

* IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

* HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN
AND

* HONOURABLE SRI JUSTICE N. BALAYOGI

+ APPEAL SUIT No.871 of 2012

% 10-11-2017

BETWEEN:

1. Ganuga Ranganath, S/o. G. Suryanarayana, residing at
D.No.26/4/3223, Melapuram, Hindupur, Anantapur District.
2. Chimpiri Vijaya Bhaskara Reddy, S/o. Narasimha Reddy, residing at
Lepakshi Village and Mandal, Anantapur District.

... Appellants/plaintiffs

Vs.

Hotel Garudadri (Private) Limited,
Repl. By its Managing Director,
D.No.17-3—634/A, Penukonda Road,
Hindupur.

... Respondent/defendant

!Counsel for the Appellants : Mr. O. Manohar Reddy

^ Counsel for the Respondent : Mr. T.P. Acharya

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? Cases referred

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N. BALAYOGI

APPEAL SUIT No.871 of 2012

JUDGMENT: (per VRS,J.)

The unsuccessful plaintiffs in a suit for specific performance have come up with the above regular appeal.

2. Heard Mr. O. Manohar Reddy, learned counsel for the appellants/plaintiffs and Mr. T.P. Acharya, learned counsel for the respondent/defendant.

3. The appellants filed a suit in O.S.No.17 of 2011 on the file of the Additional District Judge, Hindupur praying for a decree of specific performance of an agreement of sale dated 14.10.2009. The case of the appellants/plaintiffs was that the defendant agreed to sell and the plaintiff agreed to purchase the suit schedule property under the said agreement of sale for a total sale consideration of Rs.1,18,00,000/-; that a sum of Rs.10,00,000/- was paid towards part of the sale consideration; that time was not the essence of the agreement; that the defendant was obliged under the agreement to pay the arrears of municipal taxes and the electricity charges, to obtain Encumbrance Certificate and also to prepare lease agreements from the existing tenants in favour of the plaintiffs; that the plaintiffs have always been ready and willing to perform their part of the contract; that on 13.04.2010, the plaintiffs demanded the defendant to perform their part of the contract; that the Managing director of the defendant requested for a further period of two months and made an endorsement on the agreement of sale extending the time till 13.06.2010; that since the defendant kept on postponing the execution of the sale deed, the plaintiffs got issued a legal notice dated 02.01.2011 calling upon

the defendant to execute the sale deed on 07.03.2011; that on that day the plaintiffs were present at the office of the Sub-Registrar, but the Managing Director of the defendant did not turn up; that the defendant issued a reply dated 17.02.2011 containing false allegations and claiming that the agreement got cancelled and the advance money forfeited; that the Directors of the defendant as well as their family members had earlier executed an agreement on 04.10.2009, but the same got terminated; that the plaintiffs reserved their right to recover the money paid under the earlier agreement; and that therefore, the plaintiffs were constrained to file the suit for specific performance of the agreement of sale.

4. The appellants/plaintiffs also made an alternative prayer for the refund of the advance money of Rs.10,00,000/- together with interest at 24% p.a.

5. The respondent/defendant filed a written statement contending *inter alia* that though an agreement of sale was executed on 14.10.2009, the amount of Rs.10,00,000/- was not paid either as advance or as part of the sale consideration; that the said amount was stated in clear terms to be liable to be forfeited, if the plaintiffs failed to perform their part of the obligations within six months; that time was the essence of the contract; that in these days of galloping prices and demand for immovable properties, nobody can think that time is not the essence of the contract; that Hindupur is a flourishing and expanding town in every field; that several industries are developing in and around upto a distance of more than 10 K.Ms; that prices of buildings and other immovable properties are increasing by leaps and bounds and hence no seller would agree to treat the time mentioned in the agreement as a formal condition; that the defendant is a business concern, which wanted money for purchasing a

property at Bangalore and hence opted to sell the plaint schedule property; that the parties fixed six months as the time after coming to a definite understanding; that the period of six months mentioned in the agreement was never meant to be a formal clause; that on account of the default committed by the plaintiffs, the defendants lost the chance of purchasing a property at Bangalore and suffered heavy loss; that since Bangalore has attained the status of an international city, purchasing a property at Bangalore will be an all time permanent asset; that the principle that time is not the essence of the agreement of sale of immovable property, is a old time principle not applicable to the present days; that the defendant was not in arrears of electricity charges or municipal charges and there were also no encumbrances on the property; that the plaintiffs and the defendant jointly verified the records in the office of the Sub-Registrar and found that there were no encumbrances; that the obligation to get the lease deeds executed and registered by the tenants in the name of the plaintiffs, would arise only after payment of the entire amount due under the agreement of sale; that no seller will take the risk of getting the lease deeds executed in the names of purchasers before the receipt of the entire consideration; that the claim of the plaintiffs that they were ready and willing to perform their contract is not correct; that the plaintiffs never made any demand on 13.04.2010; that the averment of the plaintiffs that the Managing Director of the defendant requested for a further period of two months is also false; that there was no need for the defendant to seek further time of two months; that the plaintiffs were aware of the fact that the Managing Director of the defendant had already shifted his residence to Bangalore; that the plaintiffs pleaded their inability to pay the sale consideration within the

time fixed and appealed for extension of time; that the defendant agreed to extend the time by two months; that it was the last and final chance given to the plaintiffs, but the plaintiffs could not procure the money even by the extended time; that the legal notice sent by the plaintiffs was dated 02.01.2011, but it was sent by registered post only on 02.02.2011; that the legal notice was suitably replied to by a reply notice dated 17.02.2011; that the earlier agreement dated 04.10.2009 was brought into existence at the frequent request of the plaintiffs to enable them to obtain loan from the bank; that the circumstances under which the said agreement was brought into existence were clearly mentioned in the reply dated 18.03.2011 sent to the notice issued by the plaintiffs on 05.07.2011; that no sane person would have agreed to sell the property for a value of Rs.1,18,00,000/- on 14.10.2009, when there was already an agreement to sell the property for Rs.2,30,00,000/- on 04.10.2009; and that the plaintiffs are not entitled either for the relief of specific performance or for the refund of the money paid under the agreement.

6. On the strength of the above pleadings, the trial Court framed the following issues for consideration:

1. Whether the agreement of sale dated 14.10.2009 is uncertain in terms of as alleged by the defendant?
2. Whether the time is essence of the contract in pursuance of the terms and conditions of the agreement of sale dated 14.10.2009?
3. Whether the plaintiffs committed default and if so the defendant has suffered heavy loss because he could not purchase the property at Bangalore with the sale consideration for having sold the property to the plaintiffs under the agreement of sale?
4. Whether the plaintiffs were and are ready to perform their part of contract in pursuance of agreement of sale dated 14.10.2009?
5. Whether there were laches on the part of the plaintiffs in order to perform their part of contract?
6. Whether the agreement of sale dated 14.10.2009 stands cancelled immediately after 30.06.2010 and if so plaintiffs are not entitled to seek refund of Rs.10,00,000/- or any part of it?
7. Whether the plaintiffs are entitled for a decree of specific performance?
8. Whether the plaintiffs are entitled for refund of advance sale consideration with interest?
9. To what relief?

7. The plaintiffs examined the first plaintiff as PW.1 and a third party as PW.2. The agreement of sale and the endorsement made on 13.04.2010 were marked as Exs.A.1 and A.2. The legal notice dated 12.01.2011 and the reply notice dated 17.02.2011 were marked as Exs.A.3 and A.4. The letters issued by the Karnataka Bank, the Karur Vysya Bank and Shriram Chits (P) Ltd., expressing willingness to extend a loan, were marked as Exs.A.5 to A.7. The valuation certificate issued by the Sub-Registrar was filed as Ex.A.8. The registration extracts of six different sale deeds were marked as Exs.A.9 to A.14 to show that the plaintiffs were on a purchasing spree.

8. The Managing director of the defendant examined himself as DW.1. He filed the Xerox copy of the earlier agreement dated 04.10.2009 as Ex.B.1 and the endorsement made on the said agreement as Ex.B.2.

9. On the basis of the evidence let in, the trial Court came to the conclusion on Issue No.1 that the agreement of sale was not uncertain in terms.

10. On issues 2, 4, 6 and 8, relating to (1) time being the essence of the contract; (2) readiness and willingness on the part of the plaintiffs; (3) the cancellation of the agreement and the entitlement of the plaintiffs to seek refund; and (4) the entitlement of the plaintiffs to seek refund of advance sale consideration, the Court below held that time was essence of the contract and that since the plaintiffs were not ready and willing to perform their part of the contract, the amount of Rs.10,00,000/- paid by them under the agreement of sale was liable to be forfeited.

11. On issue Nos.3 and 5, the trial Court held that there was no material to show that the defendants suffered heavy loss due to non-payment of balance sale consideration fixed under the agreement.

12. As a result of the findings recorded on issues 1 to 6 and 8, the trial Court held on Issue No.7 that the plaintiffs were not entitled to seek specific performance. Accordingly, the Court below dismissed the suit forcing the plaintiffs to come up with the above appeal.

13. Assailing the judgment of the trial Court, it is contended by Mr. O. Manohar Reddy, learned counsel for the appellants (1) that the normal rule with respect to the sale of an immovable property is that time was not the essence of contract; (2) that to fall under the exception, special circumstances should have been explained in the agreement itself, for making time, as the essence of the contract; (3) that a mere fixation of a date for the purpose of performance of mutual obligations cannot lead to the presumption that time was the essence of the agreement; (4) that through cogent and convincing evidence, the plaintiffs have demonstrated that they had the necessary wherewithal to pay the balance of sale consideration and complete the transaction; (5) that as a matter of fact, the plaintiffs deposited the entire balance of sale consideration both before the Court below as well as before this Court, for securing an interim order of injunction restraining the defendant from alienating the property, thereby demonstrating their readiness and willingness; (6) that in the light of the very defence taken by the defendants that due to galloping prices the property cannot be sold, it was clear that the defendant was on the wrong side by refusing to honour their commitment; (7) that once the agreement is established and the readiness and willingness on the part of the plaintiffs is also established, the plaintiffs were entitled to a decree for specific performance; and (8) that the trial Court misread the evidence, went against the probabilities of the case, and dismissed the suit contrary to law.

14. In response, it is contended by Mr. T.P. Acharya, learned counsel for the defendant (1) that specific time limit was stipulated in the agreement, only because of the existence of special circumstances; (2) that those special circumstances were explained in the written statement and also in the evidence; (3) that due to the presence of those special circumstances, the time stipulated in the agreement was rightly construed as the essence of the contract by the Court below; (4) that the plaintiffs actually delayed the matter on one pretext or the other and did not make use of the opportunity granted to them by one extension of time up to 13.06.2010; (5) that the plaintiffs were never able to prove their readiness and willingness; (6) that the mere deposit of the balance of sale consideration before the Court below and before this Court for securing an interim order of injunction, cannot be considered as a demonstration of readiness and willingness; and (7) that therefore, the judgment and decree of the trial Court do not warrant any interference.

15. We have carefully considered the rival contentions. From the rival contentions, the following points arise for determination in terms of Order XLI Rule 31 of the Code:

1. Whether time could be said to be the essence of the agreement of sale dated 14.10.2009?
2. Whether the plaintiffs were always ready and willing to perform their part of the obligations?
3. Whether the forfeiture of the amount of Rs.10,00,000/- by the defendant is legally valid?
4. Whether the plaintiffs were entitled to the discretionary relief of specific performance or to the alternative relief of refund ?

Point No.1:

16. The first point arising for determination is as to whether time could be construed to be the essence of the agreement of sale dated 14.10.2009.

17. The rule that time is not the essence of an agreement of sale of an immovable property, is a time tested rule. Though at times, Courts have found the said rule to be indigestible, the said rule has not so far been annulled by a judicial mandate.

18. The only exception to the said rule is where the agreement fixed a time for its performance indicating special circumstances under which the parties agreed to have time as the essence of the contract.

19. In *Mrs. Saradamani Kandappan v. Mrs. S. Rajyalakshmi*¹, the Supreme Court reiterated in Paragraph 17 that – “normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.”

20. The mere 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. This principle, reiterated in a decision of the Constitution Bench of the Supreme Court in *Chand Rani v. Kamal Rani*², following its earlier decisions in *Gomathinayagam Pillai v. Pallanishwami Nadar*³ and *Govind Prasad Chaturvedi v. Hari Dutt Shastri*⁴ was also cited and followed in *Saradamani*.

¹ (2011) 12 SCC 18

² (1993) 1 SCC 519

³ 1967 (1) SCR 227

21. Though in *Saradamani*, the Supreme Court attempted to strike a discordant note with respect to the principle “time is not the essence”, by referring to the distinction between the Indian law and the English law, after taking note of Section 55 of the Contract Act, the Supreme Court did not upset the time tested principle even in *Saradamani*. All that the Supreme Court said towards the end of paragraph 27 of its decision was that there is an urgent need to revisit the principle that time is not the essence in contracts relating to immovable property. The Supreme Court did not even think it fit either to refer the matter to a Larger Bench or to revisit the principle in the same decision. On the contrary all that the Supreme Court did in *Saradamani* was merely to formulate certain principles in paragraph 28 of its decision, till the issue is considered (or revisited) in an appropriate case.

22. Therefore, as on date the law is that time is not the essence of the contract relating to immovable property, unless through express or implied terms, time can be inferred to have been specifically prescribed as the essence of the contract. Keeping this principle in mind, let us go back to the terms of the agreement, the pleadings of the parties and the evidence.

23. In Ex.A.1-agreement, all that the parties agreed to was as follows:

“I agree to execute registered sale deed in your favour or to your order on receiving the remaining balance of Rs.1,08,00,000/- (Rupees one crore and eight lakhs only) within six months from this date. If you fail to obtain registered sale deed within the said period of six months, the advance amount stands forfeited and you will not have any right over the schedule property. On the other hand if you are ready to obtain registered sale deed within the said period and if I fail to execute the sale deed, you are at liberty to obtain sale deed through

⁴ 1977 (2) SCC 539

process of law. I agree to bear costs and consequences for the said transaction. By the date of registration I agree to obtain EC clearing and clearance of municipal taxes and electricity charges over the schedule property and I further agree that I will obtain fresh lease deeds from the present tenants of the property on the existing conditions in your favour and thereafter I will handover the possession of the property to you. This is the agreement of sale executed by me at my free will and volition.

24. The above stipulation is neither an expression nor an implied term to suggest the existence of special circumstances making time as the essence of the contract. As a matter of fact, the date 13.04.2010 was agreed to be extended by two more months by the endorsement under Ex.A.2.

25. Even in the written statement, the defendant did not plead any special circumstances as to why time was agreed to be the essence of the contract. Though the defendant claimed that they wanted to purchase properties in Bangalore and that the said attempt was frustrated, the defendant could not produce a single piece of paper to show that they had entered into any agreement with any person in Bangalore for the purchase of any property. Repeatedly the defendant emphasized in the written statement that property prices were galloping. Therefore, it is clear that time was not stipulated either expressly or impliedly to be the essence of the contract. Hence we hold on Point No.1 that time was not the essence of the agreement under Ex.A.1.

Point No.2:

26. The second point arising for consideration is as to whether the plaintiffs were always ready and willing to perform their part of the obligations under Ex.A.1-agreement.

27. As we have seen earlier, the plaintiffs were obliged to pay the balance of sale consideration within six months from the date of the

agreement, viz., 14.10.2009. The period was to expire on 13.04.2010. Though it is the contention of the plaintiffs that time was not agreed to be the essence of the agreement, the extension was granted upto 13.06.2010, at the instance of the defendant.

28. In other words, the case of the plaintiffs is that they were ready and willing to perform their part of the obligations even on 13.04.2010, but the defendant sought extension of time by two months. Therefore, the plaintiffs have to stand or fall on the basis of such a pleading and establish that they were ready and willing to perform their obligations even as on 13.04.2010.

29. Section 16 (c) of the Specific Relief Act, 1963 makes it mandatory for a plaintiff to aver and prove that he was always ready and willing to perform the essential terms of the contract. The Explanation under Section 16 makes it clear that where a contract involves payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court.

30. As held by the Supreme Court in J.P. Builders v. A. Ramadas Rao⁵, the onus is on the plaintiffs to prove readiness and willingness.

31. The 1st plaintiff examined himself as PW.1. He claimed that the plaintiffs were always ready and willing. To prove their readiness and willingness, the plaintiffs filed three loan offer letters from two different banks and a Finance Company as Exs.A.5 to A.7. The plaintiffs also filed the registration extract of certain sale deeds to show that they were buying several properties at around the same time.

⁵ (2011) 1 SCC 429

32. But unfortunately for the plaintiffs, Exs.A.6 and A.7 (loan offer letters from Karur Vysya Bank and Shriram Chits (P) Ltd.,) were dated 23.04.2010. Therefore, the claim of the plaintiffs that they were ready and willing even on 13.04.2010 and that it was only the defendant who sought extension of time by two months, is obviously a lie.

33. Though Ex.A.5, the loan offer letter of the Karnataka Bank, is dated 24.12.2009, the contents of the letter would show that the offer was subject to the fulfilment of legal clearance and other formalities acceptable to the bank. The plaintiffs never made any whisper even earlier that they submitted Xerox copies of title deeds to the bank for processing their loan applications. It is common knowledge that loan applications are to be filed in a prescribed format along with legal opinion on title and the Xerox copies of title deeds. There is no claim either in the oral evidence or otherwise that a loan application form was submitted and the copies of the title deeds were also furnished.

34. As a matter of fact, if we go by the oral testimony of PW.1, the plaintiffs need not have gone to the banks for a loan at all. During the cross-examination, PW.1 claimed that the plaintiffs actually had cash on hand. The relevant portion of the testimony of PW.1 during cross-examination reads as follows:

“I have not shown cash in my account. It is not true to say that we do not have any ready cash nor financial capacity to purchase the property in question, therefore, we did not pay the balance sale consideration to the defendant within time as stipulated in Ex.A.1. I had kept one crore eight lakhs with my friends. It is not mentioned either in my plaint or Ex.A.3 notice or in my chief affidavit that I kept one crore eight lakhs balance sale consideration with my friends. I applied Karnataka Bank, Karur Vysya Bank and Sreeram Finance for loans. On 25.04.2010, I applied loan from Sreeram Chits, Hindupur. The Sreeram Chits addressed Ex.A.7 letter on 25.04.2010 offering to give a loan. Ex.A.6 is the letter addressed by me to the Karur Vysya Bank for a loan. I addressed Ex.A.5 letter to Karnataka Bank on 24.12.2009 for a loan. It is not true to say that since I do not have cash with

me therefore I applied loans from those banks and chit fund company. My source of income from business. But, I cannot give specific source out of my business. It is not true to say that we the plaintiffs do not have any source of income, ready cash nor financial capacity to purchase the property in question.”

35. We do not know why a person, who had kept Rs.1,08,00,000/- with his friend, which exactly tallies with the balance of consideration payable under Ex.A.1-agreement, should apply for a loan from two different banks and one financial institution. In any case, after having taken a stand during cross-examination that they had kept the balance of consideration with their friends, the plaintiffs would have examined those friends.

36. Interestingly, the plaintiffs examined one of their friends by name A. Narendranath as PW.2. In the affidavit filed by him in lieu of chief-examination, he simply made a bald statement to the following effect.

“On several occasions, when the 1st plaintiff demanded execution of sale deed, he kept the cash of the balance of consideration i.e., Rs.1,08,00,000/- in my house.”

37. But in the same affidavit he claimed that the plaintiffs purchased other properties worth Rs.80,00,000, even after the agreement dated 14.10.2009. One of the properties was purchased by the plaintiffs was under Ex.A.9. Ex.A.9 is dated 26.04.2010. The sale consideration under the said document was Rs.34,00,000/-. Another sale deed is dated 03.02.2011, the copy of which was filed as Ex.A.10 and the sale consideration indicated therein was Rs.11,00,000/-. The sale consideration indicated in the third document Ex.A.11, dated 12.09.2011 was only Rs.65,000/-, the sale consideration indicated in the document filed as Ex.A.12, dated 22.09.2011 was Rs.4,90,000/-, the sale consideration indicated in the document filed as Ex.A.13, dated 23.04.2011 is

Rs.35,10,000/- and the sale consideration indicated in the document filed as Ex.A.14, dated 08.12.2011 was Rs.25,00,000/-.

38. We do not know why the sale consideration payable under Ex.A.1 alone was kept by the plaintiffs in the house of PW.2. We do not also know how the cash allegedly kept by the plaintiffs in the residence of PW.1 could be correlated to the balance of sale consideration under Ex.A.1. In any case, the plaintiffs have applied for loans from the Karnataka Bank on 24.12.2009 and from the Karur Vysya Bank and Shriram Chits (P) Ltd., on 23.04.2010 and 25.04.2010 respectively as reflected by Exs.A.5 to A.7. If really the plaintiffs had kept the aforesaid amount in the house of PW.2, there was no necessity for them to apply for the loan.

39. The claim made by the appellants/plaintiffs that they had kept the cash to the extent of the balance of sale consideration in the house of their friends, without even naming PW.2 in the testimony of PW.1, does not inspire our confidence. There is no evidence to show that the plaintiffs were ready and willing to perform their obligations. The deposit made by the plaintiffs for the purpose of securing interim orders of injunction, would not throw any light upon their readiness and willingness at the relevant point of time. The readiness and willingness on the part of the plaintiffs should be tested with reference to the relevant time for the purpose of the contract. What happens after the initiation of the litigation cannot be an indication as to the readiness and willingness.

40. Therefore, in the absence of clear cut evidence, we hold on Point No.2 arising for consideration that the plaintiffs have not established that they were ready and willing to perform their part of the obligations under the agreement.

41. We have to take note of one more fact. The original claim of the plaintiffs was that the obligations imposed upon the defendant, under Ex.A.1-agreement to provide the encumbrance certificate and to clear municipal taxes and electricity charges and to obtain fresh lease from tenants, were not performed by the defendant, so as to enable the plaintiffs to perform their part of the obligations. But unfortunately, the plaintiffs did not even make a demand in writing until the issue of legal notice under Ex.A.3. Though Ex.A.3 is dated 02.01.2011, it was sent by registered post only on 02.02.2011. This is why the date fixed in Ex.A.3 for the performance was dated 07.03.2011.

42. Even according to the plaintiffs, the extended time for the performance of the agreement, expired on 13.06.2010. There is nothing on record to show the steps taken by the plaintiffs from 13.06.2010 up to 02.02.2011. In this regard it is relevant to take note of one of the three principles enunciated by the Supreme Court in *Saradamani*, in Para 28 (iii), which reads as follows:

“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.”

43. In this case, there is no indication either in the plaint or in the evidence as to what the plaintiffs were doing from 13.06.2010 to 02.02.2011. If the plaintiffs had actually kept the cash of more than Rs.1.00 crore in the residence of one of their friends, they could not have kept quiet for eight months, especially when even according to PW.2 there was not even a written acknowledgement about such huge cash being kept at his residence.

44. Therefore, we hold on Point No.2 that the plaintiffs have not established their readiness and willingness.

Point No.3:

45. The third point arising for consideration is as to whether the forfeiture of the advance amount of Rs.10,00,000/- paid under Ex.A.1-agreement was legal and valid.

46. A careful look at the relevant portion of Ex.A.1-agreement would show that the same was only advance money and not earnest money. Therefore, the clause that the advance amount will stand forfeited, can be taken at the most to be only a clause *in terrorem*.

47. Interestingly, the defendant claimed that they suffered loss on account of the non-performance of the agreement by the plaintiffs within the time. But this claim was found against them by the Court below. Under Issue Nos.3 & 5, the trial Court found that there was no evidence to show that the defendant suffered any loss due to the failure of the plaintiffs to pay the balance of sale consideration.

48. A clause relating to forfeiture of advance money paid under the agreement, should be traced to the hardship or damage caused to one of the parties on account of the failure of the other to comply with the terms of the agreement.

49. In *M/ s. Kailash Nath Associates v. Delhi Development Authority*⁶, the Supreme Court noted the scope of Section 74 of the Contract Act. After pointing out that Section 74 is sandwiched between Sections 73 and 75, which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfilment of a contract after such party rightfully

⁶ (2015) 4 SCC 136

rescinds such contract, the supreme Court pointed out that compensation is payable under Section 74 only where damage or loss is caused by such breach. After eliciting in paragraph 37 of its decision, the principles laid down in paragraph 68 of the decision in *ONGC Ltd., v. Saw Pipes Ltd.*⁷, the Supreme Court dealt with the issue of forfeiture of earnest money from paragraph 38 onwards. Eventually, the Supreme Court held in *Kailash Nath* that Section 74 of the contract Act will apply to cases of forfeiture of earnest money under a contract. In the case on hand, the sum of Rs.10,00,000/- was not even an earnest money. It was only an advance money, supposed to be a part of the sale consideration. The defendant could not prove any loss on account of the failure of the plaintiffs to perform their part of the obligations.

50. Section 22(1)(b) of the Specific Relief Act, 1963 enables a person suing for specific performance of a contract for the transfer of property, to ask for any other relief including the refund of any earnest money or deposit paid, in case, the claim for specific performance is refused. The power to grant the relief under Section 22(1)(b), viz., to order refund of earnest money, is without prejudice to the power of the Court even to award compensation in lieu of specific performance.

51. Therefore, in the absence of any evidence to show that the defendant suffered any loss due to the failure of the plaintiffs to perform their part of the obligation, the forfeiture of the defendant's money is totally unjustified. The clause for forfeiture is only a clause *in terrorem*. In fact even according to the defendant, their insistence on time being the essence of the contract was on account of galloping prices. Therefore, the failure of the contract under Ex.A.1 should have resulted in a profit for the

⁷ (2003) 5 SCC 705

defendant due to “galloping prices”. Hence the refusal of the defendant to refund the defendant’s money is completely unjustified and the third Point is answered in favour of the appellants/plaintiffs.

Point No.4:

52. The 4th point arising for determination is as to whether the appellants/plaintiffs are entitled to the discretionary relief of specific performance or atleast to the alternative relief.

53. In view of our finding on Point No.2 that the plaintiffs have not established that they were always ready and willing, the plaintiffs are not entitled to the grant of relief of specific performance. Section 16 is very clear to this effect. Therefore, we need not even go to Section 20. Hence we hold on Point No.4 that the plaintiffs are not entitled to the discretionary relief of specific performance.

54. However, as we have already indicated, the plaintiffs are entitled to the alternative relief of refund of the advance money paid. The advance money was paid at the time of execution of Ex.A.1-agreement, dated 14.10.2009. The amount has been lying with the defendant for the past 8 years. The defendant is a Company engaged in business. According to the defendant, they were buying and selling lot of properties and they were also in hotel business. Therefore, the advance money that the plaintiffs paid, could have been employed by the defendant for his business purposes, giving them a good return on investment. This return of investment arose from the defendant’s money.

55. Though the plaintiffs have claimed interest at 24% p.a., we do not think that we can grant such a rate of interest. The agreement is silent about the rate of interest. This is in view of the fact that the agreement stipulates the advance money as forfeitable.

56. The question as to whether the interest can be awarded in the absence of any stipulation contained in the contract, came up for consideration before a Division Bench of this Court to which one of us (VRSJ) was a party, reported in Apollo Health and Lifestyle Limited v. Anupam Saraogi of Indian Inhabitant.⁸ After a detailed consideration of the origin and evolution of the Interest Act, 1978, this Court held in paragraph 80 of its judgment that both in England and in India, Courts have treated interest as a payment which becomes due as compensation for the deprivation. This Court also took note of the decision of the Constitution Bench in Central Bank of India v. Ravindra⁹ and held that the Court is entitled to award interest on such a rate as the Court considers reasonable, unless the Court is satisfied that there are special reasons why interest should not be allowed.

57. We are of the considered view that the defendant should be directed to pay interest at 9% p.a. This is in view of the fact that at the instance of the Court while granting an interim order of injunction, the plaintiffs have parked a huge sum of Rs.1,08,00,000/-. We do not know whether the amount was kept in fixed deposit so as to earn interest. The defendant, who is a commercial undertaking, has kept the amount of Rs.10,00,000/- paid by the plaintiffs with them for the past seven years. Therefore, we consider that interest at 9% p.a. may meet the ends of justice.

Conclusion:

58. Therefore, in fine, we are of the considered view that though the trial Court was right in dismissing the claim for specific performance, the trial Court ought to have at least granted the alternative relief of

⁸ 2017 (3) ALT 602

⁹ (2002) 1 SCC 367

refund of advance money with interest. Hence the appeal is allowed and the judgment and the decree of the trial Court are set aside. The suit filed by the appellants/plaintiffs will be decreed, directing the defendant to refund to the plaintiffs, the advance money of Rs.10,00,000/-, with interest at the rate of 9% p.a., from 13.06.2010 up to the date of actual repayment. The plaintiffs will be entitled to proportionate costs throughout. The balance of sale consideration kept by the appellants/plaintiffs pursuant to the interim orders passed in the appeal is permitted to be withdrawn by the appellants together with the accumulated interest, if any, if the amount had been kept in deposit in an interest bearing account.

59. As a sequel, miscellaneous petitions pending in this appeal, if any, shall stand closed. There shall be no order as to costs.

V. RAMASUBRAMANIAN, J.

N. BALAYOGI, J.

10th November, 2017.
Js

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N. BALAYOGI

APPEAL SUIT No.871 of 2012
(per VRS, J.)



10th November, 2017.

Js.