

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO. 239 OF 2005

1. The East India Hotels Limited,
company incorporated under the
provisions of the Companies Act, 1956 and
having its registered office at 4, Mangoe
Lane, Calcutta.
2. Oberoi Palaces and Resorts International
Limited,
a company incorporated under the
provisions of the Companies Act, 1956 and
having its registered office at 4, Mangoe Lane, Calcutta. ...Appellants

V e r s u s

1. Smt. Esperence Leonita Dias,
widow of late Manual Dionosio do Rosario
Dias, major, landlady, residing at
Patreacante, Cavellossim, Salcete, Goa (since
deceased).
2. Shri John C. Dias (Since deceased through
legal representatives)
 - a) Marushka Dias, wife of John Dias,
 - b) Dinizio do Rosario Dias, son of John
Dias
 - c) Ms. Derin Dias, married, daughter of
John Dias
 - d) Ms. Dephane Dias, spinster, daughter
of John DiasAll residing at Patreacante,

Cavellossim, Salcete, Goa.

3. Smt. Alita Assunta Dias,
wife of John C. Dias, major, housewife,
residing at Patrecante, Cavellossim, Salcete,
Goa.
4. Shri Peter A. C. Dias,
son of late Manual Dionisio do Rosarion
Dias, major, seaman, residing at Patrecante,
Cavellossim, Salcete, Goa.
5. Smt. Olinda Dias
wife of Peter Dias, major, housewife,
residing at Patrecante, Cavellossim, Salcete,
Goa.
6. Shri Antonio Paixao Viegas,
major, service, married, residing at
Patrecante, Cavellossim, Salcete, Goa (since
deceased).
 - a) Mr. Rosario Viegas,
son of late Antonio Viegas, major,
unmarried, service, residing at
Screamvaddo, Chinchinim, Salcete, Goa.
 - b) Miss Wilma Viegas,
daughter of late Antonio Viegas, major,
unmarried, service, residing at
Screamvaddo, Chinchinim, Salcete, Goa.
7. Smt. Ludovina Dias E Viegas (Deceased)
wife of Antonio Paixao Viegas, major,
housewife, residing at Patrecante,
Cavellossim, Salcete, Goa.

8. Mr Joseph Matias,
Son of late Marcelino Matias, major,
residing at Altinho, Panaji, Goa.
9. Shri Cajetan S. Cordeiro,
major, residing at Panaji, Goa.
(This Appeal stands dismissed against
Respondent Nos.9 & 12 in view of order
dated 05.08.08 passed in MCA
No.395/08)
- 10 M/s. J. M. Builders Corporation,
a partnership firm, having its principal
place of business at H-1, Gharse Towers,
near Don Bosco School, Panaji, Goa.
- 11 Mr Anthony Francis Benedito Pereira
(since deceased through legal
representatives)
a) Mrs Iva Pereira,
widow of late Antonio Francisco Benedito
Pereira, Major of age, housewife, Residing
of H. No.100, 'Twiga Lodge'
Near St. Andrew Church,
Vasco da Gama, Goa.
- 12 Shri Dhaneshwar Dhirajlal Davne,
major, residing at Panaji, Goa. (Dismissed) ...Respondents

Mr. Sudesh Usgaonkar and Ms. Rosette Marie Pereira, Advocates
for the Appellants.

Mr. V. A. Lawande and Ms. P. Kaur, Advocates for the
Respondent Nos.2 to 5, 6(a), 6(b) and 7.

Mr. Raunaq Rao, Advocate for the Respondent No.8.

Mr. D. J. Pangam and Mr. P. Sawant, Advocates for the

Respondent No.9.

***CORAM: N M Jamdar &
Nutan D Sardesai, JJ
DATED: 24 February 2018***

ORAL JUDGMENT (per N.M. Jamdar J):

1. By this Appeal, the Appellants-Original Plaintiffs have challenged the dismissal of their suit filed for specific performance of agreement of sale.

2. The Appellants-Plaintiffs are companies incorporated under the provisions of Companies Act. According to the Plaintiffs, they were desirous of setting up a hotel complex and for that purpose, they intended to purchase the property known as "Setimo Lanco De Praias" admeasuring 3499 square metres situated in the Village of Cavelossim, Salcete, Goa and registered in the land registration office of Salcete at Margao under no.29365 and enrolled in the Talula Revenue Office at Margao under matriz no.844 and surveyed under nos.122/6 and 122/5(part). Defendant Nos.1 to 7 are the owners of the suit property. The Defendant Nos.8 to 9 were carrying out business of Real Estate in the name of 'Jercy Group'. The Defendant No.10 was a partnership firm carrying on business as dealers in Real Estate/Real Agency. Defendant Nos.8, 11 and 12 were partners

of Defendant No.10 i.e. firm known as J. M. Builders Corporation.

3. The Plaintiffs filed a Special Civil Suit No.296/1993 in the Court of Civil Judge Senior Division Margao, briefly with the following contentions : An agreement of Sale was entered into between the Defendant Nos.1 to 7, who are the owners of the said property, alongwith Defendant No.11 on 22nd July 1986. The consideration was agreed at ₹1,00,000/-. The agreement was executed by Defendant Nos.1, 3, 4, 5, 6 and 7 on behalf of themselves and their husbands. They agreed to sell the property survey nos.122/4 and 122/5 (part), to Defendant Nos.9 and 10. The Defendant Nos.1 to 7 permitted the Defendant Nos.9 to 10 to further enter into an agreement for sale and the sum of ₹10,000/- was paid by way of earnest money. On 17 December 1986, another agreement was executed by the Defendant Nos.8, 9, 10 and 12 to sell the suit property as well as some other properties to the Plaintiffs at the rate of ₹47.75 per square metre. The Plaintiffs needed these properties to construct a hotel complex. By agreement dated 17 December 1986, the Defendant Nos.8, 10 and all other owners jointly with Defendant No.7 entered into an agreement for the purchase of the suit property. Relying upon these agreements, the Plaintiffs entered into agreements with other adjoining land owners and purchased those

properties. A supplementary agreement was executed between the Plaintiffs and other Defendant Nos.1 to 7 and others wherein the Defendant Nos.1 to 7 confirmed their obligation to sell their property to the Plaintiffs. Thereupon, the Plaintiff prepared the sale deed on 29 May 1989 which was signed by Defendant Nos.1, 3, 5 and 8 to 12. The Defendant Nos.2, 4, 6 and 7 were out of Goa at that time and did not reach to finalise the sale deed and, therefore, the execution of the sale deed was deferred. The Defendants on some pretext or the other avoided to execute the sale deed and on 15 December 1992, the Defendant No.4 sent a letter to the Plaintiffs indicating that they were not willing to execute the sale deed and were not interested in selling the suit property. A notice was sent by the Plaintiffs on 29 March 1993 calling upon the Defendants to execute the sale deed. Since there was no positive response from the Defendants, the Plaintiffs had to institute the suit for specific performance. With these contentions, the Plaintiffs, by the suit prayed for a declaration that the agreements dated 22 July 1986, 17 December 1986 and 24 February 1988 are valid, subsisting and binding on the Defendants. It was also prayed that Defendant Nos.1 to 12 be ordered and decreed to specifically perform the agreements dated 22 July 1986 and 17 December 1986, in the alternative, in the event of the Court not granting specific performance, the

Appellant-Plaintiff prayed for damages to the tune of ₹2.50 crores.

4. Summons were issued to the Defendants to file their written statement. The Defendant Nos.2, 4 and 6 contended that there is no nexus between the Plaintiffs and that as there has been no agreement between them and the Plaintiffs, and that since they were owners of the suit property, without there being any agreement between them and the Plaintiffs, no specific performance could be sought. It was contended that the wives of these Defendants had no authority to enter into agreements on their behalf as these Defendants were residing out of India and they were ignorant of any such agreement. It was contended that the Defendant Nos.3, 5 and 7 were estate agents and they pressurised the wives of these Defendants to enter into the agreements and neither the owners nor these Defendants were parties to the agreement between the parties and the estate agents. It was contended that on various occasions, it was pointed out to the Defendant Nos.9 to 11 that the property being grossly undervalued in the agreement, they are not inclined to go ahead with the same. Further Defendant Nos.9 to 11 could not be found at the given address and the Advocate's notice was served on 6 October 1999 which was redirected. The Defendant Nos.3, 5 and 7 also filed written statements and resisted the relief sought

for by the Plaintiffs. They also contended that there is no nexus between them and the Plaintiffs.

5. Defendant No.9, by filing a written statement contended that the suit was filed beyond the period of limitation and was liable to be dismissed; all the co-owners were not signatory to the agreements and the Plaintiffs were not ready and willing to perform their part of the contract. The factum of supplementary agreement dated 24 February 1988 was denied and so also payment of any amount. It was denied that a sum of ₹38,605/- was paid by the Plaintiffs. The claim of the Plaintiffs for damages was also resisted.

6. Issues were framed by the Civil Judge as regards as to whether the Plaintiffs prove that the Defendants had agreed to sell the suit property to them; whether the Plaintiffs prove that the Defendants had agreed to join in the conveyance such other persons as may be required. Issues were also framed as to the payment of ₹38,605/- towards the price of the suit property; whether the Plaintiffs prove that the agreements dated 22 July 1986 and 17 December 1986, were valid. Issue was also framed as regards the claim of the Plaintiffs for damages of ₹2.50 crores; whether Defendant Nos.3, 5 and 7 were aware of the agreements of sale; whether the Defendant Nos.1 to 7 proved that the

Plaintiffs had played fraud and coercion on Defendant Nos.1, 3, 5 and 7; and an additional issue was framed whether the suit was filed within limitation.

7. The Plaintiffs examined Mr. Albin Fernandes, constituted attorney of Plaintiffs and produced documentary evidence on record. The Advocates filed their written arguments. After considering the evidence on record, the learned Civil Judge came to the conclusion that the Plaintiffs had failed to prove that the Defendants had agreed to sell the suit property to the Plaintiffs and that the Plaintiffs were entitled to specific performance of the agreements dated 22 July 1986. The claim of the Plaintiffs towards damages of ₹2.50 crores, was also negated. The case of the Defendants that the Plaintiffs played fraud and coercion on Defendant Nos.1, 3, 5 and 7, was not accepted. The Civil Judge held that the suit was not filed within the period of limitation. In view of these conclusions, the Civil Judge by Judgment and Order dated 30 October 2004 dismissed the suit. Thereupon, the present First Appeal was filed and was admitted on 26 September 2005.

8. We have heard Mr. Sudesh Usgaonkar, learned Advocate appearing for the Appellant-Plaintiff, Mr. V. A. Lawande, learned Advocate appearing for the Respondent Nos.2

to 5, 6(a), 6(b) and 7, Mr. Raunaq Rao, learned Advocate appearing for the Respondent No.8 and Mr. D. J. Pangam, learned Advocate appearing for the Respondent No.9.

9. Mr. Sudesh Usgaonkar, the learned Counsel for the Appellants-Plaintiffs submitted that all ingredients seeking specific performance of the agreements have been fulfilled. The suit property being a family owned property, the wives of the Defendant Nos.1, 3, 4, 5, 6 and 7 had their independent share in the property and this aspect has not been considered by the learned Civil Judge at all. Mr. Usgaonkar submitted that even assuming the husbands i.e. Defendant Nos.2, 4 and 6 had not signed the agreements, specific performance could have been granted against those Defendants who have signed the agreement, by separating their shares, Mr. Usgaonkar further submitted that though the owners, Defendant Nos.1 to 7, and the Plaintiffs were not signatory together in one document, there was a supplementary agreement executed on 24 February 1988 wherein all the owners had confirmed their intention to abide by the earlier two agreements and, therefore, the learned Civil Judge was in error in refusing specific performance on the ground that there was no privity of the contract between the Defendants and the Plaintiffs in the earlier agreements. Mr. Usgaonkar submitted that in view of the supplementary agreements, specific

performance should have been granted in favour of the Appellants. Mr. Usgaonkar submitted that the finding of the learned Civil Judge that the suit is not within the period of limitation is entirely incorrect as the starting period of limitation has been erroneously held on 26 October 1989 i.e. a notice given by the Defendants, without considering the fact that this notice was not addressed to the Plaintiffs, and in the supplementary agreement, it was clearly stipulated that the Plaintiffs could act as an Agent on behalf of the other Defendants. It was contended that for the first time that by letter dated 15 December 1992, the Defendants indicated to the Plaintiffs that they are not interested in selling the property and, therefore, the suit filed by 15 December 1992 was within time. Mr. Usgaonkar submitted that there is no reason as to why the earnest amount which has been admittedly received and acknowledged in their agreements be not returned to the Plaintiffs by the Defendants. He submitted that therefore specific performance of the agreement be granted by decreeing the suit and if the specific performance is not to be granted, the damages be awarded in favour of the Appellants, or atleast a decree be passed directing the Defendants to return the earnest amount with interest as may be found suitable by the Court.

10. All learned Counsel appearing for the Respondents submitted that the suit was not filed within the period of limitation and the finding of the learned Civil Judge to that effect is correct and the suit is barred by limitation. According to Mr. Lawande and Ms. Kaur, learned Counsel for the Defendants-owners, the supplementary agreement with the starting period of limitation would be 26 October 1989 when the notice of termination was given and even otherwise going by the case of the Plaintiffs of supplementary agreement, period of three years was specified therein and the suit has not been filed within the period of three years. Mr. Lawande submitted that some of the Defendants who are admittedly owners of the suit property had not signed any of the agreements and, therefore, the suit for specific performance could not have been enforced against them and there is no prayer nor it has ever been the case of the Plaintiffs that share in the suit property would be equal and only part of the property be conveyed, therefore, there is no error in the view taken by the learned Civil Judge that the Plaintiffs are not entitled to specific performance. Mr. Lawande submitted that there is no agreement between the Plaintiffs and all the owners of the suit property and the Plaintiffs and the owners had already given a notice of termination in respect of the first agreement and that has not been challenged by the Defendants who had acted as an estate agent. It was contended that by

passage of time of 30 years, it has become highly equitable to grant specific performance, even assuming the Plaintiffs have proved that the agreement subsists and it is binding. As regards the claim of the Plaintiffs for return of the earnest amount, it was contended by Mr. Lawande, learned Counsel for the Defendants-owners that they had only received an amount of ₹10,000/- from the Defendants who had acted as estate agent and there is no proof that the amount of ₹38,605/- as claimed by the Plaintiffs has been received by the Defendants-owners and the statements are only in respect of the amount received from Defendants, the estate agents. It was contended, even otherwise, the suit being barred by limitation, there is no question of return of any amount to the Appellants-Plaintiffs. The learned Counsel for the Respondents submitted that the Judgment and order passed by the learned Civil Judge is just and proper and the discretion has been exercised in judicious manner.

11. Before we consider the contentions of the learned Counsel for the parties on merits, we may note that the agreements are of the year 1986 and 1988 i.e. almost 30 years ago. The suit has been dismissed and specific performance was refused. Therefore, in the year 2018, after a period of 30 years, we are called upon to direct the Defendants to specifically perform the agreement of 30 years ago. The agreements were in

respect of the open plots. When the Appeal was admitted, there was no interim order passed. Upon an inquiry to Mr. Usgaonkar as to the present state of the plot as they continue to be vacant or construction has been put up or any third party rights are created, he submitted that he has no instructions and inspite of communicating to the Appellants that the Appeal is listed on Board for final hearing, they have not contacted him. It is in this background that we have to consider the claim of the Appellants-Plaintiffs for specific performance, which is essentially equitable one.

12. The following issues are framed for consideration :

1. Whether the Suit filed was within the period of limitation ?
2. Whether the Plaintiffs-Appellants prove that they are entitled to specific performance of the agreements dated 22 July 1986 and 17 December 1986 ?
3. Whether the Plaintiffs-Appellants prove that they are entitled to damages of ₹2.50 crores ?
4. Whether the Plaintiffs-Appellants prove that they are entitled for return of the amount of ₹58,830/- along with interest ?

Issue No.1 : Limitation

13. The learned Civil Judge has held that the suit filed by

the Appellants-Plaintiffs is beyond the period of limitation. In the plaint, the Appellants-Plaintiffs have stated that the cause of action occasioned on 24 April 1993, upon the failure of the Defendants to complete the sale inspite of Advocate's notice dated 29 March 1993 and thus the suit is filed on 15 October 1993 which is in time. This position has been disputed by the Defendants by contending that on 6 October 1989, they addressed a letter to Defendant Nos.1 to 7 that their agreement was terminated and these Defendants re-directed the letter dated 26 October 1989. According to them, this was the starting period of limitation and assuming the case of the Appellants-Plaintiffs for supplementary agreement is accepted, the agreement itself provided that the sale deed shall be executed within a period of three years i.e. one week after three years 29 March 1993. Mr. Usgaonkar submitted that it is for the first time in the year 1992 that the Appellants-Plaintiffs received a letter from Defendant Nos.1 to 7 that they are not performing their part of the contract and thereafter immediately the suit was filed, which is within the period of limitation.

14. Article 54 of the Limitation Act provides for limitation in the cases of suit filed for specific performance. The Article reads thus :

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

Thus, the period of Limitation will have to be reckoned from three years from the date fixed for performance or if no such date is fixed from the date on which the Plaintiff first notices that the performance is refused.

15. A notice of termination was given by the Defendant Nos.1 to 7 on 26 October 1989 and the suit has been filed on 15 October 1993. Once the Appellants-Plaintiffs had engaged the services of the Defendant Nos.8 to 12 as real estate companies and estate Agents and they were interested in purchasing the suit property, a notice issued by Defendant Nos.1 to 7 would have come to the knowledge of the Appellants-Plaintiffs. It is inconceivable that the Plaintiff will not be in communication with the agent for four years. It was therefore incumbent upon the Appellants-Plaintiffs to explain as to how they were not aware of the notice issued by Defendant Nos.1 to 7 dated 26 October

1989. Pw.1/Mr. Fernandes in the cross examination admitted that he was not aware of anything prior to the year 1996 when he joined the Plaintiff-company. He said he has not enquired as to whether Mr. Cordeiro or Mr. Antonio Pereira were not in communication with the Plaintiffs. There is thus complete failure on the part of the Plaintiff to explain as to how they did not receive the notice issued to their agent. The contention of the learned Counsel for the Defendants that the starting period of limitation will have to be construed on 6/26 October 1989 will have to be thus accepted. For want of any explanation whatsoever from the Appellants-Plaintiffs, they deemed to have had knowledge of the notice given to their Agents on 26 October 1989 and therefore the suit filed on 15 October 1993 was beyond three years from the date from which performance was refused. In the alternative, it is also contended by Mr. Lawande that as per the case of the Plaintiffs themselves, in the supplementary agreement dated 24 February 1988, it was provided that the Sale Deed was to be executed on 29 May 1989 and the date was fixed. After having perused the agreement, we find substance in the argument. It is, therefore, obvious that the suit for specific performance had to be filed from three years thereafter. Going by the case of the Appellants-Plaintiffs themselves that the sale deed had to be executed on 29 May 1989, the suit filed on 15 October 1993 was not within the period of limitation. The findings

recorded by the learned Civil Judge that the suit was filed beyond the period of limitation, is thus correct. This issue will have to be answered against the Appellants-Plaintiffs.

16. In view of this finding, the discussion of other issues will not arise further. But, for the purpose of completeness, we have considered the other issues as well.

Issue No.2 – Specific Performance

17. It is the case of the Appellants-Plaintiffs that the Defendants are bound by the two agreements i.e. the agreements dated 22 July 1986 and 17 December 1986. It is the case of the Plaintiffs that on 22 July 1986, an agreement was executed between Defendant Nos.1 to 7 and Defendant No.9, 10 and 11 wherein the Defendant Nos.1 to 7 agreed to sell the suit property to Defendant Nos.9 and 10 for the price of ₹1,00,000/-. In this agreement, the Defendant Nos.1 to 7 expressly agreed and authorised Defendant Nos.9 and 10 to enter into an agreement for sale to any nominee including second Plaintiff. As regards the agreement dated 17 December 1986, it is the case of the Appellants-Plaintiffs that this agreement was entered into between Defendant Nos.8 to 12 and the second Plaintiff and Defendant Nos.1 to 12, and by the agreement dated 17 December 1986,

Defendant Nos.1 to 12 were bound and liable to apply and obtain necessary certificates and no objections clearing all encumbrances and handing over vacant possession. By the agreement dated 24 February 1988, the Defendant Nos.1 to 7, confirmed their obligation to sell the suit property. In the plaint, the specific performance however has been sought of the two agreements, and a declaration is sought that the agreement dated 24 February 1988 is valid and binding on the Defendants.

18. In support of its case, the Plaintiffs examined Mr. Albin Fernandes as the constituted Attorney of the Plaintiffs. He produced a copy of the agreements dated 22 July 1986 and 17 December 1986. In his examination in chief he reiterated the contentions taken in the plaint as regards the two documents. Pw.1/Mr. Fernandes asserted that by supplementary agreement dated 24 February 1988, the Plaintiffs paid a sum of ₹3,64,000/- to Defendant Nos.8 to 12 to pay all the owners which amount was inclusive of ₹8,830/- payable to the owners and an amount of ₹28,390/- was paid by Defendant Nos.8 to 12 to Defendant No.1 to 7. He stated that due to neglect and failure of Defendant Nos.1 to 7, the sale could not be completed and on 29 May 1989 when the sale deed was prepared, the Defendant Nos.2 and 4 did not reach Goa to sign the sale deed. He stated that the Plaintiffs spent huge sum for purchasing the property for setting up hotel

complex and substantial damages caused to the Plaintiffs and, therefore, the Defendants should pay damages to the Plaintiffs to the tune of ₹2.50 crores.

19. Pw.1-Mr. Fernandes was cross examined. He admitted that there was no direct agreement between Defendant Nos.1 to 7 but there was a Broker in between, i.e. one Ralph D'Souza. He admitted that the agreement between this Broker and the Plaintiffs was not brought on record. A suggestion was given that such an agreement does not exist. Pw.1-Mr. Fernandes admitted that an amount of ₹10,000/- was given to the Broker at the time of initial agreement of sale but not to Defendant Nos.1 to 7 directly. He also admitted that the Plaintiffs are not party to agreement dated 22 July 1986. He admitted that the Power of Attorneys were not annexed to the agreement nor the agreement mentioned that the signatories were holding Power of Attorneys. Pw.1/Mr. Fernandes admitted that he joined the Plaintiffs-Company in the year 1996 and he filed an affidavit based on the information given by Mr. Ashok Khanna who had left the Company in the year 1996 and none of the facts stated were out of his personal knowledge. He stated that he had no knowledge of the letter dated 6 October 1989 by Defendant Nos.1 to 7 to Mr. Cordeiro. He admitted that he was not aware that any dues or payments were recovered from Defendant No.5 by Plaintiffs

and it was not true to suggest that Defendant No.9 is not liable to pay any amount to the Plaintiffs.

20. From the evidence on record, two positions thus are clear and on which there is no dispute, is that for the agreement dated 22 July 1986, the Plaintiffs are not a party. This agreement admittedly is between Defendant Nos.1 to 7 and the other Defendants. It is also an admitted position that the signatories to this agreement are Defendant Nos.1, 3, 5 and 6 and Mr. Cordeiro signed on behalf of the Broker. The agreement has been signed by the spouses and the mothers of Defendant Nos.2 and 4. Therefore, all owners, i.e. Defendant Nos.1 to 7 have not signed the agreement dated 22nd July 1986, neither the Plaintiff is party to the same.

21. As regards the second agreement i.e. dated 17 December 1986, the same has been executed between Defendant Nos.8, 9, 10 to 12 with the Plaintiffs. As regards the agreement dated 17 December 1986, the Defendant Nos.2, 4 and 6 were not party to the same.

22. The same is the position for the supplementary agreement dated 24 February 1988. The supplementary agreement upon which reliance is placed by Mr. Usgaonkar, states

that it has been executed by Mrs. Olinda Dias for herself and Attorney of her husband and the same is the position of Mrs. Ludovinha Dias. However, the supplementary agreement does not refer to any particulars of the Power of Attorney nor it is annexed to the same. Therefore, only by stating in the agreement that they were signed on behalf of their husbands, the same will not bind the Defendant Nos.2 and 4.

23. Therefore, conjoint reading of all the three agreements shows that all the owners were not party to the agreement nor in the first two agreements the Plaintiffs and the Defendant Nos.1 to 7, the owners, were party in the same agreement. The Plaintiffs are not rustic Villagers. They had engaged the services of estate agents and when the agreements were executed, they ought to have taken care that all owners signed the agreement for sale of the suit property. It is not that the Plaintiffs were unaware that there were other owners i.e. the husbands. Any prudent purchaser will know that the agreement signed only by the wives would not convey title to the Appellants-Plaintiffs.

24. Mr Usgaonkar then submitted that even assuming the husbands were not signatory to the agreement for sale, the Plaintiffs have signed the agreements with the wives and the mothers, and they will be bound by the same and the wives and the mothers can be directed to specifically perform their

agreements in respect of their shares in the property. This stand is advanced orally for the first time in the Appeal. There is no case whatsoever to that effect either in the plaint or in the evidence, nor such is the prayer of the Appellants-Plaintiffs. The Plaintiffs have come to the Court with a clear case that the entire suit property should be conveyed to them and all Defendants be directed to specifically perform their part of the agreement. There is no separation of shares even remotely indicated anywhere in the pleadings. The prayers and the pleadings show that the Appellants-Plaintiffs had sought conveyance in respect of the entire property which, according to the Appellants-Plaintiffs, was needed for setting up a hotel complex. It is not clear whether such submission is made by Mr. Usgaonkar on instructions or that it is only an argument advanced across the bar, because such stand is not to be found anywhere in the pleadings. In fact, Mr. Usgaonkar candidly informed the Court that he has not received any instructions from the Appellants. Therefore, for want of signatories of all the owners of the suit property, the Plaintiffs cannot seek to direct the Defendants to convey the suit property to them.

25. Even assuming the Agreements are binding on the Appellants and it is legitimate for the Appellants-Plaintiffs to seek specific performance, it is settled law that the grant of specific

performance is not automatic. Specific Relief Act confers discretion on the Court in the matter of grant of specific performance. Even though the Court may have jurisdiction to grant the relief of specific performance and the contracts are capable of specifically being enforced, it does not mean that the decree for specific performance must follow. In coming to the conclusion whether specific performance should be granted or rejected, Court has to keep in mind the facts and circumstances of each case and a judicial decision has to be taken whether the case is made out for grant of specific performance. There is no absolute right of grant of specific relief. The Plaintiff who seek specific performance has to be ready and willing to perform their part of the contract. The Court has to ascertain before granting specific performance in favour of the Plaintiff whether the Plaintiff is ready and willing to perform its part of the contract.

26. In the present case, the suit was filed by the Appellants-Plaintiffs for specific performance of agreements of the year 1986 and 1988. The Appellants-Plaintiffs Companies wanted to set up a hotel complex on the suit land and the adjoining properties. It appears that they had engaged estate agent and real estate companies for that purpose. It was the case of the Appellants-Plaintiffs that they had purchased surrounding lands and they needed the suit property for completion of their

project. However, no documents or sale deeds of the surrounding properties were produced. It is not found from the records, neither the learned Counsel appearing for the parties have asserted that there was any interim relief during the pendency of the suit neither there is any interim relief pending the hearing of the Appeal. To a specific query to Mr. Usgaonkar as to what is the condition of the property as on today, he informed the Court that he has received no instructions from the Appellants-Plaintiffs whether the plots continued to be open and complete, whether any third party rights have been created in the absence of any restraint on the Defendants-owners for the last 30 years. For want of any instructions to the learned Counsel for the Appellants, it is not even clear whether the Appellants are willing to go ahead with the transaction as on date.

27. The original-owners/Defendant Nos.1 to 7 had received only ₹10,000/- in the year 1986 that too from Defendant No.9 and not from the Plaintiffs. All the owners have not signed the agreement. The prices of the land have gone up since last 30 years. Even if this factor is not to be considered as a stand alone ground for refusal of specific performance, it can be considered that cumulatively with other factors when the Court is called upon to consider the grant of specific performance for the first time. Therefore, considering the totality of the circumstances,

even assuming all factors in favour of the Appellants-Plaintiffs, it is not equitable to grant specific performance sought for by the Appellants-Plaintiffs. In these circumstances, the issue no.1 will have to be answered against the Appellants.

Issue No.3 - Damages

28. As regards claim for damages, the learned Civil Judge had dismissed the claim for damages to the tune of ₹2.50 crores on the ground that there were no particulars. Nothing has been shown as to how this finding is incorrect.

29. We have perused the evidence of Pw.1/Mr. Fernandes. He does not refer to any documents as to how he has arrived to a figure of ₹2.50 crores. It is not produced on record whether the Appellants-Plaintiffs purchased the other property as alleged or that the proposal was only on paper and abandoned. To a specific query to Pw.1/Mr. Fernandes, he admitted that he has not given any break up of the damages claimed. In the circumstances, the claim of ₹2.50 crores cannot be considered, as no evidence has been produced in support of the same. Mr. Usgaonkar has also not been able to demonstrate that the claim is sustainable.

Issue No. 4 : Return of earnest money

30. Mr. Usgaonkar submitted that if the specific performance of the agreement is not to be granted, the Court should direct the Defendants to return the earnest money of ₹58,830/- alongwith interest, as it cannot be that the Defendants, after having admitted to have received the amount in the agreement and the written statement, are allowed to retain the same. Learned Counsel for the Respondents submitted that there is no prayer made by the Appellants-Plaintiffs that the amount of earnest money be returned. Mr. Lawande submitted that they received only an amount of ₹10,000/- that too from Defendant No.9 and there is no question of them returning the amount of ₹58,830/- as claimed by the Plaintiffs-Appellants. Learned Counsel for the Respondents contended that the suit is filed beyond the period of limitation and there is no question of return of the earnest money.

31. I have considered the contention of the learned Counsel for the parties on this issue. Section 22 of the Specific Relief Act reads thus :

*“Power to grant relief for possession,
partition, refund of earnest money, etc.”*

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or 1[made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed: Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including

a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

Section 22(2) empowers the Court to grant amendment to the plaint and to include a relief of return of the earnest amount, in case the Plaintiff seeks amendment for including such claim. Mr. Usgaonkar advanced an oral submission and no formal amendment has been sought. This need not detain the Court to proceed further, as even otherwise, we do not find that any case is made out by the Appellants-Plaintiffs for directing return of the earnest amount. As regards Defendant Nos.1 to 7 the owners are concerned, though there is a statement by them in the agreement that they have received the amount, in the plaint and in the deposition of Pw.1, the case of the Plaintiffs itself is that out of an amount of ₹58,830/-, ₹28,390/- was paid by Defendant Nos.8 to 12 to Defendant Nos.1 to 7. It is the case of the Defendant Nos.1 to 7 that they received only ₹10,000/- initially and that too from Defendant No.9. In the backdrop of such contrary pleadings, it was incumbent upon the Appellants-Plaintiffs to produce evidence regarding payment of this amount. Except

reiterating that the amount is paid, nothing has been shown in what manner it has been paid. Nowhere it has been pleaded by the Appellants-Plaintiffs that the amount was paid by cash or cheque. Considering the fact that the Appellants-Plaintiffs are companies, in usual course of business, in respect of transactions of immovable properties, the amounts would be paid by the cheque. No particulars of whatsoever nature are placed on record. If it was paid by cash, no receipts have been placed on record. In the light of the failure of the Appellants-Plaintiffs to produce any such evidence regarding payment of earnest money and to whom in what proportion, the relief cannot be granted in favour of the Appellants-Plaintiffs.

32. In view of the discussion as above, there is no merit in this Appeal and the same is dismissed. No order as to costs.

Nutan D. Sardesai, J.

N.M. Jamdar, J.