVL 52, (2015) 1 JLJR 16, (2015) 1 MAD LW 24, (2014) 2 CLR 1107 (SC), (2015) 1 CAL HN 182, (2015) 4 CIVLJ 176, (2014) 2 LANDLR 66, (2015) 1 PAT LJR 219, (2014) 4 RECCIVR 904, (2015) 1 JCR 286 (SC), (2015) 146 ALLINDCAS 202 (SC), AIR 2015 SC (CIV) 1

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Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELALTE JURISDICTION

CIVIL APPEAL Nos. 9949-9950 OF 2014
(Arising out of SLP (C) Nos.35800-35801 of 2011)

Rathnavathi & Another Appellant(s)

VERSUS

Kavita Ganashamdas Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1. Leave granted.

2. The plaintiff filed two suits, one for specific performance of agreement and other for grant of permanent injunction in relation to the suit house. The trial court vide common judgment and decree dated 16.10.2001 dismissed both the suits. The first appellate court, i.e., the High Court, in appeal, by impugned judgment and decree dated 08.09.2011 reversed the judgment and decree of the trial court and decreed both the suits in appeal, against the defendants. Being aggrieved by the

judgment and decree of the High Court, Defendants 1 and 3 have approached this Court in the instant civil appeals.

3. The question arises for consideration in these appeals is whether the High Court was justified in allowing the first appeals preferred by the plaintiff, resulting in decreeing the two civil suits against defendants in relation to suit house?

4. In order to appreciate the controversy involved in the civil suits, and now in these appeals, it is necessary to state the relevant facts.

5. For the sake of convenience, description of parties herein is taken from Original Suit No.223/2000.

6. Defendant no.2 is the original owner of the suit house and defendant no.1 is the subsequent purchaser of the suit house from defendant no.2.

7. The dispute relates to a dwelling house bearing no. 351 Block no.11, Matadahalli Extension, now known as R.T. Nagar Bangalore (hereinafter referred to as " the suit house ").

8. The suit house was purchased by defendant no. 2 from Bangalore Development Authority (in short "BDA") in a scheme. On 15.02.1989, Defendant no. 2 entered into an agreement (Annexure-P-1) with plaintiff for sale of suit house at a total consideration of Rs. 3,50,000/-. In terms of clause 2 of the agreement, the plaintiff paid a sum of Rs. 50,000/- as advance towards sale consideration. These facts are not in dispute.

9. On 07.01.2000, the plaintiff filed a civil suit being OS No. 223/2000, initially against 3 defendants for seeking permanent injunction restraining the defendants jointly and severally from interfering in plaintiff's possession over the suit house. In substance, case of the plaintiff was that she entered into an agreement on 15.02.1989 with defendant no. 2 to purchase the suit house for Rs. 3,50,000/- and paid a sum of Rs. 50,000/- to defendant no. 2 by way of advance towards the sale consideration. Later, the plaintiff further paid the balance consideration of Rs. 3 Lacs towards the sale price and obtained receipts acknowledging the payment so made. It was alleged that the plaintiff was accordingly placed in actual physical possession of the suit house and since then she has been in possession of the suit house. It was alleged that she also made some improvements therein by spending money and is paying electricity and water charges etc. It was further alleged that the plaintiff was and has always been ready and willing to perform her part of the agreement to get the sale deed executed in her favour after having performed her part of the contract. However, defendant no. 2, for the reasons best known to her, did not execute the sale deed despite having received the full sale consideration from the plaintiff. It was alleged that defendant no. 1, who is a total stranger to the suit house and having no right, title and interest in the suit house, on 2.1.2000 visited the suit house along with defendant no. 2 and some other unwanted elements and threatened the plaintiff to dispossess her from the suit house. It was also alleged that on 8.1.2000, defendant nos. 1 and 2 again visited and attempted to assault the plaintiff and unsuccessfully attempted to commit trespass in the suit house.

10. On seeing the hostile attitude of defendant nos. 1 and 2 and their associates, the plaintiff immediately lodged a complaint in the concerned police station. Since police authorities did not take any action, which was required of, the plaintiff filed the aforesaid civil suit for permanent injunction restraining the defendants from interfering in her peaceful possession over the suit house. It was submitted that the plaintiff has a prima facie case, so also the balance of convenience and irreparable loss in her favour, which entitles her to claim permanent injunction against the defendants in relation to the suit house. The plaintiff also averred that she reserved her right to file a suit for specific performance of agreement against the defendants.

11. The aforesaid suit was contested by defendant nos. 1 and 2. While admitting the ownership of defendant no. 2 over the suit house and the fact of entering into an agreement with the plaintiff for its sale to the plaintiff and further while admitting the receipt of advance payment of Rs 50,000/- from the plaintiff, the defendants denied all material allegations made in the plaint. It was alleged that the plaintiff did not pay the balance consideration as alleged. It was also alleged that defendant no. 2 on 25.10.1995 cancelled the agreement dt 15.02.1989 by sending legal notice to the plaintiff and then sold the suit house to defendant no. 1 on 09.02.1998 for Rs. 4 lacs and placed her in its possession.

12. On 31.03.2000, the plaintiff filed another civil suit being OS No. 2334 of 2000 in the Court of City Civil Judge Bangalore against the defendants for specific performance of agreement dated 15.02.1989 in relation to the suit house.

13. After pleading the same facts, which are set out above, the plaintiff further alleged that she has performed her part of the agreement by paying entire sale consideration of Rs. 3,50,000/- and has been in possession of the suit house. It was alleged that on the one hand, defendant no. 2, despite having received full sale consideration, did not perform her part of the agreement by not getting the suit house transferred in plaintiff's favour as per clause 3 of the agreement and by doing the acts which she was expected to do in terms of agreement, and on the other hand, tried to interfere in plaintiff's lawful possession over the suit house.

14. This led the plaintiff to serve upon defendant no.2 a legal notice dated 6.3.2000 thereby calling upon defendant no.2 to execute the sale deed in relation to suit property in plaintiff's favour. Since despite service of legal notice, defendant no. 2 failed to execute the same, suit for specific performance was also filed. The plaintiff then by way of amendment also sought to add one prayer for cancellation of sale deed alleged to have been executed by defendant no. 2 in favour of defendant no. 1. This amendment was allowed.

15. The defendants contested the civil suit. While admitting the execution of agreement dated 15.02.1989 with the plaintiff for sale of suit house for Rs. 3,50,000/- and also admitting payment of Rs. 50,000/- by the plaintiff to defendant no. 2, the defendants denied all other material allegations and inter alia alleged that since the plaintiff failed to pay the balance sale consideration of Rs. 3 lacs to defendant no. 2 in terms of the agreement, defendant no. 2 on 25.10.1995 sent a legal notice to the plaintiff cancelling the agreement dated 15.2.1989 and sold the suit house to defendant no. 1 on 09.02.1998 for consideration and placed her in possession of the suit house. The defendants also

alleged that defendant no. 1 was the bona fide purchaser for value and hence her title cannot be questioned in the suit.

16. The defendants also contested the suit on two legal grounds. Firstly, it was contended that the suit was not maintainable, as the bar contained in Order II Rule 2 of Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') did not permit the plaintiff to file the suit for specific performance of agreement in question against the defendants. It was alleged that relief to claim specific performance of agreement was available to the plaintiff when she filed the first suit (OS No. 223/2000) for permanent injunction against the defendants. Yet, the plaintiff failed to claim the relief in the first suit, consequently, the second suit filed to claim specific performance of agreement in question is hit by rigor contained in Order II Rule 2 of CPC. It is now barred and hence liable to be dismissed as not maintainable. Secondly, it was contended that the suit is otherwise barred by limitation having been filed beyond the period of three years from the date of accrual of cause of action as provided in Article 54 of the Limitation Act, 1963. It was, therefore, contended that the suit is liable to be dismissed as being barred by limitation, as well.

17. The trial court consolidated both the suits for trial. Issues were framed. Parties adduced evidence. The trial court vide judgment/decree dated 25.8.2009 though answered some issues in plaintiff's favour but eventually dismissed the civil suits. It was held that the agreement dated 15.02.1989 was executed between the plaintiff and defendant no. 2 for sale of suit house; that the plaintiff was not placed in possession of suit house pursuant to agreement in question; that the plaintiff was not ready and willing to perform her part of the agreement; that suit is barred by limitation; that the plaintiff was not entitled to claim the relief for specific performance of agreement; that the plaintiff was not entitled to claim the relief for grant of permanent injunction; that defendant no. 1 is a bona fide purchaser of the suit house for value; that the plaintiff was not entitled to challenge the sale deed dt. 9.2.1998, that the suit was hit by the bar contained in Order II Rule 2 of CPC because the plaintiff did not obtain leave to file second suit for specific performance while filing the first suit for grant of permanent injunction against the defendants in relation to the suit house.

18. Feeling aggrieved, the plaintiff filed two regular first appeals being R.F.A. Nos. 1092 of 2009 and 1094 of 2009 before the High Court. By common impugned judgment/decree, the High Court allowed both the appeals, reversed the judgment/decree of the trial court and decreed both the civil suits by passing a decree for specific performance of agreement against the defendants in relation to suit house and also issued permanent injunction as claimed by the plaintiff. The High Court answered all the aforementioned issues in plaintiff's favour and against the defendants.

19. The High Court in its judgment held that the plaintiff was in possession of suit house; that the plaintiff performed her part of the agreement; that the plaintiff paid the entire sale consideration of Rs. 3,50,000/- to defendant no. 2; that the plaintiff was ready and willing to perform her part of agreement; that defendant no. 2 failed to perform her part of the agreement thereby rendering her liable to perform her part of agreement; and that subsequent sale even if made by defendant no. 2 in favour of defendant no. 1 was not binding on the plaintiff because it was not bona fide.

20. The High Court, however, after deciding the issues in favour of the plaintiff, directed that in order to weigh the equities between the parties and keeping in view the price escalation, which is unavoidable in present days, the plaintiff will pay an additional sum of Rs. 4 lacs over and above Rs. 3,50,000/- to defendant no. 2 for obtaining sale deed in her favour.

21. It is against this judgment/decree of the High Court, the defendants have filed the present appeals by way of special leave petitions.

22. Mrs. Nalini Chidambaram, learned Senior Counsel appearing for the appellants (defendants) while assailing the legality and correctness of the impugned judgment urged various submissions. Firstly, she argued that the High Court erred in allowing plaintiff's first appeals, as according to her, both the appeals were liable to be dismissed by upholding the judgment /decree of the trial court which had rightly dismissed the suits. Secondly, she argued that second suit filed for claiming specific performance of the agreement for sale of suit house to the plaintiff was hit by bar contained in Order II Rule 2 of CPC for the reason that the plaintiff failed to secure leave in her first suit and hence the second suit filed by the plaintiff for grant of specific performance was not maintainable. Thirdly, she argued that assuming the second suit was held maintainable, even then it was barred by limitation prescribed in Article 54 of the Limitation Act. It was pointed out that cause of action to file suit for specific performance of contract against the defendants arose in the year 1989 itself no sooner 60 days period expired from the date of agreement as provided in clause 2 of the agreement, whereas, the suit in question seeking specific performance was filed in year 2000 and hence, it was hopelessly barred applying the limitation prescribed in Article 54. Fourthly, it was argued that in any case, there was no case made out on evidence by the plaintiff for reversal of the findings relating to grant of specific performance of agreement because the plaintiff was neither ready nor willing to perform her part of the agreement and nor there was any evidence to hold in her favour on this material issue. Fifthly, she argued that there was no evidence to hold that the plaintiff was in possession of the suit house; rather there was enough evidence to hold that after sale of suit house by defendant no.2 to defendant no.1, it was defendant no.1, who was in possession. Therefore, it should have been held that the plaintiff was not in possession of the suit house, as was rightly held by the trial court. And, lastly she argued that it should have been held with the aid of evidence that defendant no. 1 was bona fide purchaser of the suit house for value, as she purchased it after the owner i.e. defendant no. 2 cancelled the agreement dt 15.2.1989 and then sold the suit house to defendant no. 1.

23. After arguing at length with reference to documents on record, learned counsel for the appellants contended that impugned judgment /decree deserves to be set aside and that of the trial court be restored by dismissing both the suits filed by the plaintiff. Learned counsel also relied upon certain decisions, which we shall refer later.

24. Mr. P. Vishwanatha Shetty, learned senior counsel for the respondent (plaintiff) supported the impugned judgment /decree and contended that it does not call for any interference. According to learned senior counsel, all the findings recorded by the High Court, though of reversal, deserve to be upheld because the High Court, in exercise of its first appellate powers under Section 96 of CPC, rightly appreciated the evidence and came to its independent conclusion which it could legally do

and which it rightly did while allowing the two first appeals. Learned senior counsel urged that this Court while hearing these appeals cannot and rather should not undertake the exercise of appreciating the whole evidence again like that of the first appeal except to find out whether there is any apparent legal error in the impugned judgment so as to call for any interference by this Court. Learned senior counsel submitted that no such error exists in the impugned judgment and hence these appeals are liable to be dismissed.

25. Having heard the learned counsel for the parties at length and upon perusal of the record of the case, we find no merit in these appeals as in our considered opinion, the submissions urged by the learned senior counsel for the appellants, though argued ably, have no force.

26. Coming first to the legal question as to whether bar contained in Order II Rule 2 of CPC is attracted so as to non- suit the plaintiff from filing the suit for specific performance of the agreement, in our considered opinion, the bar is not attracted

27. At the outset, we consider it apposite to take note of law laid down by the Constitution bench of this Court in Gurbux Singh v. Bhooralal, AIR 1964 SC 1810, wherein this Court while explaining the true scope of Order II Rule 2 of CPC laid down the parameters as to how and in what circumstances, a plea should be invoked against the plaintiff. Justice Ayyangar speaking for the Bench held as under:

> "In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3)that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar....." (Emphasis supplied)

28. This Court has consistently followed the aforesaid enunciation of law in later years and reference to only one of such recent decisions in Virgo Industries (Eng.) P. Ltd. Vs Venturetech Solutions P. Ltd., (2013) 1 SCC 625, would suffice, wherein this Court reiterated the principle of law in following words:

> "The cardinal requirement for application of the provisions contained in Order II Rules 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the Church of Christ

> Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee JT 2012 (6) SC 149. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Laws of England, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted herein below:
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> " 'Cause of Action' has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the Plaintiff to succeed, and every fact which a Defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action on the part of the Defendant which gives the Plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

29. In the instant case when we apply the aforementioned principle, we find that bar contained in Order II Rule 2 is not attracted because of the distinction in the cause of action for filing the two suits. So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2.1.2000 and 9.1.2000. This would be clear from reading Para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non performance of agreement dated 15.2.1989 by defendant no. 2 in plaintiff's favour despite giving legal notice dated 6.3.2000 to defendant no. 2 to perform her part.

30. In our considered opinion, both the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance of agreement

31. In case of former, plaintiff is required to make out the existence of prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff on facts with reference to the suit property as provided in Section 38 of the Specific Relief Act, 1963 (in short "the Act") read with Order 39 Rule 1 & 2 of CPC. Whereas, in case of the later, plaintiff is required to plead and prove her continuous readiness and willingness to perform her part of agreement and to further prove that defendant failed to perform her part of the agreement as contained in Section 16 of The Act.

32. One of the basic requirements for successfully invoking the plea of Order II Rule 2 of CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based.

33. As mentioned supra, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a plea of bar contained in Order II Rule 2 of CPC to successfully non suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants.

34. Indeed when the cause of action to claim the respective reliefs were different so also the ingredients for claiming the reliefs, we fail to appreciate as to how a plea of Order II Rule 2 could be allowed to be raised by the defendants and how it was sustainable on such facts.

35. We cannot accept the submission of learned senior counsel for the appellants when she contended that since both the suits were based on identical pleadings and when cause of action to sue for relief of specific performance of agreement was available to the plaintiff prior to filing of the first suit, the second suit was hit by bar contained in Order II Rule 2 of CPC.

36. The submission has a fallacy for two basic reasons. Firstly, as held above, cause of action in two suits being different, a suit for specific performance could not have been instituted on the basis of cause of action of the first suit. Secondly, merely because pleadings of both suits were similar to some extent did not give any right to the defendants to raise the plea of bar contained in Order II Rule 2 of CPC. It is the cause of action which is material to determine the applicability of bar under Order II Rule 2 and not merely the pleadings. For these reasons, it was not necessary for plaintiff to obtain any leave from the court as provided in Order II Rule 2 of CPC for filing the second suit.

37. Since the plea of Order II Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits.

38. In the light of foregoing discussion, we have no hesitation in upholding the finding of the High Court on this issue. We, therefore, hold that second suit (OS No. 2334 of 2000) filed by the plaintiff for specific performance of agreement was not barred by virtue of bar contained in Order II Rule 2 CPC.

39. This takes us to the next question as to whether suit for specific performance was barred by limitation prescribed under Article 54 of the Limitation Act?

40. In order to examine this question, it is necessary to first see the law on the issue as to whether time can be the essence for performance of an agreement to sell the immovable property and if so whether plaintiff in this case performed her part within the time so stipulated in the agreement?

41. The learned Judge J.C. Shah (as His Lordship then was), speaking for the Bench examined this issue in Gomathinayagam Pillai and Ors. Vs. Pallaniswami Nadar, AIR 1967 SC 868, in the light of English authorities and Section 55 of the Contract Act and held as under:

> "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 Khodaram Irani v. Burjorji Dhunjibhai I.L.R. 40 Bom. 289 the Judicial Committee of the Privy Council observed that the principle underlying S. 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 that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, 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.... Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in Tilley v. Thomas I.L.R. (1867) Ch. 61 :-

'The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v. Berry (1853) 3 De G.M. G. 284, there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds... mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

42. In Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Anr., (1977) 2 SCC 539, this Court placing reliance on the law laid down in Gomathinayagam Pillai (supra), reiterated the aforesaid principle and held as under:

".....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.
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> Apart from the normal presumption that in the case of an agreement of sale of immovable properly time is not the essence of the contract and the fact that the terms of the agreement do not unmistakably state that the time was understood to be the essence of the contract neither in the pleadings nor during the trial the respondents contended that time was of the essence of the contract."

43. Again in the case reported in Smt. Chand Rani vs. Smt. Kamal Rani, (1993) 1 SCC 519, this Court placing reliance on law laid down in aforementioned two cases took the same view. Similar view was taken with more elaboration on the issue in K.S. Vidyanadam and Ors. v. Vairavan, (1997) 3 SCC 1, wherein it was held as under:

> "It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit (s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in Chand Rani vs. Kamal Rani (1993) 1 SCC 519:
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> "....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 (evident?) : (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract." In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised.

Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973.

".....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……" The aforesaid view was upheld in K. Narendra vs. Riviera Apartments (P) Ltd. (1999) 5 SCC 77.

44. Applying the aforesaid principle of law laid down by this Court to the facts of the case at hand, we have no hesitation in holding that the time was not the essence of agreement for its performance and the parties too did not intend that it should be so.

45. Clauses 2 and 3 of the agreement (Annexure P-1), which are relevant to decide this question reads as under:

> "2. The purchaser shall pay a sum of Rs.50,000/- (Rupees Fifty Thousand only) as advance to the seller at the time of signing this agreement, the receipt of which the seller hereby acknowledges and the balance sale consideration amount shall be paid within 60 days from the date of expiry of lease period.
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> 3. The Seller covenants with the Purchaser that efforts will be made with the Bangalore Development Authority for the transfer of the schedule property in favour of the Purchaser after paying penalty. In case it is not possible then the time stipulated herein for the balance payment and completion of the sale transaction will be agreed mutually between the parties."

46. Reading both the clauses together, it is clear that time to perform the agreement was not made an essence of contract by the parties because even after making balance payment after the expiry of lease period, which was to expire in 1995, defendant no. 2 as owner had to make efforts to transfer the land in the name of plaintiff. That apart, we do not find any specific clause in the agreement, which provided for completion of its execution on or before any specific date.

47. Since it was the case of the plaintiff that she paid the entire sale consideration to defendant no. 2 and was accordingly placed in possession of the suit house, the threat of her dispossession in 2000 from the suit house coupled with the fact that she having come to know that defendant no. 2 was trying to alienate the suit house, gave her a cause of action to serve legal notice to defendant no. 2 on 6.3.2000 calling upon defendant no. 2 to perform her part and convey the title in the suit house by executing the sale deed in her favour. Since defendant no. 2 failed to convey the title, the plaintiff filed a suit on 31.3.2000 for specific performance of the agreement.

48. Article 54 of the Limitation Act which prescribes the period of limitation for filing suit for specific performance reads as under:

54.	For specific performance of a contract.	Three years	The date of fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

49. Mere reading of Article 54 of the Limitation Act would show that if the date is fixed for performance of the agreement, then non-compliance of the agreement on the date would give a cause of action to file suit for specific performance within three years from the date so fixed. However, when no such date is fixed, limitation of three years to file a suit for specific performance would begin when the plaintiff has noticed that the defendant has refused the performance of the agreement.

50. The case at hand admittedly does not fall in the first category of Article 54 of the Limitation Act because as observed supra, no date was fixed in the agreement for its performance. The case would thus be governed by the second category viz., when plaintiff has a notice that performance is refused.

51. As mentioned above, it was the case of the plaintiff that she came to know on 02.01.2000 and 09.01.2000 that the owner of the suit house along with the so-called intending purchaser are trying to dispossess her from the suit house on the strength of their ownership over the suit house. This event was, therefore, rightly taken as starting point of refusal to perform the agreement by defendant no.2, resulting in giving notice to defendant no.2 by the plaintiff on 6.3.2000 and then filing of suit on 31.3.2000.

52. In the light of the foregoing discussion, we uphold the findings of the High Court and accordingly hold that the suit filed by the plaintiff for specific performance of the agreement was within limitation prescribed under Article 54 of the Limitation Act.

53. This takes us to the last question as to whether the High Court was justified in granting specific performance of agreement in plaintiff's favour by reversing the judgment/decree of the trial court which had dismissed the suit.

54. We may observe that notice of SLP was issued essentially to examine the two legal issues arising in the case as discussed above. These two issues have been dealt with and answered against the appellants. However, since learned senior counsel for the appellants also questioned the legality and correctness of the finding of the High Court on all other factual issues, we have, therefore, examined the other issues as well.

55. Learned senior counsel for the appellants contended that the High Court was not justified in holding that defendant no. 1 was not a bona fide purchaser of the suit house for value. Another submission was that the plaintiff was not ready and willing to perform her part of the agreement; and lastly her submission was that the plaintiff was never in actual possession of the suit house despite execution of agreement and making part payment of Rs. 50,000/- to defendant no. 2. Learned senior counsel for the appellants urged these factual submissions with equal force like the two legal issues dealt with supra.

56. In our considered opinion, the High Court being the last Court of appeal on facts /law while hearing first appeal under Section 96 of CPC was well within its powers to appreciate the evidence and came to its own conclusion independent to that of the trial court's decision. One can not dispute

the legal proposition that the grant/refusal of specific performance is a discretionary relief, and, therefore, once it is granted by the appellate court on appreciation of evidence, keeping in view the legal principle applicable for the grant then further appellate court should be slow to interfere in such finding, unless the finding is found to be either against the settled principle of law, or is arbitrary or perverse.

57. This Court while hearing appeal under Article 136 is not inclined to again appreciate the entire ocular/documentary evidence like that of first appellate court unless the parameters noticed above are successfully made out in the case. Such does not appear to be a case of this nature.

58. The High Court, in our considered opinion, properly appreciated the evidence for recording findings in plaintiff's favour that she was ready and willing to perform her part of the agreement and in fact did perform her part, firstly, by paying Rs. 50,000/- as advance and then paid balance of Rs. 3,00,000/- towards sale consideration to defendant no.2; that plaintiff was placed in possession of the suit house by defendant no. 2 pursuant to agreement; and, lastly defendant no. 2 did not perform her part of the agreement.

59. It is pertinent to mention that despite holding that the plaintiff paid the entire sale consideration of Rs. 3,50,000/- to defendant no 2, the High Court directed the plaintiff to pay an additional sum of Rs 4 lacs over and above Rs. 3,50,000/- to defendant no. 2 towards sale consideration. Though no reasons were assigned by the High Court while rendering this finding, but it seems that it must have been done either to balance the equities between the parties and/or to compensate defendant no. 2 the loss caused to her due to escalation in prices of immoveable properties.

60. Be that as it may, since the plaintiff has not challenged this finding by filing any appeal or cross objection in these appeals, this Court refrains from going into its correctness in these appeals filed by the defendants.

61. In the light of the foregoing discussion, we do not find any merit in the submissions urged by the learned senior counsel for the appellants and accordingly we uphold the findings of the High Court on the issues relating to merits.

62. Before concluding we consider apposite to take note of two more issues. The High Court while passing the decree directed both the defendants i.e. owner of the suit house (vendor) defendant no.2 and subsequent purchaser (defendant no. 1) to execute the sale deed of the suit house jointly in favour of the plaintiff' to avoid any legal complications, provided the plaintiff pays Rs. 4 lacs over and above Rs. 3,50,000/- to the owner of suit house (defendant no. 2).

63. A direction of this nature is permissible. It was so held by this Court way back in the year 1954 in Lala Durga Prasad and Anr. Vs. Lala Deep Chand and Ors., AIR 1954 SC 75, wherein the learned Judge Vivian Bose J. known for his subtle power of expression and distinctive style of writing while speaking for the bench held as under:

> "In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin v. Samiraddin AIR1931Cal67 and appears to be the English practice. See Fry on Specific Performance, 6th edition, page 90, paragraph 207; also Potter v. Sanders 67 E.R. 1057. We direct accordingly."

64. We respectfully follow these observations and accordingly uphold the direction issued by the High Court for execution of the sale deed.

65. There is, however, one more aspect of the case which needs to be taken note of and has arisen in the case as a result of passing of the impugned decree in plaintiff's favour by the High Court and upheld by this Court.

66. The effect of execution of sale deed in plaintiff's favour by the defendants in terms of decree would obviously result in cancellation of contract of sale of the suit house between the owner (defendant no. 2) and subsequent purchaser (defendant no. 1). The reason is not far to seek.

67. In a contract for sale of immovable property for consideration, if a seller fails to transfer the title to the purchaser, for any reason, on receipt of consideration towards the sale price then a seller has no right to retain the sale consideration to himself and he has to refund the same to the purchaser. When the contract fails then parties to the contract must be restored to their respective original position which existed prior to execution of contract as far as possible provided there is no specific term in the contract to the contrary.

68. The contract between defendant no.2 and defendant no.1, i.e., owner and subsequent purchaser, stands frustrated due to impugned judgment/decree because now defendant no.2 would not be in a position to sell the suit house to defendant no.1 though she has received Rs.4 lacs from defendant no.1 for such sale of suit house in her favour. It is for this reason, defendant no.2 is liable to refund Rs.4 lacs to defendant no.1.

69. Though this litigation is not between inter se owner and subsequent purchaser of the suit house yet in order to do substantial justice between the parties and to see the end of this long litigation and to prevent a fresh suit being instituted by defendant no.1 against defendant no.2 for refund of sale consideration which will again take years to decide and lastly when neither it involve any intricate adjudication of facts, nor it is going to cause any prejudice to the parties, we consider it just and proper to invoke our power under Article 142 of the Constitution of India in the peculiar facts and circumstances of the case as narrated above and accordingly direct defendant no. 2 (owner of the suit house) to refund Rs. 4 lacs to defendant no. 1 within three months after execution of sale deed by them in favour of plaintiff pursuant to the impugned judgment/decree.

70. We also direct that failure to refund the amount within three months, would carry interest at the rate of 9% payable on the unpaid amount from the date of this order till recovery and defendant no. 1, in the event of non-payment by defendant no. 2, would be entitled to levy execution against defendant no. 2 for realization of outstanding money along with interest as awarded treating this order to be a decree in appropriate executing court in accordance with law.

71. We, however, make it clear that we have given this direction because this Court alone has power to pass such directions in an appropriate case and in our view, this is a case wherein we consider it appropriate to do so, to do substantial justice to all parties.

72. For the foregoing reasons and directions, these appeals are accordingly disposed of. No costs.

……J. [FAKKIR MOHAMED IBRAHIM KALIFULLA]
.....J. [ABHAY MANOHAR SAPRE] New Delhi;

October 29, 2014.
