

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****CIVIL APPELLATE JURISDICTION****FIRST APPEAL NO.381 OF 2012  
IN  
S.C. SUIT NO.1322 OF 2006  
WITH  
CIVIL APPLICATION NO.853 OF 2012  
IN  
FIRST APPEAL NO.381 OF 2012**

Shri Jayant Maniklal Lunawat

...Appellant  
(Orig. Plaintiff)

vs.

1. Smt. Kamal Arjan Hingorani

And

2. Mr. Bharat Arjan Hingorani

...Respondents  
(Orig. Defendants)

....

Ms. Rajni Iyer, Senior Advocate, a/w. Ms. Gulnar Mistry, Ms. Nidhi Singh and Ms. Chaitrika Patki, i/b. Vidhii Partners, for the Appellant.

Mr. Sharan Jagtiani, a/w. Mr. Astad Randeria, Mr. M.K. Khan, Mr. R.K. Satpalkar, Mr. P. Shah and Ms. M. Avasai, i/b. M/s. Mulla & Mulla & Craigie Blunt & Caroe, for Respondent Nos. 1 and 2.

Mr. Chetan Kapadia, a/w. Mr. Karl Tamboly and Ms. Nandini Joshi, i/b. Harish Joshi & Co., for Respondent Nos. 3 and 4.

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**CORAM : S.C. GUPTE, J.**

**DATED : 2, 7, 9, 13 AND 20 FEBRUARY 2018**

**ORAL JUDGEMENT :**

. The present first appeal arises out of a decree of dismissal passed in a specific performance suit by Joint Civil Judge, Senior Division, Pune.

2. The short facts of the case may be stated as follows :-

Respondent Nos. 1 and 2 herein (“Defendants”) are lesses in respect of a plot of land, bearing Plot No.265 at Village Aundh, Pune-7, together with the structure constructed thereon (“suit property”). Sindh Co-Operative Housing Society Ltd. (“Society”) is the owner of the suit property. It has executed a lease deed dated 17 May 1999 in favour of the Defendants. By a Memorandum of Understanding dated 25 May 2005 (“first MOU”), executed between the Appellant (“Plaintiff”) and Defendant No.1, the latter agreed to sell the suit property to the Plaintiff. A sum of Rs. 5 lakhs was paid by the Plaintiff towards this sale. In pursuance of the first MOU, a power of attorney was also executed authorising the Plaintiff to do various acts in respect of the suit property on behalf of the vendors. In the first week of June 2005, the Plaintiff was allowed to carry out certain work in the suit property, which included clearing of the plot for development. On 30 June 2005, Defendant No.1 revoked the power of attorney granted in favour of the Plaintiff. It appears that, thereafter, there were fresh negotiations between the parties and finally, on 22 June 2005, a second MOU was executed between the Defendants and the Plaintiff. By this MOU (“second MOU”), the Defendants agreed to sell the suit property to the Plaintiff for a lumpsum consideration of Rs.1.61 crores. The second MOU records that the sum of Rs. 5 lakhs, originally paid by the Plaintiff to the Defendants under the first MOU, shall be adjusted towards the sale price and the balance consideration shall be paid by the Plaintiff within a period of ten months from the date of execution of the second MOU,

i.e. on or before 21 May 2006, and at the time of delivery of possession of the suit property to the Plaintiff or his nominee. On 7 November 2005, further payment of Rs. 15 lakhs was made by the Plaintiff to the Defendants by way of part-payment of the consideration by cheques of Rs.5 lakhs and Rs.10 lakhs. Between November 2005 and May 2006, there was correspondence between the parties, including the Society, concerning various aspects bearing on the transaction such as demarcation of the property, reactivation of a well contained therein and the Society's permission for transfer of the suit property by the Defendants in favour of the Plaintiff. The last of such documents was dated 18 May 2006. This was an undertaking given by the Plaintiff to the Society that a bungalow would be constructed within 24 months and that the well in the property would not be filled-up. By this date the Defendants had in all received from the Plaintiff a sum of Rs.42 lakhs towards the sale of the suit property, leaving a balance of Rs.1.19 crores. On 26 May 2006, the Defendants cancelled the second MOU on the ground of non-payment of the balance consideration. Simultaneously, the Defendants withdrew their application to the Society for its NOC for transfer of the suit property to the Plaintiff. On 12 June 2006, the Defendants executed an agreement for sale in favour of one Jyotin Gandhi and Payal Gandhi, who are arraigned as Respondent Nos. 3 and 4 ("Respondents") to the present appeal. The Respondents claim to have paid a sum of Rs.29.50 lakhs to the Defendants in pursuance of this agreement. After execution of this agreement, the Defendants attempted to refund the amount of Rs.42 lakhs received by them from the Plaintiff towards the sale of the suit property, requesting for a copy of duly cancelled MOU along with all originals. The Plaintiff refused to accept

the refund. On 28 July 2006, the Plaintiff filed the present suit, Special Civil Suit No.1322 of 2006, in the Court of Civil Judge, Senior Division, Pune, for specific performance of the second MOU. On 1 December 2006, an interim injunction was granted by the learned Judge restraining the Defendants *inter alia* from creating any third party rights in respect of the suit property. On 23 November 2011, the learned Civil Judge dismissed the suit. In February 2012, the present first appeal was filed by the Plaintiff.

3. The learned Judge framed 14 issues in all. The issues can be broadly grouped under six heads, namely, (i) execution of the suit agreement for sale (Issue Nos.1 and 8); (ii) the Plaintiff's readiness and willingness to perform his part of the contract (Issue Nos. 2 and 7); (iii) the Defendants' failure to perform the suit agreement for sale (Issue No.5); (iv) time as essence of contract (Issue Nos. 3 and 4); (v) existence of reciprocal promises in the contract (Issue No.6); and (vi) non-joinder of necessary parties (Issue No.9). The other issues were either incidental to these main issues or reflected on the relief to be granted in the suit (Issue Nos. 8A, 8B, 8C, 10 and 11).

4. On the aspect of execution of the suit agreement for sale, the learned Judge held that after termination of the first MOU, after re-negotiation and by consent, the second MOU was executed between the parties and it contained an agreement for sale of the suit property at or for a consideration of Rs.1.61 crores, as mentioned in the MOU. On the aspect of the Plaintiff's readiness and willingness to perform the contract, and the connected issues of time as essence and existence of reciprocal

promises, the learned Judge held against the Plaintiff, accepting the Defendants' contention that time was of essence of the contract and that the Plaintiff was not ready and willing to perform his part of the contract at all material times. The learned Judge rejected the Plaintiff's contention that the Defendants had voluntarily waived the condition of time being essence of contract or that there were reciprocal promises in the contract and the Defendants had failed to perform their promises. Correspondingly, the learned Judge also held the issue of the Defendants' breach of contract in the negative. The learned Judge, accordingly, held that the Plaintiff was not entitled to specific performance of the suit contract or the alternative relief of damages. On the issue of non-joinder of the subsequent purchasers, i.e. the Respondents, with whom the Defendants had entered into an agreement for sale, the learned Judge held in favour of the Plaintiff, holding that the Respondents were neither necessary nor proper parties and were not required to be joined.

5. During the pendency of the appeal, on or about 11 April 2012, the Respondents were impleaded as proper parties to the first appeal. This was on the application of the Respondents. On 5 May 2016, the first appeal came to be dismissed for default. By an order dated 11 July 2016, the first appeal was restored. In the meantime, on 10 May 2016, a deed of assignment and transfer was executed by the Defendants in favour of the Respondents in respect of the suit property. This was followed by a tripartite deed of confirmation executed on 20 June 2016 between the Respondents, the Defendants and the Society. The Respondents, who had originally sought impleadment as agreement

purchasers, now renew their plea of non-joinder of necessary parties on the basis of their subsequent acquisition of title to the suit property. Two more aspects on this question arise as a result; firstly, whether as subsequent holders of title to the suit property, the Respondents are necessary parties to be joined to the suit and, in their absence, no decree can be passed and secondly, whether the rule of *lis pendens* has any application to the purported transfer as between the Respondents and the Defendants. The Defendants and Respondents both submit that, even otherwise, in the facts of the case, the Court ought to refuse specific performance by using its discretion under Section 20 of the Specific Relief Act. In addition, the Respondents raise an issue of jurisdiction, contending that a specific performance suit, in a case where the agreement for sale is terminated, cannot be filed without challenging such termination.

6. Based on the foregoing discussion, the present appeal involves, thus, broadly the following questions:-

- (i) Whether the Plaintiff's suit for specific performance is liable to be dismissed on account of his failure to seek a declaration challenging the termination of the suit contract by the Defendants?
- (ii) Whether the suit is liable to be dismissed for non-joinder of the Respondents (Respondent Nos. 3 and 4 to the present appeal), who are subsequent purchasers of the suit property?
- (iii) Whether the present appeal is liable to be dismissed on

account of failure of the Plaintiff/Appellant to impugn the subsequent purchase of the suit property by the Respondents?

(iv) Whether time was of essence of the suit contract and the Plaintiff breached the contract on account of his failure to perform his part, namely, payment of the entire balance consideration on or before the stipulated date (21 May 2006) and whether for such reason the Plaintiff can also be said to be wanting in readiness and willingness to perform the suit contract? and

(v) Whether in the exercise of its discretion under Section 20 of the Specific Relief Act, the Court should deny specific performance or damages in lieu thereof to the Plaintiff?

7. I would like to consider the technical objections to the maintainability of the Plaintiff's suit first. It is submitted both by the Defendants and the Respondents that the Plaintiff's suit for specific performance is liable to be dismissed on account of his failure to challenge, by seeking an appropriate declaration, the termination of the suit contract by the Defendants. Learned Counsel in this behalf rely on the judgment of the Supreme Court in the case of **I.S. Sikandar (Dead) By LRs. vs. K. Subramani and others**<sup>1</sup>. In **Sikandar's** case, the plaintiff had instituted a suit claiming specific performance on the basis of an agreement for sale. The suit property was a vacant site. It was the case of the plaintiff that he had entered into an agreement with the defendants for sale of the suit property for a consideration, part of which

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<sup>1</sup> (2013) 15 SCC 27

was paid and against which original title deeds were delivered by the latter and the former was put in physical possession of the property in part performance. The balance consideration was agreed to be received at the time of registration of the sale deed within five months of the ULC permission as also income tax clearance. It was the case of the plaintiff that the defendants got issued a legal notice through their counsel calling upon the plaintiff to comply with the former's part of the contract by paying the balance consideration. The plaintiff in his reply called upon the defendants to execute the conveyance deed and receive the balance consideration. The agreement for sale thereafter was rescinded by the defendants by a letter, through which the plaintiff was called upon to return the original documents of the suit property given to him at the time of execution of the agreement for sale and on his failure to do so by a particular date, the agreement would stand terminated automatically. One of the questions of law considered by the Supreme Court was whether the original suit filed by the plaintiff seeking a decree of specific performance without seeking a declaratory relief with respect to the defendants' termination of the suit agreement rescinding the contract, was maintainable in law. The court noted that the defendants had issued a legal notice to the plaintiff pointing out his failure to perform the contract in terms of the agreement for sale by not paying the balance consideration and called upon the plaintiff to pay the same and get a sale deed executed on or before a particular date. The plaintiff, by his reply letter, had admitted his default in performing his part of the contract and prayed for time to make payment of the balance consideration and get the sale deed executed in his favour. Another legal notice was sent thereafter by the defendants to the plaintiff extending time granted to

the plaintiff to pay this consideration amount and get the sale deed executed on or before a particular date, on failure of which the agreement of sale would be terminated for non-fulfillment of the plaintiff's part even by the extended date. Since the plaintiff did not perform his part of the contract within the extended period, the agreement for sale was said to have stood terminated as per the notice with effect from the extended date. In these facts, the Supreme Court held that the plaintiff not having sought any declaratory relief concerning the termination of the agreement for sale, the suit was bad in law and not maintainable. Learned Counsel submit that this proposition has since been followed by various courts.

8. The facts of **Sikandar**'s case are clearly distinguishable from the facts of our case. Not only has the Plaintiff in the present case not accepted any failure to perform his part of the agreement but by his reply, rejected the purported unilateral termination of the agreement for sale by the Defendants and maintained that the MOU was still valid and binding between the parties. But quite apart from these distinguishing facts, if one has regard to the plaint, the averments of the Plaintiff here are that the legal notice of 26 May 2006 allegedly unilaterally terminating the second MOU and the Power of Attorney was without offering to perform the Defendants' part of the contractual obligations; the notice was immediately responded to by the Plaintiff through his Advocate's reply refuting all allegations and claiming that the MOU and the Power of attorney were very much legally subsisting and binding on all the Defendants and calling upon the latter to specifically perform the agreement in the MOU. The Plaintiff, in the premises, proceeded on the

footing that this conduct of the Defendants indicated their desire to breach the terms and conditions of the MOU without performing their part of the contract and amounted to a refusal to perform the suit agreement for sale, giving rise to a cause of action for the Plaintiff to seek specific performance. In the premises, the Plaintiff has averred that the second MOU is valid, subsisting and binding on the Defendants and a decree of specific performance deserves to be passed against the Defendants and in favour of the Plaintiff in respect of the MOU. These averments read with the prayers in the suit indicate that the Plaintiff's suit essentially proceeds on the footing that it is the Defendants, who failed to perform the suit agreement for sale and their unilateral termination of the suit agreement for sale is of no legal consequence. The Plaintiff, in the premises, has prayed for (i) declaration that the MOU is valid, subsisting and binding on the Defendants and (ii) based on such declaration, specific performance of the suit MOU. Declaration of invalidity of the purported unilateral termination of the suit agreement for sale by the Defendants is implicit in these reliefs, particularly in the backdrop of the averments in the plaint. The declaration concerning validity and subsistence of the MOU is merely another way of asserting and claiming invalidity of the alleged termination. The MOU could be said to be valid and subsisting only if the alleged termination is held to be unlawful. In other words, when the court considers whether or not to make the declaration sought, what the court is essentially called upon to consider is whether the unilateral termination of the suit agreement for sale was, in fact, legal and valid. Only upon finding such termination to be invalid, would the court make a declaration, as prayed for by the Plaintiff, and then award specific performance of the suit contract.

Specific performance is, thus, claimed after seeking the requisite declaration which bears on the invalidity of the alleged termination. The Supreme Court judgment in **Sikandar's** case is, consequently, clearly distinguishable.

9. The case of **C. Padmawati Naidu vs. Friends Co-operative Housing Society Ltd.**<sup>2</sup> relied upon by learned Counsel for the Respondents is also equally distinguishable. In that case, the agreement for sale was executed on 30 January 1975. The final sale deed was to be executed within a period of two years, i.e. on or before 30 January 1977. Before this period could expire, with effect from 17 February 1976, the Urban Land Ceiling Regulation Act, 1976 ("ULC Act") was brought into force and the suit property was reserved for residential use in the master plan and as such, all transactions of transfer were prohibited, save and except under a permission to be obtained under the ULC Act. Though there was an application made in that case for releasing the property from the ULC Act, the exemption never came till about 1982. On 12 July 1982, the defendants by a legal notice informed the plaintiff that the suit agreement for sale should be treated as cancelled. Lot of correspondence ensued between the parties in pursuance of that legal notice. Thereafter, only sometime in 1985, did the plaintiff approach the court seeking the relief of specific performance. In the suit, there was no challenge to the act of cancellation of the suit agreement for sale. Our court noted that the plaintiff was fully aware about the refusal by the defendants to perform the suit agreement for sale. The court, in the premises, found it difficult to fathom as to why the plaintiff had failed to challenge the act of cancellation by saying why the refusal was not valid in law. In other

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<sup>2</sup> 2016(3) Bom.C.R.236

words, in the suit before the court, the refusal on the part of the defendants to perform the contract was not specifically put in issue or contest. In the premises, our court applied the ratio of **Sikandar's** case to the facts before it. As mentioned above, the facts of the present case are clearly distinguishable. In the present case, there is an explicit contest based on the Plaintiff's own pleading as to the validity of the alleged unilateral termination of the suit agreement for sale by the Defendants.

10. Even in the case of **Manohar vs. Ramesh**<sup>3</sup>, cited by learned Counsel for the Respondents, cancellation happened about three years prior to the filing of the suit, and there was no contest in the suit as to the legality of the alleged cancellation. In **Dharampal Satyapal Ltd. vs. Sanmati Trading and Investment Ltd.**<sup>4</sup>, the Defendant had not only cancelled the agreement for sale but purported to refund the advance paid by the Plaintiff. The court found that there was a cancellation in unequivocal terms and the cancellation was not specifically challenged in the suit. In **Mohinder Singh Vs. Lakbir Singh**<sup>5</sup>, there was a legal notice by which the defendant (agreement vendor) had cancelled the agreement of sale and forfeited the earnest money. The legal notice was duly replied by the plaintiff (agreement purchaser) asking for liquidated damages. The Court found that the agreement for sale having been terminated and no declaratory reliefs having been sought in respect of such termination, the suit for specific performance was not maintainable. The Court, in this case, did not simply rest its decision on this point

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3 2016 SCC OnLine Bom 2674

4 2017 SCC OnLine Del 7317

5 2015 SCC Online P&H 19427

alone. It proceeded to hold that the case of specific performance was not maintainable in view of the breach of the terms and conditions of the agreement by the plaintiff. The Court held that the terms of the contract should have been complied with within the stipulated period including the extended period and that not having been done by the plaintiff, the plaintiff was not entitled to the decree of specific performance. All these cases are clearly distinguishable, both on facts and the way the cause of action was framed therein.

11. The second objection to the maintainability of the suit is on the ground of non-joinder of the Respondents originally to the suit. Alternatively, it is submitted that no effective relief can be passed in the present appeal in the absence of the Respondents as parties to the suit. These Respondents are subsequent purchasers of the suit property. (This purchase happened during the pendency of the present appeal.) It is submitted that the decision in the suit will not in anyway bind the Respondents, since their purchase is not covered under the doctrine of *lis pendens*. These aspects of the controversy are covered in the questions formulated as (i) and (ii) in para 6 above. It is submitted by the Respondents that as agreement purchasers claiming under the original defendants, who are the plaintiff's vendors, the Respondents were necessary or, at any rate, proper parties, who ought to, or should, have been joined. As explained by this Court in the case of **M/s. Lakshmi Construction vs. Pushp Kamal Co-operative Housing Society Ltd.**<sup>6</sup>, a third party agreement purchaser (as opposed to the subsequent title holder) under the defendant vendor in a specific performance suit cannot be joined as a party defendant at his (i.e. the agreement purchaser's)

<sup>6</sup> CHS 1385-12 in S.2457-11 dated 22 January 2018.

instance. The case of such agreement purchaser is foreign to the plaintiff purchaser's cause of action. The only questions which are to be considered in the plaintiff's case for specific performance are (i) validity and subsistence of the suit agreement for sale and (ii) the plaintiff's readiness and willingness to perform his part of the contract. As far as these matters are concerned, the agreement purchaser, claiming his own rights under the defendant-vendor, has no *locus* to contest the plaintiff's case.

12. Let us now come to the Respondents' acquisition of title during the pendency of the present appeal and its effect vis-a-vis the doctrine of *lis pendens* on the decree to be passed in the appeal. In the first place, it is the Respondents' case that when they purchased the suit property, the present appeal was not pending. It is submitted that on the date the transfer was effected in their favour, the appeal had already stood dismissed for want of prosecution. The appeal was restored after the purchase was complete. It is submitted that in the premises, the doctrine of *lis pendens* does not apply vis-a-vis the transaction between the original defendants and the respondents. Before we discuss this issue and consider the judgments cited at the Bar in its connection, it is necessary to set out the relevant dates and particulars. As we have noted above, the suit agreement for sale ('second MOU') was purportedly terminated by the Defendants on 26 May 2006. On 12 June 2006, the Defendants executed an agreement for sale in favour of the Respondents herein. On 28 July 2006, the present Special Civil Suit was filed by the Plaintiff. On 1 December 2006, an interim injunction was granted by the Civil Judge Senior Division, Pune in favour of the Plaintiff. At that

time, it was urged before the Court by the Defendants that the interim application had become infructuous as third party interest in the suit property was already created by the Defendants on 12 June 2006. The Trial Court held that merely because the Defendants had entered into an agreement in respect of the suit property, no interest in the suit property could be said to have been created, or vested, in favour of the third party; and possession of the suit property did not seem to have been delivered to the third party. The Court, in the premises, considering the *prima facie* case and balance of convenience, granted a temporary injunction restraining the Defendants from transferring, alienating, assigning their interest or constructing or creating a third party interest in the suit property in any manner, till the final disposal of the suit. The hearing of the civil suit accordingly proceeded as between the Plaintiff and the Defendants without the Respondents herein being joined as parties to the suit. On 23 November 2011, by a final judgment and order passed by the trial court, the Plaintiff's suit was dismissed. The present first appeal was filed in February 2012, i.e. within the period of limitation. In this appeal, the Respondents were for the first time impleaded as parties on their application. That was on 11 April 2012. On 5 May 2016, the first appeal came to be dismissed for want of prosecution. Within five days of that dismissal, i.e. on 10 May 2016, a deed of assignment and transfer was executed by the Defendants in favour of the Respondents, purporting to assign and transfer the suit property to the latter. On 16 June 2016, the Plaintiff filed a restoration application seeking recall of the dismissal order passed on 5 May 2016. During the pendency of that application, on 20 June 2016, a tripartite deed of confirmation was purportedly executed by the Defendants, the

Respondents and the society. On 11 July 2016, this Court restored the first appeal. On 2 August 2016, interim reliefs were granted in the first appeal restraining the Respondents from acting on the deed of assignment dated 10 May 2016 and the deed of confirmation dated 20 June 2016. This Court also directed that these deeds would be subject to the result of the first appeal. That is where the matter stands when we are called upon to consider it. It is in the backdrop of these facts that we must consider whether the Plaintiff/Appellant needs to specifically impugn the assignment and transfer as between the Defendants and the Respondents or such assignment and transfer are anyway invalid as against the Plaintiff on the principle of *lis pendens*.

13. The doctrine of *lis pendens* is a well known principle of law, embodied in our statutory law under Section 52 of the Transfer of Property Act. Section 52 is in the following terms:-

**52 Transfer of property pending suit relating thereto.-**

During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.-For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and

to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

No immovable property, right to which is directly and specifically in question in any suit or proceedings, can, thus, be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein. The only exception to this rule is where such transfer or dealing is under the authority of the court and on such terms as it may impose. There is no question in the present suit that what is transferred here as between the Defendants and the Respondents is an immovable property, right to which was directly and specifically in question in the present suit. The purported transfer of the property is admittedly by a party to the suit. The transfer affects the right of the other party under any decree or order, which may be made in the suit and such transfer is not under any authority of the Court or on terms proposed by it. The only question that needs to be considered is whether this transfer has taken place during the pendency of the suit. Learned Counsel for the Respondents submits that on the date when this transfer took place, there was no pending suit. The transfer purportedly took place on 10 May 2016, by which date the first appeal had come to be dismissed for default. It is submitted that there was no *lis pendens* as between the parties on 10 May 2016. On the other hand, relying on the Explanation to Section 52, it is submitted by learned Counsel for the Plaintiff that the doctrine of *lis pendens* under Section 52 could be said to

be inapplicable only if the time provided for making a restoration application or appealing against the order of dismissal for default had passed without such application/appeal having been preferred. It is submitted that mere dismissal of the appeal did not result in cessation of the *lis*. Several judgments of this Court as well as the Supreme Court were referred to in this behalf. Particularly, the Plaintiff relied on the decision of our Court in the case of **Krishnaji Pandarinath Balwankar vs. Anusayabai Sidram Gulbile**<sup>7</sup>, which was cited with approval in the decision of Supreme Court in the cases of **Jagan Singh (DEAD) through LRS vs. Dhanwanti**<sup>8</sup> and **Kirpal Kaur vs. Jitendra Pal Singh**<sup>9</sup>.

14. In **Krishnaji's** case, the appellant before this court, Krishnaji Balwankar, was a purchaser of a house from one Sidram by a sale deed. Sidram was the husband of Respondent No.1 to the appeal, one Anusayabai, who had filed a suit in the Court of Civil Judge, Junior Division, Pandharpur, against Sidram for a decree of maintenance. She claimed a charge for arrears as well as future maintenance on this property. The suit, which was filed on 14 February 1950, was dismissed on 15 July 1952 for non-payment of process fee. The transfer of property as between Sidram and Krishnaji took place on 17 July 1952, i.e. after the dismissal of the suit. On 29 July 1952, Anusayabai applied for restoration of the suit and the suit was ordered to be restored. When Anusayabai's suit was decreed ex-parte against Sidram, Anusayabai applied for execution by sale of the property charged. The execution was opposed by Krishnaji, the purchaser of the property, who joined as a

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7 1958 SCC Online Bom 74: AIR 1959 Bom 475

8 (2012) 2 SCC 628

9 (2015) 9 SCC 356

purchaser *pendente lite*. He resisted the execution contending *inter alia* that he was a purchaser of the property for value without notice and that his sale would not be affected by the doctrine of *lis pendens*, since it was effected after the plaintiff's suit was dismissed. The trial court held that the execution application was maintainable and the appellant could not avail of his purchase on the doctrine of *lis pendens*. The District Court confirmed the order of the trial court and the matter was brought before this Court in a second appeal. The question of law before this Court was whether a sale, which is conducted after the dismissal of the suit and before the suit was restored but during the period provided for presentation of the appeal is affected by the doctrine of *lis pendens*. After considering the provisions of Section 52, in the light of the Explanation, which follows the main provision in the Section, this Court held that it was true that the sale effected by Sidram was after the dismissal of the suit filed by Anusayabai and before the suit was restored, but the alienation being before the final decree or order was passed and complete satisfaction or discharge of such decree was obtained, it must be regarded as *pendente lite*. The Court considered the provisions of Section 52 of the Transfer of Property Act, as it stood before it was amended by Act 20 of 1929. The unamended Section used the expression "active prosecution of any suit or proceeding". The Court noted that the expression was omitted by the amended Act but the amended provision made it clear that the *lis* continued so long as a final decree or order had not been obtained and complete satisfaction thereof had not been rendered. The Court noted the statement of law in Sir Dinshaw Mulla's "*Transfer of Property Act*", where the law, after referring to several authorities, was stated thus:

“..... Even after the dismissal of the suit, a purchaser is subject to *lis pendens*, if an appeal is afterwards filed.”

The Court was of the view that if after the dismissal of the suit and before an appeal was presented, the *lis* were to continue so as to prevent the defendant from transferring the property to the prejudice of the plaintiff, there was no reason for holding that between the date of dismissal of the suit under Order IX Rule 2 of the Civil Procedure Code and the date of its restoration, the *lis* did not continue.

15. The judgment in **Krishnaji's** case was cited with approval in at least two recent decisions of the Supreme Court. In **Jagan Singh's** case (supra), the Supreme Court held that a sale effected after the dismissal of the suit and the first appeal but during the period of limitation when a second appeal could have been filed would be covered by the doctrine of *lis pendens*, if such second appeal was in fact filed. The Supreme Court noted that the doctrine of *lis pendens* was founded in public policy and equity, and must be read meaningfully so that a sale, as in the case before the Court, until the period of limitation for second appeal was over, would have to be held as covered by Section 52 of the Transfer of Property Act. In **Kirpal Kaur's** case (supra), the court considered a gift deed executed before the expiry of the period of limitation for filing of a Special Leave Petition, holding that any transfer executed during this period was also likewise hit by Section 52 of the Transfer of Property Act.

16. The law stated by the authorities discussed above makes it amply clear that mere dismissal of a suit does not imply the end of the *lis*. The *lis* continues at least during the period, during which an appeal or a restoration application, in an appropriate case where the dismissal is under Order IX, Rule 2 or otherwise for want of prosecution, could be filed before the Court. If no such appeal or application is filed, the *lis* may be treated as having come to an end on the date of dismissal of the suit but if such appeal or application is filed then the *lis* would continue without any break till the appeal or application is disposed of, as the case may be.

17. Mr. Kapadia for the Respondents relies on the cases of **Nallakumar Goundan vs. Pappayi Ammal**<sup>10</sup> and **Primella Sanitary Products Pvt. Ltd. vs. Gurudas Vishwanath Sinai Gaitonde**<sup>11</sup>. Learned Counsel submits that the question of *lis pendens* arising in the present case is not covered by the judgments cited by the Appellant, but is governed by the *dicta* in these two judgments. Learned Counsel submits that once the period of limitation expires, no *lis pendens* can be said to subsist from the date of dismissal or disposal of a proceeding. Any subsequent proceeding upon condonation of delay cannot act to the prejudice of a third party and extend the deeming benefit of *lis pendens* to the party, who does not avail of its remedy within the period of limitation. Learned Counsel particularly lays stress on the fact that the period of limitation for the Plaintiff's application for restoration of the first appeal had expired on 3 June 2006, that is to say, after the expiry of 30 days from the date of dismissal of the first appeal for default. The

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10 AIR 1945 Mad 219

11 2010 (7) MhLJ 104

Plaintiff's application for restoration (Civil Application No.2853 of 2016) was filed on 16 June 2016 with an application for condonation of delay of ten days. By an order dated 11 July 2016, this Court condoned the delay of ten days and restored the appeal. On these facts, learned Counsel submits that if the principle urged by the Plaintiff were to be accepted, the doctrine of *lis pendens* would have an elastic ambit with umpteen possibilities of its revival years after it has ceased to operate, simply because further proceedings could always be filed after seeking condonation of the delay.

18. Broadly, on a principle, learned Counsel may be right. The application of the principle cannot be so open-ended. But in the present case, the argument is of no avail to the Respondents. In the present case, after dismissal of the appeal for want of prosecution, the Plaintiff would have an option to either present an application for restoration of the first appeal, with an application for condonation of delay if the restoration was beyond time or to challenge the order of dismissal by way of a special leave petition. The period for filing of a restoration application is 30 days, whilst for filing of a Special Leave Petition from a first appeal dismissed by the High Court it is 90 days. The Appellant chose the remedy of restoration with condonation of delay within 90 days. Now, merely because the Appellant chose a particular remedy, namely, restoration application within such time, it cannot be said that *lis* between the parties had come to an end, particularly since on such application, the first appeal was restored by this Court and, thereafter, heard on merits. Otherwise, we would come to a strange situation. If the Appellant were to file a Special Leave Petition and the Supreme Court

were to entertain the same, the *lis* would be said to be pending but instead, on the same facts and apropos of the same dates, if the Appellant were to move an application for restoration of the first appeal and the first appeal were to be restored and thereafter heard on merits, the *lis* could be said to be not pending as between the dates of the dismissal of the first appeal and the restoration application. Anyway, after the first appeal was restored, this Court, by an order dated 2 August 2016, had noted that the deed of assignment of 10 May 2016 as also the deed of confirmation of 20 June 2016, executed by the Defendants in favour of the Respondents, would be subject to the result of the first appeal, though the contentions of the Respondents based on equities were kept open for being urged at the hearing of the first appeal. The Respondents were, in the premises, restrained from acting in pursuance of the deed of assignment and the deed of confirmation in the matter of seeking development permission from the Municipal Corporation for constructing upon the suit property or creating any third party rights. The Respondents filed a Special Leave Petition from this order. The SLP was later withdrawn. The Respondents' case on equities, if any, arising in their favour, is considered later in this order.

19. In the premises, the doctrine of *lis pendens*, which is a principle of equity and which has found statutory expression in Section 52 of the Transfer of Property Act, squarely applies to the transfer of the suit plot on 10 May 2016 between the Defendants and the Respondents.

20. That brings us to the central question of the time being of essence of the contract and whether or not there was failure on the part

of the Plaintiff to perform the contract, or alternatively, whether the Plaintiff could be said to be wanting in readiness and willingness to perform the suit contract. It is the Defendants' case that under the suit agreement for sale (second MOU), the commitment on the part of the purchaser to pay balance consideration within a period of ten months from the date of execution of the MOU, i.e. on or before 21 May 2006, is an absolute commitment without reference to any reciprocal obligation on the part of the vendors. This contention hinges on the true construction of the suit contract, the salient provisions of which are quoted below:

“2. Out of the said total consideration of Rs.1,61,00,000/- the Purchaser has already paid sum of Rs.5,00,000/- by Cheque No.75914 dt. 25.5.2005 on Pune People's Co-operative Bank, Model Colony Branch, Pune, receipt whereof Vendors hereby admit. Balance consideration shall be paid by the Purchaser to the Vendors within a period of 10 months from the date of execution of this Memorandum i.e. on or before 21.5.2006 and at the time of delivery of possession of the said Plot by the vendors to the Purchaser or his nominee.

3. Time for payment of the balance consideration is the essential term of this Memorandum and shall be strictly complied by the Purchaser. If for any reason Purchaser fails to pay the balance amount to the Vendors on or before 21.5.2006 then this understanding shall stand automatically cancelled and terminated whereupon the Vendors shall repay to the Purchaser the said amount of Rs.5,00,000/- without interest.

6. The Vendors have agreed to transfer the said plot on 'as is and where is' basis. However as and when required by the Purchaser, the Vendors shall sign all

applications, statements and other documents for obtaining the various permissions for transfer of the said plot. All permissions that may be required for transfer of the said plot shall be obtained by the Purchaser at his own costs.

9. The transfer will be completed as per the rules and regulations of the Society. The Vendors have already given Special Power of Attorney to the Purchaser for carrying out works specified therein. The said Power of Attorney is hereby confirmed by the Vendors. It is however made clear that the authorities will be used by the Purchaser at his own costs and risks and in a legal manner. By virtue of the said Power of Attorney the Purchaser shall not claim any right, title or interest in the said property and the said Power of Attorney shall be co-extensive with the MOU.”

Learned Counsel reads clause 3, which immediately follows clause 2, providing for the purchaser's obligation to make payment within time. Clause 3 provides that time for payment of the balance consideration is an essential term of the memorandum and shall be strictly complied with by the purchaser. The clause not only makes time of essence, but, according to learned Counsel for the Defendants, further underscores the point by providing that if, for any reason the purchaser fails to pay the balance amount to the vendors on or before 21 May 2006, then the MOU shall stand automatically cancelled and terminated, whereupon the vendors shall repay the earnest amount without interest to the purchaser. Learned Counsel submits that the obligations to obtain all requisite permissions were squarely of the purchaser. There was no corresponding reciprocal obligation in this behalf on the vendors. All that the vendors had to do was to sign the applications, wherever necessary, for seeking such permissions. It is submitted that even permission under the Urban

Land Ceiling Act, 1976 had to be obtained by the purchaser *inter alia* after filing of a statement under Section 6(1) of that Act. It is submitted that the document read as a whole makes it clear that the vendors had agreed to transfer the suit property on '*as is where is basis*' with all obligations to obtain permissions for transfer of title being to the purchaser's account. It is submitted that, in the premises, since the purchaser admittedly failed to pay the balance consideration on or before 21 May 2006, the agreement has stood automatically cancelled and terminated. It is submitted that the vendors had admittedly offered to repay to the purchaser the part payment made under the MOU without interest in accordance with the stipulations in the agreement.

21. If one reads clause 2 of the agreement in the light of, or in the context of, the other clauses referred to above, one thing is quite clear and that is that the balance consideration was to be paid by the purchaser to the vendors on or before 21 May 2006 **and** at the time of delivery of possession of the suit plot by the vendors to the purchaser, or his nominee. In the minimum, what it means is that unless the vendors were in a position to offer delivery of possession of the suit plot to the purchaser or his nominee, there was no obligation on the part of the purchaser to tender payment of balance consideration to the vendors. Payment of balance consideration and delivery of possession are clearly simultaneous events. Unless the time of delivery of possession coincides with the stipulated date of payment of balance consideration, i.e. 21 May 2006, there is no obligation on the purchaser to tender such payment by this date. All other clauses of the agreement are consistent with this interpretation of clause 2. When clause 3 provides that time for balance

consideration was an essential term and was to be strictly complied with by the purchaser, even giving rise to an automatic cancellation and termination of the suit agreement, what it does is to deny the purchaser any excuse for non-payment of the balance consideration **if and so long as** the vendors are ready to deliver possession of the suit property to the purchaser or his nominee. It is another matter that all permissions that may be required for transfer of the plot, such as the permission of the authorities under the Urban Land (Ceiling and Regulation) Act, 1976 etc., were to be obtained by the purchaser. That still does not detract from the requirement on the part of the vendors to be ready with delivery of possession of the suit plot. In fact, the agreement provides (clause 10) that the permission of the society for transfer of the plot in the name of the purchaser was to be obtained by the vendors, though the transfer fee of the society was to be borne by the purchaser. The suit plot is in a tenant co-partnership co-operative society, where the co-operative society has executed a lease in favour of the vendors, i.e. the Defendants herein, which mandates the Defendants as lessees not to assign, dispose of, underlet, or part with possession of the suit plot without prior written permission of the lessor society. It is imperative, therefore, that before the Defendant vendors could part with possession of the suit plot, they had to obtain a prior written permission from the society. In keeping with this clause, there is a stipulation in the suit agreement for sale that the vendors shall obtain written permission of the society for transfer of the suit plot in favour of the purchaser or his nominee. Unless and until this permission was obtained by the vendors, they could not be said to be in a position to part with possession of the demised plot to the purchaser or his nominee, and if they were not in such position, they could not

demand payment of balance consideration, even if the date stipulated for such payment was to expire.

22. For the same reasons, it cannot be said that the Plaintiff purchaser was not ready and willing to perform his part of the contract. If there is a reciprocal obligation on the Defendant vendors to deliver possession of the suit property against payment of balance consideration unless the Defendants are in a position to perform this obligation, the Plaintiff need not tender payment of balance consideration. If he does not, in the premises, tender such balance consideration, he cannot be said to be wanting in readiness and willingness to perform his part of the suit contract. There is no case that the Plaintiff was not having any funds or ready with such funds as of 21 May 2006 or any other relevant date. The only ground urged in the suit against the Plaintiff was that he did not offer the payment of balance consideration on or before 21 May 2006.

23. At the hearing of the first appeal, however, Mr. Jagtiani, learned Counsel for the Defendants, raises an altogether new contention. Learned Counsel submits that the Plaintiff was obliged to obtain ULC permission/clearance and his failure to do so demonstrated that he had not complied, or was not ready to comply, with his obligations under the suit MOU. It is submitted that all that the Plaintiff purchaser did in this behalf was to file a declaration under Section 6(1) of the ULC Act on 20 April 2006. Learned Counsel submits that the obligation of the Plaintiff was not only to file a statement/return under Section 6 of that Act, but also to obtain a permission under Section 26 of that Act and since the

Plaintiff had not taken steps to obtain such permission and there was no way such permission could have been obtained by 21 May 2006, the Plaintiff cannot said to be ready and willing to perform his part of the contract.

24. Apart from the general question of the Plaintiff's readiness and willingness to perform his part of the contract, the point, which we need to consider in the context of his obligation to obtain ULC permission, is, whether ULC permission was necessary insofar as payment of balance consideration and simultaneous delivery of possession of the suit plot are concerned. The provisions of Section 26 of the ULC Act make it clear that a clearance under Section 26 is required only for transfer of land by way of sale, mortgage, gift, lease or otherwise. Whereas ULC clearance would, thus, be undoubtedly necessary for a conveyance or transfer, handing over of possession of the suit plot against balance consideration would not by itself depend or hinge upon the ULC clearance. In keeping with this, even the terms of the suit MOU do not require ULC clearance to pre-date either payment of balance consideration or delivery of possession. As held by this Court in the case of **Bastion Constructions vs. Nusli N. Wadia**<sup>12</sup>, ULC clearance may not always be a promissory condition, the breach of which by one party would entitle the other to terminate the contract. In fact, the termination of the suit contract in the present case did not proceed on the basis that the Plaintiff in any way breached his obligation to bring a ULC permission or was not ready and willing to comply with his obligation towards bringing such permission.

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<sup>12</sup> Suit No.353 of 2009 dated 4 March 2015.

25. Even otherwise, on the facts of the case before the Court, it cannot be said that the Plaintiff was not ready and willing to perform his part of the contract or had in any way failed to take steps for obtaining ULC permission. On 21 May 2006, the Defendant vendors, not being in a position to deliver possession of the suit property, want of ULC permission by that date cannot be made a ground for termination of the suit contract by the Defendants. In fact, the Defendants' inability to deliver such possession even continued thereafter till 13 June 2006, on which date the Defendant vendors purported to terminate the suit contract. If on the date the suit contract was terminated by the vendors, the vendors themselves were not in a position to deliver possession of the suit property, against which alone they could claim the payment of the balance consideration, the fact that the permission from the ULC authorities had not come by then or was not brought by the Plaintiff by then, cannot be availed by the Defendant vendors for terminating the suit contract. There is, accordingly, no failure on the part of the Plaintiff to perform his part of the contract on this account.

26. In short, though the time was of essence under the suit contract for payment of balance consideration, it was also subject to the Defendant vendors themselves being in a position to deliver the suit plot to the Plaintiff or his nominee. Since they were not so ready by the stipulated date, they could not claim payment of balance consideration. Failure on the part of the Plaintiff to tender such payment by 21 May 2006 cannot, thus, be termed either a breach on his part or a fact denoting want of readiness or willingness to perform on his part. For the reasons discussed above, even the Plaintiff's failure to obtain ULC

clearance by 21 May, 2006 does not qualify either as a breach or want of readiness or willingness on his part.

27. That brings us to the last of the questions formulated above, namely, whether or not this Court should exercise discretion under Section 20 of the Specific Relief Act for ordering specific performance. Before I consider this issue, I must record the statement on the part of learned Counsel for the Appellant/Plaintiff that the Plaintiff is not only ready to pay the balance consideration payable to the Defendants, but also such interest on the amount as may be ordered by this Court. Alternatively, learned Counsel also submits that her client is also willing to pay the balance consideration calculating the amount on the basis of what was paid by Respondent Nos. 3 and 4 to the Defendant vendors on 10 May 2016 with such interest as may be ordered by this Court.

28. On this issue, learned Counsel for the Defendants submits that Defendant No.1 is a senior citizen, a widowed lady, living alone in Mumbai; Respondent No.2, her son, has been permanently residing abroad. It is submitted that the overall circumstances together with the terms of the suit MOU unmistakably suggest that she intended to sell her property in a time-bound manner; the transaction was expected to be completed or on before 21 May 2006. It is submitted that even if one were to proceed on the footing that under the MOU it was her obligation to obtain the permission of the society, the performance of this obligation, in the facts of the case recounted above, necessarily depended on the Plaintiff himself performing certain acts in a timely manner. It is submitted that though there was no permission of the society and, in the

premises, the transaction could not be completed by the stipulated date, it was more because of the action/inaction on the part of the Plaintiff and not so much on her part. It is submitted that the conduct of the Plaintiff, both before and after the suit MOU, of firstly closing or deactivating the well and thereafter, delaying re-excavation and re-activation of the well significantly contributed to the Society's permission not being available before 21 May 2006. It is submitted that considering the conduct of the Plaintiff, even if there is a case otherwise made out for specific performance, such specific performance ought to be denied to the Plaintiff by exercising discretion under Section 20 of the Specific Relief Act. Besides, it is submitted that the Society's bye-laws provide that a person, who is already a tenant member of any other Society in Pune, shall not be entitled to hold a plot in it. It is submitted that even if a decree of specific performance were to be granted in favour of the Plaintiff, the transfer would still be subject to the permission of the society and, in the facts of the case, specific performance subject to such permission may be a mere academic matter.

29. No doubt specific performance is a discretionary remedy and is not granted “*merely because it is lawful to do so*”. The remedy is within the discretion of the Court, to be exercised on sound Judicial principles. (See **Madamsetty Satyanarayana vs. G. Yelloji Rao**<sup>13</sup>.) Section 20 of the Specific Relief Act, which provides for this discretion of the Court, itself recognizes some of these principles (Sub-section(2) of Section 20). Two of these principles (Clauses (a) and (c) of Sub-section 2) concern the contract itself and the circumstances of its making including the conduct of the parties at the time of its making. Upon considering the

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13 AIR 1965 SC-1405

terms of the contract in the light of this conduct or circumstances, if the court is of the view that grant of specific performance would give the plaintiff an unfair advantage over the defendant, the court may refuse to grant such performance and mould its relief differently. So also, where the circumstances surrounding the making of the contract are such as would make it inequitable to enforce specific performance, though such circumstances do not add up to a case of a voidable contract, the court may still refuse specific performance. The third principle (Clause (b) of the Sub-section 2) concerns the performance of the contract at the time the court considers whether or not to order it. The Court compares relative hardship to the parties at that time, in a case where such performance would involve a hardship on the defendant which the latter did not foresee at the time of making it. Though these cases are illustrative and by no means exhaustive, they offer guidance for exercising the discretion and formulating the relief in a specific performance suit. The Court may, whilst considering the relief, take into consideration the circumstances of the case, the conduct of the parties (both before and after entering into the suit contract and even during the course of the litigation) and their respective interests under the contract. It is, however, important to remember that the court is called upon to exercise this discretion after finding all ingredients of a case of specific performance in favour of the plaintiff. As held by the Supreme Court in the case of **Prakash Chandra vs. Angadlal**<sup>14</sup>, as an ordinary rule, specific performance should be granted, and ought to be denied only when equitable considerations show that damages would constitute adequate relief. Lastly, it is also important to bear in mind that it is permissible, in

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14 1979 (4) SCC 393

an appropriate case, to order specific performance on terms imposed upon the plaintiff to avoid any hardship to the defendant that would otherwise result from such performance.

30. Bearing these principles in mind, let us now examine the facts of this case from the point of view of exercising discretion under Section 20. Let us first consider the terms of the contract. The contract provides for an adequate consideration and makes it subject to reciprocal obligations of the parties, as noticed above. It casts all responsibility of obtaining statutory and other provisions on the purchaser save and except the permission of the Society for transferring the property or parting with its possession. This latter responsibility is cast on the vendors. And rightly so, since this matter is strictly between the Society and the vendors who are its members. Subject to these obligations, the contract makes time as essence and provides for a stipulated date by which to pay consideration and receive delivery of possession. These are perfectly reasonable and fair terms, and there is nothing in them to give any unfair advantage to the plaintiff. As I have observed above, the Defendants have to simply obtain the Society's permission and then go on to receive the balance consideration by the stipulated date, i.e. 21 May 2006, against delivery of possession to the Plaintiff. The Plaintiff could withhold the payment of balance consideration only till delivery of possession by 21 May, 2006 or till after the Society's permission, whichever is later. No other compliance, whoever be the party to whose account it may be attributed, can hold up this simultaneous receipt of payment and delivery of possession. This situation clearly continued when the contract was purportedly determined by the Defendants. There

is nothing in these terms which gives any unfair advantage to the Plaintiff even if the performance of the contract were to be ordered today. The hardship, if any, that could result to the Defendants in that case may be compensated by terms. Next let us consider the circumstances at the time of making of the contract. The parties had entered into an MOU earlier; even a part payment was made by the Plaintiff under this MOU to the Defendants. The Plaintiff was even put into possession of the suit plot. After being put in possession, the Plaintiff closed a well in the plot, which, according to the Plaintiff, was an unused well. As a result, the Society complained and asked the Defendants to re-open the well. This communication was followed by a letter from the Defendants that, after carefully studying the MOU, it was noticed that there were some lapses in it; some agreed terms were not incorporated and some were wrongly recorded. So also, the delivery of possession without the Society's permission was unauthorized. In the premises, the Defendants sought to terminate the first MOU, but showed their willingness to enter into a fresh MOU within 10 days if the agreed terms were incorporated. This position was contested by the Plaintiff. The parties thereafter re-negotiated the matter and entered into a Second MOU, which is the Suit MOU, incorporating the "renegotiated" terms. There is nothing in these circumstances which would give any unfair advantage to the Plaintiff or make it inequitable for the Defendants to enforce the contract specifically. Circumstances during the course of the litigation, on the other hand, show that the Defendants have already received a competent consideration from the Respondents and would not in any way be inconvenienced or prejudiced now if proper terms are proposed for such enforcement. Let us now consider the conduct of the

parties. I do not see anything in the Plaintiff's conduct, which would disentitle him to the relief of specific performance. The Defendants have not made out the case urged by Learned Counsel that if the transaction could not be completed by the stipulated date, that was more because of the Plaintiff's conduct rather than the Defendants'. It is not proved that the delay on the part of the Plaintiff in re-excavating or re-activating the well directly resulted into the delay on the part of the Society in granting its permission for transfer of the plot and its possession. The delay, if any, on the part of the Plaintiff in obtaining ULC permission has, as I have noted above, nothing to do with payment of consideration against delivery of possession. As in the case of **Bastion Constructions**, even here, the ULC permission was not a promissory condition for payment of consideration and delivery of possession. Once payment and delivery are accomplished, the responsibility of ULC clearance was to the account of the Plaintiff and he took the consequences of its rejection, if any. As for the Defendant vendors, the payment was complete and irrevocable; the property was offered by them on "as is where is" basis, ULC clearance being exclusively to the Plaintiff's account. Nothing in the matter of ULC clearance led to the purported determination of the contract. It was not even a reason stated for such determination. Let us consider, on the other hand, the Defendants' conduct both before and after the Suit. The termination, as this Court has held above, was clearly wrongful. Within less than twenty days of this purported termination, the Defendants proceeded to enter into an agreement for sale with the Respondents. In the Suit filed thereafter, there was a restraint order of the trial court against creation of further third party rights. After the Suit was dismissed and the present First Appeal was filed, this restraint order was continued.

It subsisted till the date when the appeal was dismissed for default. After the dismissal, the Plaintiff had an option to apply for restoration within 30 days or challenge the order in an SLP within 90 days. Within this period, the Defendants executed a deed of assignment and transfer in favour of the Respondents. This conduct, though it cannot be described as wrongful in law, certainly leaves much to be desired in terms of propriety. The parties, both Defendants and Respondents, did not even think it fit to wait till the expiry of the statutory limitation period for restoration of the appeal. Within 5 days after dismissal of the appeal for default, they went ahead with the transaction. There is surely nothing equitable in this conduct. There is nothing, to say the least, which calls for an exercise of the court's discretion in their favour.

31. There is no other circumstance, which calls for such exercise either. With the repeal of the ULC Act, the ULC permission is no more required. The Society's permission, on the other hand, is a matter of mere formality. There is nothing in the circumstances of the case, which could disentitle the Plaintiff from getting such permission or applying for membership of the Society. As of today, the Plaintiff is not a tenant member of any other Society in Pune. Nothing is produced before the Court to show such tenant membership. Besides, it is always permissible to the Plaintiff to claim performance in favour of his nominee.

32. That brings us to the relief to be moulded in the present case. As we have seen above, whilst considering the relief in a specific performance suit, the Court can put the parties to such terms as may be deemed fit. Here, the Defendants have already received a competent

consideration for the suit property. If, however, as a result of the specific performance decree, the Respondents were to vacate the property, the Defendants would be exposed to a claim for return of the sale consideration possibly with interest. That would bring in an element of hardship to them, particularly considering that what they had entered into with the Respondents was a transaction, which the law did not prohibit, though it would be, as held by this court above, subject to a decree to be passed herein. The original consideration fixed under the Suit MOU was Rs. 1.61 crores. The Defendants agree that a sum of Rs. 42 lakhs was received by them under the suit MOU and this amount had to be returned to the Plaintiff as a consequence of termination of the contract, but which, though offered by the Defendants, was not accepted by the Plaintiff. The Plaintiff did not do so because, according to him, the contract was subsisting and he would seek specific performance of it. As against this, the Defendants received a value of Rs. 1.95 crores from the Respondents as a consideration for the suit property, which may have to be returned possibly with interest. The Plaintiff has offered to match this price by paying the difference and even interest on the entire amount of unpaid price. It would, therefore, be in the interest of justice that the Plaintiff is asked to pay this amount on behalf of the Defendants to the Respondents as return of consideration by the Defendants. The Defendants, in addition to the value of Rs. 1.95 lakhs, hold a sum of Rs. 42 lakhs paid to them in 2006. They have had use of this amount all these days. It is, therefore, in the interest of justice that they be ordered to pay this amount with interest to the Respondents so as to complete the return of the consideration paid by the latter for the suit property and return the balance to the Plaintiff with like interest.

33. On these facts, this Court is of the view that in the interest of justice, the most appropriate relief to be granted in this suit would be to grant specific performance of the suit MOU and as a condition (i) direct the Plaintiff to pay to the Respondents on behalf of the Defendants a sum of Rs. 1.53 crores (i.e. Rs.1.95 crores less Rs.42 lakhs already paid) with interest at the rate of 9% p.a. (presumably as an average of the highest of the maximum rates at which interest is paid on deposits by scheduled banks) from 10 May 2016 and till payment or realization; (ii) direct the Defendants to pay a sum of Rs.42 lakhs with interest on the sum of Rs.29.5 lakhs at 9% p.a. from 12 June 2006 till payment or realization and on the sum of Rs.12.5 lakhs at 9% p.a. from 10 May 2016 and till payment or realization, to the Respondents towards full and final return of the consideration paid by the latter to the former; and (iii) direct the Defendants to pay to the Plaintiff a sum equivalent to interest at the rate of 9% p.a. on the sum of Rs.12.5 lakhs from 12 June 2006 till 9 May 2016. By this arrangement, the Defendants' hardship of returning the consideration paid by the Respondents is avoided; the Defendants get to keep the entire consideration paid by the Respondents to them and merely have to return the sum of Rs. 42 lakhs held by them in consideration of the suit MOU; and on the other hand, the Respondents get return of the entire consideration paid by them with interest. This return comes partly from the Plaintiff and partly from the Defendants, from the latter to the extent of Rs.42 lakhs retained by the Defendants under the suit MOU. As part of performance the Respondents may be directed to hand over possession of the suit property to the Plaintiff. Appropriate directions may also have to be passed for the Society's permission for such transfer.

34. In the premises, the First Appeal is disposed of in terms of the following order :

(a) The impugned order dated 23 November 2011, passed by 2<sup>nd</sup> Additional Judge, Small Causes Court and Joint Civil Judge, Senior Division, Pune, in Special Civil Suit No.1322 of 2006, is quashed and set aside and the Appellant's suit is decreed in the following terms;

(b) Respondent Nos. 1 and 2 (original Defendants) are directed to specifically perform the suit agreement for sale, namely, the Memorandum of Understanding dated 22 July 2005;

(c) Respondent Nos. 1 and 2 shall apply to Sindh Co-operative Housing Society for, and obtain, permission to transfer the suit plot of land, namely, Plot No.265 at village Aundh, Pune-7 together with the structure standing thereon ("suit plot") for completing the transfer in favour of the Appellant or his nominee;

(d) Respondent Nos. 1 and 2 shall sign such documents/writings as may be necessary to effectively transfer the suit plot to the Appellant or his nominee and as may be demanded by the Appellant;

(d-1) If Sindh Co-Operative Housing Society requires any document to be signed by Respondent Nos. 3 and 4 for completing the transfer in favour of the Appellant or his nominee, such document/writing shall be signed by Respondent Nos. 3 and 4.

(e) The documents executed by Respondent Nos. 1 and 2 in favour of Respondent Nos. 3 and 4, namely, the Deed of Assignment and transfer dated 10 May 2016 and the Deed of Confirmation dated 20 June 2016, shall have no effect so far as the rights of the Appellant under the decree herein are concerned;

(f) Respondent Nos. 3 and 4 shall hand over possession of the suit plot to the Appellant immediately upon receipt of the permission of Sindh Co-operative Housing Society referred to in clause (c) above;

(g) The Appellant shall pay to Respondent Nos. 3 and 4 a sum of Rs.1.53 crores together with interest at the rate of 9% p.a. from 10 May 2016 and till payment or realization against delivery of possession by the Respondents in terms of clause (f) above, towards return of consideration for the Deed of Assignment and Transfer dated 10 May 2016;

(h) Respondent Nos. 1 and 2 shall pay a sum of Rs.42 lakhs with interest at the rate of 9% p.a. on the sum of Rs.29.5 lakhs from 12 June 2006 and till payment or realization and on the sum of Rs.12.5 lakhs from 10 May 2016 and till payment or realization to Respondent Nos. 3 and 4, towards full and final settlement of return of consideration for the Deed of Assignment and Transfer dated 10 May 2016 after taking into account the payment provided in clause (g) above;

(i) Respondent Nos. 1 and 2 shall pay to the Appellant a sum equivalent to interest at the rate of 9% p.a. on the sum of Rs.12.5 lakhs

from 12 June 2006 and till 9 May 2016; and

(j) Respondent Nos. 1 and 2 shall pay the costs of the appeal to the Appellant.

35. In view of the disposal of the first appeal, nothing survives in the civil application and the same is disposed of.

36. At the request of learned Counsel for the Respondents, this order is stayed for a period eight weeks from today. The timeline provided for in the order will, accordingly, be modified and reckoned from after the expiry of the stay.

**(S.C. GUPTE, J.)**