

Chandulal K. Shah And Vaibhav C. Shah vs Nisha Deepak Saraf & Anr on 4 September, 2017

Author: K.R.Shriram

Bench: K.R.Shriram

1

suit2543.12.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.2543 OF 2012

1) Chandulal K.Shah)
Of Mumbai, Indian Inhabitant, residing at)
B-41, Bansi Nagar, Kulpwadi, Highway)
Milton Co-operative Housing Society Ltd.)
Borivali (East), Mumbai-400 066)

2) Vaibhav C.Shah)
Of Mumbai, Indian Inhabitant, residing at)
B-41, Bansi Nagar, Kulpwadi, Highway)
Milton Co-operative Housing Society Ltd.)
Borivali (East), Mumbai-400 066)....Plaintiffs

V/s.

1) Haridas Laxmidas Ashar (deleted))
Of Mumbai, Indian inhabitant, having)
His address at Bansi Nagar, Kulupwadi)
Highway Milton Co-operative Housing)
Society Limited, Borivali (East),)
Mumbai-400 060)

2) Nisha Deepak Saraf)
Of Mumbai, Indian inhabitant, having her)
Address at 501, Varsha Navyug Co-op.)
Housing Society Limited, Plot No.1, JVPD)
Scheme, Vile-Parle (East), Mumbai-400 065)
And presently residing at B-42, Bansi Nagar)
Kulpwadi, Highway Milton Co-operative)
Housing Society Limited, Borivali (East))
Mumbai-400 066)
(Also legal representative and heir of)
Defendant no.1))

3) Deepak Saraf)
Of Mumbai, Indian Inhabitant, having her)

Address at 501, Varsha Navyug Co-op.)
Housing Society Limited, Plot No.1, JVPD)
Scheme, Vile-Parle (East), Mumbai-400 065)
And presently residing at B-42, Bansi)
Nagar, Kulpwadi, Highway Milton Co-op.)

KJ

::: Uploaded on - 06/09/2017

::: Downloaded on - 07/09/2017 02:01:
2 suit2543.12.doc

Housing Society Limited, Borivali (East),
Mumbai-400 066

)
)....Defendants

Mr.Aurup Dasgupta a/w Ms.Sheetal Shah i/by M/s.Mehta & Girdharlal for plaintiffs.

Mr.Sandeep Parikh a/w Mr.Pranesh J.Gada i/by M/s.Dhanuka & Partners for the defendants.

CORAM : K.R.SHRIRAM,J RESERVED ON : 4.8.2017 PRONOUNCED ON : 4.9.2017 Judgment :-

1 The plaintiff no.1 and his son plaintiff no.2 have approached this Court seeking specific performance of a Memorandum of Understanding dated 22.1.2011 (Exh.B), whereby the defendant nos.1 & 2 had agreed to sell to the plaintiffs a residential apartment admeasuring 465 sq. feet being flat no.B-42, 4 th floor, Highway Milton Co-operative Housing Society Limited, Borivali (East), Mumbai-400 066 (the suit flat) for a lumpsum consideration of Rs.36,00,000/-. Defendant no.1 and defendant no.2 were joint members of the Highway Milton Co-operative Housing Society Ltd and entitled to the suit flat. Defendant no.2 is the daughter of defendant no.1. Defendant no.3 is the husband of defendant no.2.

Defendant no.1 has since expired, defendant nos.2 & 3 reside in the suit flat.

KJ 3 suit2543.12.doc 2 The plaintiffs, in the alternative to decree of specific performance, are seeking return of the advance of Rs.22,00,000/- paid together with interest @ 18% p.a. from the date of filing of the suit till payment/realization, a sum of Rs.51,00,000/- being the difference in the value of the flat between the date of Memorandum of Understanding and date of filing of the suit and further sum of Rs.21,00,000/- as damages for loss suffered on account of anxieties, deterioration of health, frustration, depression, costs of transportation and other misc. expenses.

3 The defendants have filed written statement denying that the plaintiffs are entitled to the relief sought alleging that :- (a) Plaintiffs' intention was to grab the suit flat at throw away price which was much lesser than the market value ; (b) the plaintiffs have failed to show readiness and willingness to perform their obligations under Memorandum of Understanding; (c) plaintiffs have themselves violated an essential term of the Memorandum of Understanding and acted in variance to the agreed terms and therefore, breached the terms of the Memorandum of Understanding ; and (d) Suit is bad for mis-joinder of parties as defendant no.3 is not a party to the Memorandum of Understanding.

4 The following issues were framed on 30.6.2014 :-

KJ 4 suit2543.12.doc (1) Whether the Defendants prove that the suit is barred for misjoinder of parties?

(2) Whether the Plaintiffs prove that the Defendants committed breach of their obligations under the MOU dated 22.1.2011?

(3) Whether the Plaintiffs prove that the Plaintiffs have been ready and willing to perform their part of the MOU dated 22.1.2011?

(4) Whether the Defendants prove that time is make the balance payment was essence of the contract contained in the MOU dated 22.1.2011?

(5) Whether the Defendants prove that the Plaintiffs committed breach of their obligations under the MOU dated 22.1.2011?

(6) Whether the Defendants prove that the MOU dated 22.1.2011 stood terminated as set out in paragraph 5(a) of the Written Statement?

(7) Whether the Plaintiffs are entitled to specific performance of the MOU dated 22.1.2011?

(8) If answer to issue No.7 is in the negative, whether the Plaintiffs are entitled to damages and other amounts as prayed for?

(9) Generally what order?

KJ 5 suit2543.12.doc 5 Plaintiffs led evidence of 1st plaintiff and defendants led evidence of 3rd defendant. The documents of plaintiffs have been marked as Exh.A to Exh.O and defendants' documents marked as Exh.D1 to Exh.D4. Plaintiffs' witness was the person with whom defendants had negotiated and he was the person who drafted the Memorandum of Understanding.

6 Defendants' witness was not a signatory to the Memorandum of Understanding but signed the Memorandum of Understanding and the receipt (Exh.A) as witness. Though the negotiations were between plaintiff no.1 and original defendant no.1 and original defendant no.1 was still alive it was defendant no.3 who stepped into the witness box and gave evidence. Cross-examination of

defendant no.3 was held between 10.12.2015 to 16.12.2015 and defendant no.1 died on 19.2.2016 well after defendants' evidence was closed.

Issue nos.2 to 7 (all these can be dealt with together) 7 Plaintiffs and defendants were neighbors. Plaintiffs were living in flat no.B-41 whereas the suit flat was B-42. As defendant no.1 came to know that plaintiffs were looking for a small flat for plaintiff no.2 in the neighborhood, sometime in the 2nd week of January-2011, defendant no.1 approached 1st plaintiff and offered to sell to 1st plaintiff the suit flat. After some negotiations, it was agreed KJ 6 suit2543.12.doc that defendant nos.1 & 2 will sell the suit flat to plaintiffs for consideration of Rs.36,00,000/- provided plaintiffs were agreeable to pay sum of Rs.22,00,000/- prior to 27.1.2011 and the balance before 31.3.2011. Plaintiffs were also informed that the suit flat has been mortgaged to Malad Sahakari Bank Limited (the Bank) for a facility extended by the bank to defendant no.3. Defendant no.1 informed plaintiff no.1 that amount of Rs.25,83,042/- was due and payable to the bank and bank has commenced proceedings under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act-2002 (SARFAESI) and if plaintiffs could give at least Rs.22,00,000/- before 27.1.2011, defendants would use that amount to pay off the liability to the Bank so that the SARFAESI proceedings are halted. Plaintiffs agreed as defendants were neighbors and had no cause to doubt defendants. Plaintiffs and defendants entered into Memorandum of Understanding dated 22.1.2011 whereby the defendant nos.1 & 2 agreed to sell the suit flat to plaintiffs. It will be useful to reproduce the short Memorandum of Understanding. It is as under :-

"January 22-2011

M.O.U

To,

H.L.Ashar/Mrs.Nisha D.Saraf
B-42, Bansi Nagar, Kulupwadi,
Nr.National Park, Borivali (East),
Mumbai-400 066

KJ

7

suit2543.12.doc

Dear Sir,

We the undersigned Mr.Vaibhav C.Shah & Mr.Chandulal K.Shah herewith jointly purchased above mentioned flat no.B-42,4th floor area 465 sq. ft. at Bansi Nagar, at Highway Milton Co-op Hsg. Soct. Ltd. Borivali (E) Mumbai :400 066 at a lump sum price of Rs.36,00,000/-.

We show our bonafide by giving you token amount of Rs.2,00,000/- in cash and a cheque of Rs.1,00,000/- Ch. No.000013 dated 21.01.2011 drawn on Bank of India, Borivali (East), Mumbai

:400 066 and balance payment will be done on or before 31.03.2011.

Please note that you have to clear your Bank Loan against mortgage of the above flat, created by you before execution of sale agreement. Please confirm at the bottom of this letter.

Thanking you,

Yours Sincerely,

sd/- sd/-

(Vaibhav Shah / C.K.Shah)

Purchasers

Mr.Vaibhav C.Shah/Mr.C.K.Shah

We confirm : (Vendors)

B-41, BANSI NAGAR, KULUPWADI 1. Mr.H.L.Ashar..sd/- . NR. NATIONAL PARK, BORIVALI 2. Mrs.Nisha D.Saraf sd/- (EAST), MUMBAI : 400 066 Witnesses : 1.sd/- (K.C.Shah)

2.sd/- (Deepak Saraf) 8 Thereafter admittedly plaintiffs paid a further sum of Rs.19,00,000/- to defendant nos.1 & 2 as per the receipt issued by defendant nos.1 & 2 with defendant no.3 being the witness. It should be noted, defendant no.3 was also the witness to the Memorandum of Understanding. The receipt which forms part of Exhibit-B reads as under :-

KJ 8 suit2543.12.doc " January 25, 2011 RECEIPT RECEIVED with thanks from MR.VAIBHAV CHANDULAL SHAH & CHANDULAL KESHAVLAL SHAH a sum of Rs.22,00,000/- (RUPEES TWENTY TWO LAKHS ONLY) towards sale of the Flat No.No.B/42, 4 th Floor, THE HIGHWAY MILTON CO-OP.HSG. SOC. LTD., situated at Bansi Nagar, W.E. Highway, Borivali (East), Mumbai-400 066 as part payment against sale price of Rs.36,00,000/- upto 25 th January 2011.

DATE	AMOUNT	CHEQUE	CASH	DRAWN ON
19.01.2011	1,00,000/-	....	CASH	....
21.01.2011	1,00,000/-	....	CASH	....
21.01.2011	1,00,000/-	13	....	Bank of India(Borivali E) Mumbai-66
22.01.2011	1,00,000/-	14	....	Bank of India (Borivali E) Mumbai-66
25.01.2011	8,00,000/-	16	....	Bank of India (Borivali E) Mumbai-66
25.01.2011	10,00,000	....	CASH	....
TOTAL	22,00,000/- (RUPEES TWENTY TWO LAKHS ONLY)			

Subject to realization

WE SAY RECEIVED
sd/-

(MR.HARIDAS LAXMIDAS ASHER)

(MRS.NISHA DEEPAK SARAF)
THE SELLER
sd/-
N.D.Saraf

WITNESSES :
sd/-
Deepak Saraf.

KJ

9

suit2543.12.doc

9 Plaintiffs by 25.1.2011 had parted with Rs.22,00,000/- . As

per the Memorandum of Understanding, defendants were also supposed to clear the bank loan against the mortgage of the suit flat before execution of the sale agreement. Plaintiffs therefore, wrote a letter dated 22 March 2011 (Exh.C) to the Building society stating that they have agreed to purchase the suit flat and substantial payments have already been made to defendant nos.1 & 2 and balance payment was ready with plaintiffs to be paid to defendant nos.1 & 2 subject to certain formalities to be completed by defendant nos.1 & 2. Plaintiffs requested the society not to entertain any application for transfer of the suit flat or any share certificate to anyone else. The society vide its letter dated 27.3.2011 (part of Exh.C colly) informed the plaintiffs that the society will require a letter from defendant nos.1 & 2 that they are selling the suit flat to plaintiffs and the society has not received any such letter from defendant nos.1 & 2. The society also informed plaintiffs that as per the society's record there is a lien on the suit flat raised by Malad Sahakari Bank Ltd. and unless the society receives a clearance from the bank, no steps to transfer the suit flat would be taken.

10 Thereafter plaintiffs approached the bank, got details of the amount outstanding, approached defendants for completing the KJ 10 suit2543.12.doc transaction and as defendants did not take any steps, plaintiffs even lodged complaint with the Borivali (East) Police station against defendants. It is the case of plaintiffs that defendants wanted the money desperately and plaintiffs parted with Rs.22,00,000/- without any security on the hope that defendant nos.1 & 2 will sell the suit flat to plaintiffs.

11 Defendants have not denied the execution of the Memorandum of Understanding. Defendants have not denied that they received Rs.22,00,000/- from plaintiffs. It is the case of defendants that plaintiffs were not ready and willing to perform their obligations of paying balance amount of Rs.14,00,000/- before 31.3.2011 and therefore, plaintiffs are not entitled to specific performance.

12 Plaintiffs' stand is that the further amount of Rs.19,00,000/- was paid by plaintiffs though plaintiffs had time till 31.3.2011 to make the full payment only because defendants wanted to utilize that money to settle the bank's liability and get the mortgage of the suit flat cancelled. But defendants despite having almost 2 ½ months to pay off the bank and get the mortgage cancelled did not do so. Plaintiffs, therefore, did not pay the balance of Rs.14,00,000/-. KJ 11 suit2543.12.doc Plaintiffs also submitted that defendants had an obligation to get the flat released from mortgage before plaintiffs paid the balance amount of Rs.14,00,000/-, which plaintiffs were always ready and willing to pay.

13 To a query raised by the Court that as to how specific performance would be given for sale of a flat which was mortgaged without discharge of the mortgage, counsel for plaintiffs submitted that bank has been subsequently paid off by defendants and the suit flat is released from mortgage.

14 Mr.Dasgupta further submitted that Section 13(1)(a) of the Specific Relief Act states that where a person contracts to sell or let certain immoveable property having no title or only imperfect title, the Purchaser or Lessee has the following rights namely, if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or the lessee may compel him to make good the contract out of such interest. He submitted that on account of the fact that defendants have, during the pendency of the suit, removed the encumbrances of the bank from the title of the suit flat, plaintiffs are entitled to specific performance of the Memorandum of Understanding.

KJ 12 suit2543.12.doc 15 Shri Dasgupta relied upon 1Silla Chandra Sekharam Vs. Ramchandra Sahu where it was held that even if the title is perfected after the filing of the Suit, specific performance can be granted. If the Vendor or Lessor has subsequently to the sale or lease acquired any interest in the property, the Purchaser or Lessee may compel him to make good the contract out of such interest. 16 Shri Dasgupta for plaintiffs submitted that it is apparent from take over notice dated 14.05.2011 (Exhibit D), take over notice dated 23.07.2012 (Exhibit G), take over notice dated 27.08.2012 (Exhibit H) and Public Notice by Bank dated 5.09.2012 (Exhibit J collectively), that defendants as on 31 st March 2011 were neither in possession of the title deeds of the suit flat nor were they in a position to convey the same to plaintiffs, since the mortgage was not foreclosed. Plaintiffs were ready and willing to perform their part of the contract at all time, but plaintiffs' performance was dependent upon the reciprocal obligation to be performed by defendants and the time for performance by plaintiffs would arise only after the reciprocal obligation is performed by defendants. The fact that defendants did not clear the bank dues and not having done so, plaintiffs could not be called upon to perform their obligation of making final payment, as defendants' title to the suit flat was not 1 (1964) & SCR 858 : AIR 1964 SC 1789 KJ 13 suit2543.12.doc marketable as on 31st March 2011. It is only on 12th February 2014 that defendants agreed to make payment of the outstanding loan of the Bank on or before 28th February 2014. However, in spite of undertaking to the Hon'ble Court the defendants failed to make the said payment. Therefore vide Order dated 5th

March 2014, defendants once again undertook to pay Rs.3,25,000/- on or before 10th March 2014 and this time the documents of title were directed to be deposited in Court.

17 Mr.Dasgupta relied upon the following :-

(a) Nathulal Vs. Phool Chand where it was held in considering whether a person is willing to perform his part of the contract the sequence in which the obligation under a contract are to be performed must be taken into account. One of the parties to the contract cannot require compliance with the obligations by the other party without in the first instance performing his own part of the contract which in the sequence of obligations is performed by him earlier. And therefore since defendants had not cleared their dues on or before 31st March 2011 it must be held that plaintiffs were at all relevant times willing to carry out their part of the contract and therefore it was not necessary for the plaintiffs to actually produce the money to prove their readiness and willingness.

2 (1969 (3) SCC 120) KJ 14 suit2543.12.doc

(b) Bishambhar Nath Agarwal Vs. Kishan Chand where it was held the essential precondition to competency of the seller to transfer-permission should be obtained by him first before payment of consideration amount by purchaser where the contract stipulates mutual obligations to be performed as is in Memorandum of Understanding dated 22.01.2011. A party is not entitled to complain of non-performance, i.e., defendant herein of later obligation by the other party, i.e., plaintiffs, without performing their earlier obligation.

(c) Swarnam Ramachandran Vs. Aravacode Chakungal Jayapalan where it was held that time is presumed not to be the essence of a contract relating to an immovable property. A vendor has no right to make time the essence of the contract unless he is ready and willing to proceed to completion. Admittedly there was no Notice to make time the essence of the contract, therefore, the Hon'ble Court has to examine the real intention of the parties. The onus to plead and prove that time was the essence of the contract was on defendants which they have failed to do.

(d) D.N.Dutt Vs. M.V.Gupta where it was held even if time was the essence of the contract of sale, where the Vendor has not perfected his title to the goods by the date when the contract has 3 (AIR 1998 Allahabad 195) 4 [(2004) 8 SCC 689] 5 (AIR 1958 Punjab 289) KJ 15 suit2543.12.doc to be completed, there is no breach on part of the Vendee, if he failed to pay the consideration on that date and complete the contract.

(e) Laxman Tatyaba Kankate Vs. Taramati

Harischandra Dhattrak where it was held while granting specific

performance, being the discretion of the Hon'ble Court, the Court would take into consideration the conduct of the parties, and their respective interest under the contract.

18 Defendants' counsel submitted that (a) Plaintiffs have incorrectly and falsely contended that the obligation of the 1st and 2nd Defendants to make payment of the bank loan and clear the mortgage on the suit flat is a reciprocal obligation which is required to be performed prior to the reciprocal obligation of Plaintiffs to make the balance payment of sale consideration on or before 31.3.2011 ;

(b) Plaintiffs have falsely and incorrectly stated that unless and until 1st and 2nd Defendants have performed their obligation of making payment of bank loan and clearing the mortgage on the said flat, Plaintiffs are not required to make payment of balance sale consideration ; (c) The MOU dated 22.1.2011 does not contain any express provision which sets out the sequence in which the alleged reciprocal promises/ obligations are required to be performed ; (d) the obligation of 1st and 2nd Defendants to make payment of the Bank 6 [(2010) 97 SCC 717] KJ 16 suit2543.12.doc loan and clear the mortgage on the suit flat is an obligation which is independent of Plaintiffs' obligation to make payment of the balance sale consideration on or before 31.3.2011; (e) The MOU does not contain any provision whereby Plaintiffs' obligation to make payment of balance sale consideration is contingent and/or conditional on 1 st and 2nd Defendants performing their obligation to make payment of the bank loan and clear the mortgage on the suit flat ; (f) the MOU contained two different streams of provisions for performance which are unrelated to each other ; and (g) in view of the afore-stated position, the reliance placed by Plaintiffs on Section 52 of the Indian Contract Act which relates to the order of performance of reciprocal promises is inapplicable to the facts of the present case. 19 Counsel for defendants argued that time to make the balance payment was the essence of the contract and that is obvious from the Memorandum of Understanding. According to defendants the balance of Rs.14,00,000/- was to be paid before 31.3.2011 and the same is clear, unequivocal, unconditional and independent of any other obligations or promise to be performed by defendant nos.1 & 2. According to Mr.Parekh the obligations of defendant nos.1 & 2 to make payment of the bank loan prior to execution of the loan, was not inter dependent to making the balance payment by 31.3.2011. Counsel submitted that from Exh.A it was quite clear that there was KJ 17 suit2543.12.doc an outstanding liability to the bank and hence time to make balance payment was the essence of the contract. Counsel submitted that plaintiffs have paid only Rs.22,00,000/- on or before 31.3.2011 and deliberately failed and neglected to pay balance of Rs.14,00,000/- on or before 31.3.2011. Defendants relied upon a decision of the Constitution Bench in the case of 7Smt.Chand Rani (dead) by LRs Vs. Smt. Kamal Rani (dead) by LRs. to submit that the Supreme Court after analysing various case laws, came to a conclusion that in the case of sale of immovable property there is no presumption as to time being the essence of the contract but the Court may infer that it is to be performed in a reasonable time provided it is clear from the express terms of the contract, the nature of the property and surrounding circumstances, like object of making the contract. 20 Defendants also relied upon K.S.Vaidyanathan and others Vs. Vairavan in which the Apex Court after referring to Chand Rani (supra) has reiterated the views expressed in Chand Rani. Counsel submitted that the Supreme Court held that rigour of the rule evolved by Courts that time is not of the essence of the contract in the case of immoveable properties- evolved in times when the prices and values were stable and inflation was unknown- 7 AIR 1993 SC 1742 8 AIR 1997 SC 1751 KJ 18 suit2543.12.doc requires to be relaxed, if not modified, particularly in the case of urban immoveable properties.

Counsel Shri Parikh also submitted that the Supreme Court has stated that fixation of a time period in the contract for the purpose of performance of an obligation by the parties in a given situation may not amount to making time the essence of the contract but at the same time it must have some meaning. Counsel submitted that parties could not have prescribed such a time limit of 31.3.2011 without any reason and the court while exercising its discretion would also bear in mind that when the parties prescribed certain time limit for taking steps by one or the other parties, it must have some significance and that the said time limits cannot be ignored altogether on the ground that time has not been made the essence of the contract relating to immoveable properties. 21 On the same proposition defendants also relied upon the judgment in the case of Mrs.Saradamani Kendappan Vs. Mrs.S.Rajlaxmi and others. Relying on this, counsel Shri Parikh submitted that the Supreme Court notes that the steep increase in prices is the circumstance which makes it inequitable to grant relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period and that such a purchaser can no longer take shelter under the principle that time is not of the 9 AIR 2011 SC 3234 KJ 19 suit2543.12.doc essence in performance of contract relating to immoveable property to cover his delays and laches, breaches and 'non-readiness'. 22 Mr.Parikh submitted that every suit for specific performance need not be decreed merely because it is filed within limitation by ignoring the time limits prescribed in the agreement and that also does not mean a purchaser can wait for 1 or 2 years and file a suit. The purchaser should sue quickly and only in special cases, where equity can shift in favour of the purchaser, can the court entertain. He relied upon para 28 of Mrs.Saradamani Kendappan (supra) which reads as under :-

"28. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K. S. Vidyanadam (AIR 1997 SC 1751 : 1997 AIR SCW 956) (supra) :

(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and, therefore, time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."

KJ 20 suit2543.12.doc 23 It was also submitted by Mr.Parikh that in paragraphs 35 to 37 Mrs. Saradamani Kendappan (supra) the Hon'ble Supreme Court has stated that the order of

performance of promises should be expressly stated or provided in the agreement and in the event that the agreement is silent with regard to the sequence in which the obligations are required to be performed, then a party cannot contend anything contrary to the express terms of the contract and insist that set of obligations must be performed first and only thereafter any alleged reciprocal promises ought to be performed. Mr.Parikh continued that applying the ratio in Mrs. Saradamani Kendappan (supra) to the facts of the present case, it is evident that the MOU dated 22.1.2011 does not expressly state or provide that only after performance of obligations by 1st and 2nd Defendants of making payment of the bank loan and clearing the mortgage on the suit flat, that Plaintiffs will make the balance payment of the sale consideration.

24 On this Mr.Parikh concluded, in the light of the ratio laid down by the Hon'ble Supreme Court, applying the same to the facts of the present case, that (i) from the express terms of the MOU dated 22.1.2011 it is evident that the balance payment was required to be made by Plaintiffs on or before 31.3.2011; (ii) that the suit property was mortgaged to the bank; and (iii) that there was a notice KJ 21 suit2543.12.doc dated 12.1.2011 issued by the Bank for the purpose of taking possession of the suit flat in view of the failure of Defendants to make payment of outstanding liability of Rs.25,83,042/-. Therefore, as the time was the essence of the contract, it was incumbent on Plaintiffs to make the balance payment of Rs.14 lakhs on or before 31.3.2011 and in view of Plaintiffs' failure to make payment of the balance amount on or before 31.3.2011, the same constituted a breach of the MOU by Plaintiffs. In view of the breach committed by Plaintiffs in making the balance payment on or before 31.3.2011, it must be held that Plaintiffs were not ready and willing to perform their obligations under the MOU.

25 After hearing Shri Parikh's elaborate submissions, I find rather strange that defendants in their written statement have stated that in or about January-2011 the Uncle of defendant no.3 on behalf of defendants met the ex-chairman of the bank proposing one time settlement for settling the loan account of defendants and the bank agreed for a one time settlement in the sum of Rs.19,00,000/-. Defendants paid Rs.10,00,000/- to the bank but the bank did not close the loan account because defendants did not pay the balance amount of Rs.9,00,000/- since plaintiffs did not pay the amount of Rs.14,00,000/- on or before 31.3.2011 as set out in the Memorandum of Understanding and the plaintiffs did not have the monies to pay to KJ 22 suit2543.12.doc defendant nos.1 & 2. It is rather strange because plaintiffs have by 25.1.2011 paid over to defendant nos.1 & 2 sum of Rs.22,00,000/- and there is no explanation in the written statement as to why when defendants have received Rs.22,00,000/- from plaintiffs, that amount was not used to pay entire one time settlement of Rs.19,00,000/- which would have still left defendants with Rs.3,00,000/- surplus. When defendants had paid Rs.10,00,000/- on 3.2.2011, defendants could have certainly paid balance of Rs.9,00,000/- by 3.2.2011, got the loan account closed and get the suit flat released from mortgage. There is no explanation whatsoever in the written statement. It is also not the case of defendants that amount of Rs.22,00,000/- was given by plaintiffs as loan. Defendants do agree that in the Memorandum of Understanding defendants have agreed to sell suit flat to plaintiffs but go on to state that because plaintiffs did not pay balance amount of Rs.14,00,000/- , specific performance was not permissible.

26 In the cross-examination of defendant no.3 to a question as to why the defendants then did not return Rs.22,00,000/- to plaintiffs, and it should be noted that Rs.22,00,000/- is still with the defendants even after almost 7 years have passed, the answer was plaintiffs never asked for the money back, so we did not give. The conduct of defendants smacks of utter dishonesty and it is quite obvious that the intention of defendants was to cheat plaintiffs. 27 Defendant no.3 has in his cross examination stated that he did not return the money since plaintiff no.1 did not ask for it (Answer to question no.102 in cross-examination of DW-1. Defendants have retained Rs.22,00,000/- (61% of consideration of Rs.36 lakhs) paid by plaintiffs under the Memorandum of Understanding for over six years and have also enjoyed the fruits of property, while contending that the Memorandum of Understanding stood terminated. It is an admitted position no notice of termination was issued to plaintiffs by defendants (cross-examination of DW-1, question 100) despite averring in the written statement that the Memorandum of Understanding stood terminated on account of the plaintiffs' alleged breach and admitting that there was no forfeiture clause in the Memorandum of Understanding (cross-examination of DW-1, question 101). Defendants have failed to return the amount of Rs.22,00,000/- paid by plaintiffs to defendants. Not a single letter has been produced by defendants averring to repay the amount of Rs.22,00,000/- , however in cross-examination the defendants no.3 as set out above, has stated that the money was not returned, as the plaintiff no.1 has not made any request in writing or verbally to return the said money (cross-examination of DW-1, question 102).

The fact that plaintiffs paid over 60% of the considerations and never asked for the return of money is also an indicator that KJ 24 suit2543.12.doc plaintiffs were always ready and willing to perform their obligations under the Memorandum of Understanding.

28 Another point that was raised by defendants was that the Memorandum of Understanding did not contain any provisions for paying the monthly maintenance charges which were in arrears for more than a year to the society and who would pay the stamp duty and registration charges on the execution of the agreement of the suit flat. Hence, in the absence of agreement on these two crucial elements, plaintiffs are disentitled to any specific performance. Mr.Parikh submitted that during the course of his cross-examination, plaintiff no.1 has admitted that there was no agreement between the parties regarding these crucial elements and in view of this admitted position, plaintiffs are not entitled to specific performance. 29 In the cross-examination of PW-1 question nos.65, 66, 70, 71, 72, 75 & 76 and the answers thereto are relevant and the same are reproduced hereunder :-

Q.65 : Therefore, there was no agreement between the parties with regard to the payment of stamp duty on the sale of the suit flat ? Ans. : Actually, this was the fraud committed by the defendants. They have not given any documents and papers from bank because they want to cheat me.

Q.66 : Therefore, it is also correct to say that there is no agreement between the parties with regard to the payment of transfer charges to Highway Milton Co-operative Housing Society Ltd. with regard to the transfer of the Share Certificate ?

Ans. : As the defendants did not have any intention to sell the property to me and they wanted to sell it to other party after taking money from KJ 25 suit2543.12.doc me, hence, the defendants did not prepare any documents. Hence, there is no question of payment of any stamp duty or society transfer charges. Witness adds : I was ready with the money.

Q.70 : According to you, what would be the approximate stamp duty and registration charges required to be paid on the Agreement for Sale of the suit flat ?

Ans. : Approximately at that time Rs.1 lac and slightly more amount. Q.71 : According to you, what was the amount of transfer charges to be paid to the Highway Milton Co-operative Housing Society Ltd. For the suit flat ?

Ans. : It will be between Rs.20,000/- to Rs.25,000/- which will be shared by both the parties equally.

Q.72 : According to you, were the Defendants regularly paying the maintenance charges for the suit flat to the Highway Milton Co-operative Housing Society Ltd. ?

Ans. : No. Q.75 : What is the amount of monthly maintenance paid by you for your present flat at that time ?

Ans. : At that time, I do not remember, presently I am paying approximately Rs.5000/- quarterly.

Q.76 : Would it be correct to say that there was no agreement between the parties with regard to the payment of the arrears of maintenance charges for the suit flat at the time of the MOU ? Ans. : Before the MOU, the Defendant No.1 informed me that they will clear all the dues before the Sale Agreement. 30 In answer to question no.76, PW-1 has expressly stated that defendant no.1 informed him that all the arrears of maintenance charges of the suit flat payable to the society will be paid by defendant no.1. No evidence to counter this statement of plaintiffs has been put forth by defendants. Defendant no.1 though he was alive, was not called to give evidence in the matter to controvert what plaintiff has stated. Therefore, for defendants now to say that there was no agreement on payment of arrears to the society and KJ 26 suit2543.12.doc therefore, specific performance cannot be granted, cannot be accepted.

31 So far as stamp duty and transfer charges are concerned, question no.66 in cross-examination of PW-1 and the answer thereto is relevant. It should be noted that the witness has stated "I was ready with the money". Therefore, plaintiffs were ready to make the payment of transfer charges and stamp duty. Therefore, the submissions of defendants that these factors were not agreed upon and therefore, specific performance cannot be granted, cannot be accepted.

32 Considering the documents exhibited and the evidence, in my view, plaintiffs were always ready and willing to perform their obligations. Paragraph-3 of the Memorandum of Understanding has not been inserted without any purpose. Plaintiffs paid Rs.22,00,000/- by 25.1.2017 though as per the

Memorandum of Understanding had time to make payment of balance Rs.33,00,000/- by 31.3.2011. Plaintiffs having parted with Rs.22,00,000/- by 25.1.2011, it is quite obvious that amount was paid over to defendant no.1 to pay off the liability of the bank and get the flat released from mortgage. It is defendants' case in the written statement that defendants had entered into a one time settlement of Rs.19,00,000/- but paid only KJ 27 suit2543.12.doc Rs.10,00,000/- out of Rs.22,00,000/- received. Defendants are totally silent as to why entire Rs.19,00,000/- was not paid off so that the bank's liability is settled and the flat is released from mortgage. Therefore, the sequence of events which can be culled out in the facts and circumstances is (a) plaintiff paid Rs.22,00,000/- first ; (b) defendants should use that money to pay off the bank's liability and get the suit flat released from mortgage and (c) plaintiffs will pay the balance amount of Rs.14,00,000/- while executing the sale agreement and all these to happen on or before 31.3.2011. As held in *Nathulal (supra)* one of the parties to the contract cannot require compliance with the obligation by the other party without performing his obligations. Defendants not only failed to pay the bank, they did not even write to the society about their intention to sell the flat to plaintiffs. Defendants cannot raise any grievance that plaintiffs did not pay balance of Rs.14,00,000/- before 31.3.2011. 33 Plaintiffs' readiness and willingness to perform their obligation under the MOU can also be seen from various documents. Plaintiffs had informed the society (Exh.C colly) that substantial payments have been made to defendants and the balance amount payable is also ready with plaintiffs. Plaintiffs have also filed their income-tax returns to which are annexed the demat statements (Exh.M colly) of plaintiffs, in which as on 31.3.2011 plaintiffs had KJ 28 suit2543.12.doc shares worth Rs.16,16,427/-. It is the case of plaintiffs that they would have sold the shares and paid balance of Rs.14,00,000/- if only defendants had got the suit flat released from mortgage. 34 In *Rajinder Pershad V Darshana Devi* it was held in the absence of cross examination of the statement made in examination in chief, it is an age old rule that if you dispute the correctness of the statement of a witness, you must give him an opportunity to explain his statement, otherwise you cannot impeach it. Admittedly Defendants have not questioned the correctness that Plaintiffs had a demat account which had shares valued at more than the balance consideration of Rs.14,00,000/-payable. In fact in cross- examination PW-1 has stated that the balance amount of Rs. 14 Lakhs was also available to Plaintiffs, as Plaintiffs had sold certain shares and the money was lying in the bank account jointly held by his son, Plaintiff No. 2 and his wife (question 87 to 90 and annexures thereto in cross-examination of PW-1). Defendants have not rebutted the positive statement made by PW-1 and have not even called upon PW-1 to produce such account statement nor was a question asked to PW-1 as to whether the said statements have been produced by Plaintiffs.

10 (2001) 7 SCC 69 KJ 29 suit2543.12.doc 35 It is also pertinent to note that defendants even as on 27th March 2011, (as per the letter of the Society dated 27.3.2011 addressed to the plaintiffs at Exhibit 'C' colly) had not even made an application to the Society intimating the Society of their intention to transfer the said flat and apply for NOC for sale of the suit flat to plaintiffs.

36 While considering a matter of this nature and while exercising its discretion, the court also keeps in mind the conduct of the parties. The conduct of defendants is despicable. It is true that in every suit filed for specific performance decree for specific performance need not be granted. But where equity shifts in favour of the purchaser the Court can entertain. Here is a case where plaintiffs had paid 61% of the consideration. Defendants had to pay off the bank liability before the plaintiffs paid

the balance amount of Rs.14,00,000/-. The defendants do not even write to the society of their intentions to sell. Though one time settlement in the sum of Rs.19 lakhs was agreed with the Bank and defendants had received Rs.22 lakhs from plaintiffs, defendants paid only Rs.10 lakhs to the bank. There is no explanation as to why defendants did not discharge the bank's liability in toto. Defendants also retained the amount of Rs.22 lakhs for almost 7 years and according to defendants they did not return the money because plaintiffs did not KJ 30 suit2543.12.doc ask for it. This is the conduct of defendants. In my view equity is certainly in favour of plaintiffs.

37 It is therefore, in my view, lawful and equitable that a decree of specific performance be granted since defendants have utilized the entire amount of Rs.22,00,000/- paid, denied sale, capitalized situation and enjoyed possession of the property. Defendants are not entitled to take advantage of pendency of proceedings to demand more consideration equivalent to the market value.

38 Issue no.1 :-

It is the case of defendants that defendant no.3 was not a signatory to the Memorandum of Understanding but has only signed as a witness and therefore, was not a necessary party.

Under Order 1 Rule 9 of the Code of Civil Procedure 1908, a suit cannot be dismissed for mis-joinder of party. In any event, defendant no.3 was the person for whose loan/facility, the suit flat was mortgaged with Malad Sahakari Bank Ltd. Defendant no.3 has also signed as a witness to the Memorandum of Understanding. Though it is stated entire negotiations and discussions happened between plaintiff no.1 and defendant no.1, defendant no.3 is the only one who stepped into box and gave evidence on behalf of KJ 31 suit2543.12.doc defendants. Defendant no.1 was alive at that time. In my view, Defendant no.3 has been an integral part of the entire transaction. At the same time a decree of specific performance cannot be passed against a person who was not a party to the agreement. Therefore, decree of specific performance cannot be passed against defendant no.3, who in effect is defendant no.2 now, defendant no.1 having expired.

39 In the circumstances, issues are answered as under :-

No. Issues Findings 1 Whether the Defendants prove that the suit is No barred for misjoinder of parties ?

2 Whether the plaintiffs prove that the Defendants Yes committed breach of their obligations under the MOU dated 22.1.2011 ?

3 Whether the plaintiffs prove that the plaintiffs have Yes been ready and willing to perform their part of the MOU dated 22.1.2011 ?

4 Whether the Defendants prove that time to make No the balance payment was essence of the contract contained in the MOU dated 22.1.2011 ?

5 Whether the Defendants prove that the plaintiffs NO committed breach of their obligations under the MOU dated 22.1.2011 ?

6 Whether the Defendants prove that the MOU No dated 22.1.2011 stood terminated as set out in KJ 32 suit2543.12.doc paragraph 5(a) of the Written Statement ?

7 Whether the plaintiffs are entitled to specific Yes. * performance of the MOU dated 22.1.2011 ?

8 If answer to issue no.7 is in the negative, whether Does not the plaintiffs are entitled to damages and other arise. amounts as prayed for ?

*Against defendant no.2 (now 1) Mrs.Nisha Deepak Saraf only. Unless the shares of defendant no.1 in the suit flat has been transferred to defendant no.2, in view of demise of Mr.Haridas Laxmidas Ashar, original defendant no.1, the Prothonotary & Senior Master to sign the sale deed on behalf of original defendant no.1. The plaintiffs shall deposit the balance amount of Rs.14 lakhs with the Prothonotary & Senior Master within 30 days from today but before execution of the sale deed. Upon the sale deed being executed by original defendant no.2 the entire amount of Rs.14 lakhs to be paid over to defendant no.2 Mrs.Nisha Deepak Saraf as she claims to be the sole legal heir of late Mr.Haridas Laxmidas Ashar, against indemnity and undertaking in the usual format. 40 In view of the specific performance being granted, I am not going into alternative plea for damages.

41 Suit stands decreed and disposed accordingly.

(K.R.SHRIRAM,J) KJ