

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.295 OF 2013

Shree Chaitanya Constructions .. Appellant

vs.

Shri Poonamchand Dalichand Parakh and Ors. .. Respondents

Mr.P.K.Dhakephalkar, Sr.Counsel with Mr.Makarand D. Adkar i/b
Mr.S.R.Ganbavle for the appellant

Mr.P.S.Dani, Sr.Counsel i/b Mr.Mandar Soman for the respondent no.5

Mr.Vinit Jain for the respondent nos.1, 2 and 4

**CORAM : K. K. TATED &
SARANG V. KOTWAL, JJ.**

**RESERVED ON : FEBRUARY 5, 2018
PRONOUNCED ON : FEBRUARY 14, 2018**

JUDGMENT (Per K.K.Tated, J.) :

1. Heard the learned counsel for the parties.
2. By this First Appeal, plaintiff is challenging the the Judgment and Decree dated 7.11.2012 passed by Civil Judge, Senior Division, Pune in Special Civil Suit No.2080 of 2010 rejecting plaintiff's claim for specific performance of Memorandum of Understanding dated 23.9.2007 and handing over possession of suit land to them.

3. For the sake of convenience, the nomenclature of the parties as is stated in the plaint will be referred to hereinafter with the appellant as original plaintiff and respondents as original defendants.

4. The plaintiff entered into Memorandum of Understanding dated 23.9.2007 with the defendants for purchase of the property as described in Schedule to the said Memorandum of Understanding which reads thus :

“THE SCHEDULE I ABOVE REFERRED TO:

All that piece and parcel of land or ground admeasuring 130000 sq.fts. Bearing Gat No.678 situate, lying and being at Village Velu within the Registration Sub-District of Taluka Bhore, District Pune and within the limits of the Gram Panchayat of Village Velu and falling in the “Industrial” Zone.

THE SCHEDULE II OF THE SAID BUNGALOW ABOVE REFERRED TO:

All that Piece and Parcel of the Bungalow having a built up area admeasuring 1000 sq.fts. constructed on a portion of land out of the said land as mentioned in the Schedule I referred to above.

THE SCHEDULE III OF THE FACTORY PREMISE I ABOVE REFERRED TO:

All that Piece and Parcel of the factory premise having a built up area admeasuring 12,000 sq.fts. constructed on a portion of land out of the said land as mentioned in the Schedule I referred to above.

THE SCHEDULE IV OF THE FACTORY PREMISE II ABOVE REFERRED TO:

All that Piece and Parcel of the factory premise having a built up area admeasuring 2,300.00 sq.fts. constructed on a portion of land out of the said land as mentioned in the Schedule I referred to above.

5. As per the Memorandum of Understanding, defendant nos.1 to 5 are owners of the suit property and defendant nos.6 to 8 as confirming parties to the Memorandum of Understanding. As per the said Memorandum of Understanding, plaintiff agreed to purchase the said property “As is Where Is Basis” for a total consideration of Rs.2,81,00,000/-. It was agreed by and between the parties that the said agreed consideration amount shall be paid by the purchaser to the owner and confirming parties in following manner:

“a)(i) Rs.1,60,000/- (Rupees One Lakh Sixty Thousand only) to the Owner No.(1) vide a cheque bearing No.587776 dated 23rd September, 2007 drawn on Syndicate Bank, Shivaji Nagar branch, Pune, on execution of these presents – the payment and receipt whereof the Owner No. (1) hereby admits and acknowledges.

(ii) Rs.1,60,000/- (Rupees One Lakh Sixty Thousand only) to the Owner No.(2) vide a cheque bearing No.587777 dated 23rd September, 2007 drawn on Syndicate Bank, Shivaji Nagar branch, Pune, on execution of these presents – the payment and receipt whereof the Owner No. (2) hereby admits and acknowledges.

(iii) Rs.1,71,000/- (Rupees One Lakh Seventy One Thousand only) to the Owner No.(3) vide a cheque bearing No.587786 dated 23rd September, 2007 drawn on Syndicate Bank, Shivaji Nagar branch, Pune, on execution of these presents – the payment and receipt whereof the Owner No. (3) hereby admits and acknowledges.

(iv) Rs.1,60,000/- (Rupees One Lakh Sixty Thousand

only) to the Owner No.(4) vide a cheque bearing No.587779 dated 23rd September, 2007 drawn on Syndicate Bank, Shivaji Nagar branch, Pune, on execution of these presents – the payment and receipt whereof the Owner No. (4) hereby admits and acknowledges.

(v) Rs.1,60,000/- (Rupees One Lakh Sixty Thousand only) to the Owner No.(5) vide a cheque bearing No.587780 dated 23rd September, 2007 drawn on Syndicate Bank, Shivaji Nagar branch, Pune, on execution of these presents – the payment and receipt whereof the Owner No. (5) hereby admits and acknowledges.

The payment of amounts, as upon these presents has been done upon the direction and express request of the Owners and the payment of the balance amounts, as narrated hereinafter, shall be strictly apportioned by and between the Owners and the Confirming Party herein all by themselves and the Purchaser shall not be responsible for the same.

b) *Balance amount out of the agreed sale/purchase price of the said Scheduled Property (including the amounts paid on execution of these presents) shall be paid by the Purchaser to the Owners upon.*

i) *The Owners perfecting their title to the Scheduled Property and getting in all outstanding encumbrances as mentioned herein below, on or in respect thereof:*

a) *Within a period of 45 days from the day of obtaining a letter of One Time Settlement and consequential release of charge on the repayment of the amount due and obtaining a formal Deed of Release of the Mortgage in respect of the Scheduled Property, thereby getting a NOC from Bank of Maharashtra, Bajirao Road Branch or the period suggested by the Bank to clear the dues.*

b) *Within a period of 45 days from the day of obtaining a letter of One Time Settlement and consequential release of charge on the repayment of the amount due and obtaining a*

formal Deed of Release of the Mortgage in respect of the Scheduled Property, thereby getting a NOC from the Janata Sahakari Bank or the period suggested by the bank to clear the dues.

(ii) Balance amount out of the agreed sale/purchase price of the said Scheduled Property (including the amounts paid on execution of these presents) shall be paid by the Purchaser to the Owners upon:

(a) Repayment of the amount due to the Velu Vikas Sahakari Society appearing in the other nights column, and getting the same deleted from the 7/12 extract.

(b) Repayment and setting of any other charge/mortgage/recovery in respect of the said Scheduled Property.

(c) Payment of all taxes like the N.A., Sales Tax, Excise Grampanchayat cesses, levies etc. payable upon the said land as well as the said Premise.

(d) Payment of all MSEDCL Bills and the like in respect of the Scheduled Property alongwith the transfer charges in respect of the power connection in respect of the Scheduled Property.

(e) Obtaining all or any clearances, NOCs, permissions etc. if required, as under the Industrial Scheme, Notification, Corrigendum etc. or laws, local or otherwise as applicable to the Scheduled Property, for the time being in force.

(f) And/or all such other things necessary and required to make the title of the Scheduled Property free and marketable and without any charges and/or encumbrances.

(iii) Balance amount within a period of 60 days from the full and final payment of the last clearance as mentioned herein above like obtaining a clearance, formal Deed of Release and NOC's in respect of the aforesaid charges, levies, cesses,

clearances of the Gram Panchayat and upon each of the Owners alongwith their respective family member and the Confirming Party executing a formal Agreement/s for Sale or, at the option of the Purchaser, an Agreement/s for Development and Irrevocable Power of Attorney in favour of the Purchaser or in favour of the Purchaser's nominee, as the case may be whichever is later.”

6. As per the said Memorandum of Understanding, plaintiff paid substantial amount to the defendants. When the plaintiff called upon the defendants to execute the said deed, defendant no.5 refused to do so on the ground that he had already filed Special Civil Suit No.1298 of 1999 in the court of Civil Judge, Senior Division, Pune at Pune against some of the defendants and their relatives for partition and separate possession of suit property also. Another ground for refusal taken by the Defendant was that this Court by its order dated 22.3.2007 in Appeal from Order No.1071 of 2002 had restrained the defendants in Special Civil Suit No.1298 of 1999 (some of the defendants in the present Suit also) from creating any third party interest or from transferring in any manner the suit property. Therefore, defendant no.5 had taken stand that there is no question of execution of the sale deed. Hence, the plaintiff filed present Special Civil Suit No.2080 of 2010 for following prayers:

“a. Suit be decreed with costs. Defendants No.1 to 5 be directed to remove/caused to be removed the suit property from the Pending Special Civil Suit No.1298 of 1999, and be directed to execute the sale deed of the suit property described in paragraph 1 of the Plaint, and the Defendants inter alia including the Defendants No.6 to 8 be directed to deliver the actual, physical, vacant and peaceful possession of the suit property to the Plaintiff, against the receipt of balance consideration of Rs.1,25,88,000/- from the Plaintiff.

b. Defendants be restrained by an order of permanent injunction from transferring the suit property or any part thereof, and also from creating any third party interests in or against the suit property and also from encumbering the suit property in any manner whatsoever manner, and also from parting with possession of the suit property or any part thereof, in favour of any third person, under any pretext of whatsoever nature.

c. During the pendency of the suit, temporary injunction in terms of prayer clause b above may kindly be granted against the Defendants. If, for any reason, the Hon'ble Court forms an opinion that the decree for specific performance cannot be granted, the alternative relief of damages may kindly be allowed, and the Defendants No.1 to 5 be directed to pay to the Plaintiff an amount of Rs.8,19,95,465.57/- by way of damages, as stated in paragraph above, and the first charge of the said amount along with the interest at the rate of 15% from the date of suit till total repayment is made to the Plaintiff, and the Defendants be directed to furnish security for such money decree, and failing which the suit property be attached before Judgment.”

d. Any other just and equitable orders in the interest of justice may kindly be passed.”

7. The said Suit was partly allowed by Civil Judge, Senior Division, Pune only on the ground that, when there was an order of injunction from High Court in Appeal from Order No.1071 of 2002 for alienation of the suit property and therefore, there is no question of granting decree for specific performance. The Trial Court directed defendants to pay sum of Rs.2,26,40,370/- to the plaintiff towards refund of part consideration and the damages along with interest @ 9% p.a. from the date of filing of the Suit on Rs.1,56,44,905/- till the date of decree and at the same rate till the date of realisation of the whole. Hence, the

plaintiff preferred the present First Appeal.

8. The learned Senior Counsel for the plaintiff submits that the impugned Judgment and Decree passed by the Trial Court is against justice, equity and good conscious and same is required to be set aside. He submits that the Trial Court has given a finding on issue nos.1, 2, 3 and 4 in favour of plaintiff but, the final order for specific performance of contract was against them, only on the ground that at the time of execution of the Memorandum of Understanding, injunction was running against the parties (defendants) from creating any third party, right, title and interest of suit property.

9. The learned Senior Counsel for the plaintiff submits that defendant no.5 filed Special Civil Suit No.1298 of 1999 for partition and other reliefs in respect of large portion of properties between them. Matter was then carried till High Court in Appeal from Order No.1071 of 2002. In Appeal from Order this court passed order on 22.3.2007 restraining parties (defendants) from creating any third party right, title and interest in respect of some of the suit properties in that suit. In that litigation, he submits that though prohibitory order was passed by this High Court on 22.3.2007, the defendants including defendant no.5 executed Memorandum of Understanding dated 23.9.2007 and accepted the consideration in respect of the suit property. He further submits that though injunction order was passed in March, 2007 and Memorandum of Understanding was executed in September 2007, defendant nos.1 to 5 failed to disclose the fact about the pending proceeding in respect of suit property being Special Civil Suit No.1298

of 1999 and the Appeal from Order No.1071 of 2002. He submits that plaintiff being bonafide purchaser of the suit property had paid substantial amount to the defendants.

10. The learned Senior Counsel for the Plaintiff submits that there was demand notice from Bank of Maharashtra against defendant nos.1 to 5 in respect of their borrowing. At that time, defendant nos.1 to 5 approached the plaintiff and requested to make some payments to clear the Bank of Maharashtra's liability. Therefore, the plaintiff by its letter dated 27.9.2007 (Exhibit 71) forwarded a cheque of Rs.1 Crore under "No-Lien Account" on behalf of defendants. Hence, the Bank of Maharashtra by its letter dated 28.9.2007 (Exhibit 72) informed the defendants about the compromise proposal of defendants' account which reads thus:

- "1. Rs.100.00 lakh be accepted in full & final settlement of our dues in all the sixteen group accounts to be paid on or before 30th Sept.2007.*
- 2. Bank has already lodged subsidy claim with DIC and subsidy if any received, will be adjusted towards dues over and above the compromise account.*
- 3. Recovery proceedings will be withdrawn after recovery of entire compromise amount.*
- 4. No fresh facilities will be sanctioned in future to the firms, borrowers, guarantors, or where you are involved as partners of having substantial interest.*
- 5. All the concessions granted above be cancelled in case of default in payment as above."*

11. The learned Senior Counsel for the plaintiff submits that as per compromise proposal of Bank of Maharashtra, plaintiff cleared their dues and wrote letter dated 28.9.2007 (Exhibit 73) to the bank for

issuing no dues certificate. Thereafter defendants also executed Receipt cum undertaking dated 28.9.2007 (Exhibit 74) in respect of clearance of liability of Bank of Maharashtra. The learned Senior Counsel for the plaintiff submits that in similar way the plaintiff cleared the defendants' liability with Janata Sahakari Bank Ltd., Pune also. In spite of that as the defendants failed and neglected to execute the sale deed in favour of the plaintiff. Hence, they issued legal notice dated 10.6.2008 (Exhibit 78) calling upon defendant no.5, Sudhir Poonamchand to execute sale deed of the suit property and hand over possession of the same and take concrete steps to get High Court injunction modified to the extent of the suit property.

12. The learned Senior Counsel for the plaintiff submits that thereafter defendant nos.1 to 4 filed application below Exhibit-247 before the Civil Judge, Senior Division, Pune in Special Civil Suit No.1298 of 1999 for deleting the suit property from that litigation. At that time, defendant no.5, the plaintiff in Special Civil Suit No.1298 of 1999, Sudhir Poonamchand Parakh objected the same. Hence, Civil Judge, Senior Division in Special Civil Suit No.1298 of 1999 passed following order :

*“Heard the parties through their counsel.
Plaintiff does not wish to delete the properties from the claim.
Therefore the issue relating property nos.7 and 8 will be
decided along with the main Suit.
Order dated 11.2.2010.”*

13. The learned Senior Counsel for the plaintiff submits that except defendant no.5 everybody agreed and admitted the execution of M.O.U.

and for transferring and handing over of property in favour of plaintiff. He submits that in the present proceeding, defendant no.5 failed and neglected to disclose their litigation about partition suit being Special Civil Suit No.1298 of 1999 at the time of executing Memorandum of Understanding. He further submits that though the Hon'ble High Court passed injunction order dated 22.3.2007 in Appeal from Order No.1071 of 2002, same was suppressed by the defendants particularly defendant no.5 at the time of executing the Memorandum of Understanding dated 23.9.2007.

14. The learned Senior Counsel for the plaintiff submits that though defendant no.5 filed his written statement dated 4.2.2011, he failed and neglected to enter into the witness box. Not only that, he has not participated in the proceeding except filing of written statement. He submits that at the time of passing impugned Judgment and Decree by the Trial Court, Trial Court failed to appreciate the fact that though the injunction order was passed by the High Court on 22.3.2007, defendant no.5 on his own executed M.O.U. on 23.9.2007 along with other defendants i.e. after near about 6 months. These facts were not properly considered by the Trial Court at the time of passing impugned decree. In support of this contention, the learned Senior Counsel for the plaintiff relies on the apex court judgment in the matter of ***Thomson Press (India) Limited vs. Nanak Builders And Investors Private Limited and Others***¹. Paragraph 53 of the said judgment reads thus:

“53. There is, therefore, little room for any doubt that the

¹ (2013) 5 SCC 397

transfer of the suit property pendete lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the Plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent Court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent Court may issue in the suit against the vendor.”

15. The learned Senior Counsel for the plaintiff submits that the parties cannot be permitted to 'blow hot and cold' at the same time. He submits that in the present proceeding on one hand defendant no.5 approached Hon'ble High Court in Appeal from Order No.1071 of 2002 for obtaining injunction restraining defendant nos.1 to 4 from creating any third party right, title and interest in respect of the suit property and on the other hand, within 6 months thereafter, he executed Memorandum of Understanding with the plaintiff along with defendant nos.1 to 4. This itself shows that on one hand defendant no.5 is taking shelter of injunction order dated 22.3.2007 and on the other hand by suppressing the same he executed Memorandum of Understanding dated 23.9.2007 for valuable consideration. The Trial Court accepted the said plea of defendant no.5 about injunction order and declined the decree for specific performance, only on the ground that, when the injunction order was in force they entered into Memorandum of Understanding dated 23.9.2007. The learned Senior Counsel for plaintiff submits that the Apex Court in the matter of **V.**

Chandrasekaran and Another vs. Administrative Officer and Others² held that a person is expected to approach the court of equity with clean hand, clean mind and clean heart. A person who seeks equity, must do equity. A person cannot be enriched by causing injuries to others. Paragraph 39 of this authority reads thus:

“39. In Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Co. Limited : (2011) 10 SCC 420, this Court considered a large number of judgments on the issue of estoppels and held as under:

“34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience...

35. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.”

16. The learned Senior Counsel for the plaintiff also relied on the judgment of the Apex Court in the matter of **Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Limited**³ for same principle.

² (2012) 12 SCC 133

³ (2011) 10 SCC 420.

17. The learned Senior Counsel for the plaintiff submits that in the present proceeding, defendant no.5 had knowledge about the injunction order dated 22.3.2007 passed by High Court in Appeal from Order No.1071 of 2002 and inspite of that entering into M.O.U. dated 23.9.2007 with the plaintiff for transfer of suit property for valuable consideration. Defendant no.5 also accepted part of the consideration. Not only that on behalf of defendant nos.1 to 5, plaintiff cleared their loan liability. These facts were not considered by the Trial Court at the time of rejecting plaintiff's prayer for specific performance only on the ground that M.O.U. was executed when injunction order dated 22.3.2007 was in force. In support of this contention, he relies on the judgment of the Apex Court in the matter of ***B.L.Sreedhar and Others vs. K.M. Munireddy (Dead) and Others***⁴. In this authority the Apex Court held that Estoppel is a rule of evidence and the general rule is enacted in section 115 of the Evidence Act, 1872 which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. Paragraph 13 of this authority reads thus:

“13. Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872, (in short 'Evidence Act') which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. [See Sunderbai

4(2003) 2 SCC 355

and Anr. v. Devaji Shankara Deshpande AIR 1954 SC 82.”

18. The learned Senior Counsel for the plaintiff submits that in the present proceeding, defendant nos.1 to 4 filed appropriate application in Special Civil Suit No.1298 of 1999 for deleting the suit property from that litigation so that they can execute the sale deed in favour of plaintiff but the same was opposed by defendant no.5 who himself has executed Memorandum of Understanding suppressing injunction order dated 22.3.2007. These facts were not considered by the Trial Court at the time of passing impugned the Judgment and Decree and declined to grant specific performance of the Memorandum of Understanding.

19. The learned Senior Counsel for the plaintiff submits that plaintiff is the bonafide purchaser of the suit property without any knowledge about injunction order dated 22.3.2007. He submits that defendant no.5 suppressed injunction order at the time of executing Memorandum of Understanding. Not only that defendant nos.1 to 4 filed application in Special Civil Suit No.1298 of 1999 for deleting the suit property from that litigation, so that they can execute the sale deed in favour of plaintiff hereinabove, defendant no.5 who was plaintiff in Special Civil Suit No.1298 of 1999 opposed the same. These facts were not considered by the Trial Court at the time of passing impugned the Judgment and Decree. He submits that Apex Court in the matter of ***Zarina Siddiqui vs. A. Ramalingam alias R. Amarnathan***⁵ held that equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. Paragraph 33 and 34 reads thus:

⁵(2015) 1 SCC 705

“33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the Plaintiff so that discretion would be exercised judiciously in favour of the Plaintiff. At the same time, if the Defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance.

34. In the instant case, as noticed above, although Defendant No. 2 held a registered power of attorney on behalf of Defendant No. 1 to sell and dispose of the property, but the Defendants not only made a false statement on affidavit that the power of attorney had authorized the second Defendant only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from truth of the facts. Further, by registered agreement the Defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the Defendants in our opinion, disentitle them to ask the Court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and mislead the Court, the Court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of law.”

20. On the basis of these submissions the learned Senior Counsel for the plaintiff submits that the Judgment and Decree passed by Trial Court dated 7.11.2012 is required to be set aside with a direction to the defendants to execute the sale deed and hand over possession of the suit property to the plaintiff on accepting balance amount of Rs.1,23,00,000/-. He submits that if defendants failed to execute sale deed this Hon'ble Court be pleased to direct court officer to execute the

same on deposit of balance consideration.

21. The learned Senior Counsel Mr.Dani appearing on behalf of respondent no.5, original defendant no.5, vehemently opposed the present First Appeal. He submits that plaintiff failed to make out any case to interfere with the well reasoned the Judgment and Decree passed by Trial Court. He submits that Trial Court after considering the evidence on record rightly held that plaintiff is not entitled relief for specific performance for execution of sale deed in respect of the suit property and instead of that directed defendants to pay sum of Rs.2,26,40,370/- to the plaintiff towards refund of part consideration and the damages along with interest @ 9% p.a. from the date of filing of Suit till the date of decree at the same rate and till the date of realisation of whole amount. Therefore, there is no question of interfering with the well reasoned order passed by Trial Court.

22. The learned Senior Counsel for the defendant no.5 submits that suit filed by the plaintiff itself was not maintainable because plaintiff had not claimed specific performance of entire Memorandum of Understanding dated 23.9.2007. He submits that plaintiff by the present Suit claimed relief only in respect of some of the properties as described in Memorandum of Understanding. He submits that description of the property is given by plaintiff in paragraph 1 of the plaint which is as under:

“1. Description of suit property :- All that piece and parcel of land or ground lying and being situated within the limits of “Sub Registration District Taluka Bhore, District Pune and within the limits of Zilla Parishad, Pune, Taluka Panchayat Bhore,

Village Panchayat Velu, bearing Gat No. 678, admeasuring about 1,30,000 sq.ft. which land is situated in Industrial Zone, along with a Bungalow admeasuring about 1,000 sq.ft. on the above stated land, and a Factory premises admeasuring about 12,000 sq.ft. Built up area, and yet another factory premises admeasuring about 2,300 sq.ft. Standing on the said land, the boundaries of the property are as follows:

<i>East:</i>	<i>Pune Satara Road</i>
<i>South:</i>	<i>Gat No.679 and Gat No.680</i>
<i>West:</i>	<i>Gat No.769 and Government Forest</i>
<i>North:</i>	<i>Gat No.677</i>

23. The learned Senior Counsel for the defendant no.5 submits that as the plaintiff failed to claim the entire property as described in Memorandum of Understanding dated 23.9.2007, suit itself was not maintainable and hence, Trial Court rightly rejected the plaintiff's claim for specific performance.

24. The learned Senior Counsel for the defendant no.5 submits that Trial Court failed to frame the issues as per Section 20 of the Specific Relief Act, 1963. He submits that Trial Court ought to have framed the issue about the hardship on the part of the defendants if specific performance is granted. He had also submitted that the trial court had not framed the issue as to whether it was equitable to grant the relief of specific performance. He had submitted that the matter be remanded back to trial court to determine that issue and has referred to Rule 23, 24, 25 of Order XLI of the Code of Civil Procedure. For want of the said issue, there is no question of allowing the present First Appeal preferred by the plaintiff. In support of this contention, he relies on the Apex Court judgment in the matter of ***Kallathil Sreedharan and***

Another vs. Komath Pandyala Prasanna and Another⁶. In this authority, the Apex Court held that Court is not bound to grant specific performance relief merely because it is lawful to do so but at the same time it enjoys the discretion of the court should not be arbitrary but sound and reasonable guided by the judicial principles and capable of correction by a court of Appeal. Paragraph 9 reads thus:

“9. Section 20 of the Specific Relief Act, 1963 deals with discretion and jurisdiction to the Court. It says that the Court is bound to grant such relief merely because it is lawful to do so, but at the same time it enjoins that the discretion of the Court should not be arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. It would thus be seen that the discretion given to the Court of equity is required to be exercised not arbitrarily but on sound and reasonable basis guided by judicial principles.”

25. The learned Senior Counsel for the defendant no.5 also relies on the judgement of the Apex Court in the matter ***Zarina Siddiqui vs. A. Ramalingam alias R. Amarnathan***⁷. In this authority the Apex Court held that the equitable discretion to grant or not to grant a relief for specific performance depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the Plaintiff so that discretion would be exercised judiciously in favour of the Plaintiff. Paragraph 31 to 34 reads thus:

“31. In the case of Vimalleshwar Nagappa Shet v. Noor Ahmed Shariff and Ors. : (2011) 12 SCC 658, an agreement to sell a dwelling house was entered into by some of the co-sharers and the matter was ultimately compromised on payment of higher

6(1996) 6 SCC 218

7(2015) 1 SCC 705

price. On those facts the Court held that since the value of the property escalates in urban areas very fast, it would not be equitable to grant relief of specific performance after the lapse of a long period of time. The said decision has no application in the present case.

32. Similarly, in the case of *K.S. Vidyanadam v. Vairavan*, (1997) 3 SCC 1, this Court on facts found that there was a total lapse and negligence for a period of more than 2 1/2 years from the side of the Plaintiff in taking any step to perform his part of contract under the agreement and there was gross violation of the terms of the agreement which required him to pay the balance, purchase the stamp paper and then seek for execution of the sale deed. Further the delay was coupled with substantial rise in price, which brought about a situation where it would not be equitable to give the relief of specific performance to the Plaintiff. With due respect, this decision is also not applicable in the facts of the present case.

33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the Plaintiff so that discretion would be exercised judiciously in favour of the Plaintiff. At the same time, if the Defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance.

34. In the instant case, as noticed above, although Defendant No. 2 held a registered power of attorney on behalf of Defendant No. 1 to sell and dispose of the property, but the Defendants not only made a false statement on affidavit that the power of attorney had authorized the second Defendant only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from truth of the facts. Further, by registered agreement the Defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the

Defendants in our opinion, disentitle them to ask the Court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and mislead the Court, the Court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of law.”

26. The learned Senior Counsel for defendant no.5 further submits that court below failed to consider the fact that Memorandum of Understanding dated 23.9.2007 itself was not admissible in evidence because the same was not stamped. He submits that it is specifically stated in clause 2 of the said Memorandum of Understanding that each of the owners and confirming parties puts the purchaser plaintiff in vacant and peaceful possession of the schedule property by way of part performance of the contract. Clause 2 reads thus:

“2. Each of the Owners and Confirming Party herein is putting the Purchaser in vacant and peaceful possession of the Scheduled Property as and by way of part performance of this Contract.”

27. The learned Senior Counsel for defendant no.5 submits that said Memorandum of Understanding was executed on stamp paper of Rs.500 only. He submits that as per Article 25 of Maharashtra Stamp Act, same is required to be treated as conveyance. Once conveyance is executed they have to pay full stamp duty. Hence, the same is inadmissible in evidence. He further submits that even the Trial Court failed to consider section 33 and 34 of the Stamp Act. He submits that Trial Court ought to have impounded the said instrument for proper stamp duty. He submits that as per Section 34 of the Stamp Act if

instrument is not duly stamped, it is not admissible in evidence. These facts were not considered by the Trial Court even at the time of partly decreeing the plaintiff's Suit for refund of amount along with damages and interest. Therefore, there is no question of entertaining the present First Appeal and same is required to be dismissed with costs.

28. The learned counsel for respondent nos.1, 2 and 4 submits to the courts order. It is to be noted that these defendants neither filed their written statement and / or evidence in the Trial Court nor they participated in the proceeding by cross examining the plaintiff's witness. Though the other respondents are duly served, no one appeared on behalf of them when the matter was called out. It is to be noted that these respondents failed to file their written statement in the Trial Court. Not only that, no one participated in the trial by cross examining the plaintiff's witness. Apart from that, these defendants filed their application dated 7.9.2009 in Special Civil Suit No.1298 of 1999 which was filed by defendant no.5 for partition and separate possession, for deleting the suit property. This itself shows that they had no objection for granting specific performance of Memorandum of Understanding in favour of plaintiff.

29. On the basis of the submissions and the record and proceeding, following points arise before this court for consideration :

<i>Sr. No.</i>	<i>Points</i>	<i>Findings</i>
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a)	<i>Whether the plaintiff has made out a case for interference in the the Judgment and Decree dated 7.11.2012 passed by Civil Judge, Senior Division, Pune in Special Civil Suit No.2080 of 2010.</i>	Yes
b)	<i>Whether the plaintiff has made out a case for specific performance as per prayer clause (a) of the plaint.</i>	Yes
c)	<i>Whether the defendant no.5 has made out a case that plaintiff is not entitled for specific relief as per prayer clause (a) of the plaint in view of section 20 of the Specific Relief Act.</i>	No

30. All points are discussed together as under:

The plaintiff filed following documents in Trial Court in support of his contention. Those are as under:

1)	<i>Nazir verified copy of the Firm registration Certificate of Plaintiff firm.</i>	
2)	<i>Agreement dated 23.09.2007 executed by the Defendants in favour of the Plaintiff.</i>	Exhibit 69
3)	<i>Letter dated 24.09.2007 addressed by Defendant No.5 to Plaintiff firm.</i>	Exhibit 70
4)	<i>Office copy of the letter dated 27.09.2007 addressed by Plaintiff through Shri Vikas Bhalerao to Regional Manager, Pune City Region, Bank of Maharashtra along with the endorsement thereon.</i>	Exhibit 71
5)	<i>Letter issued by Bank of Maharashtra on 28.09.2007 to Defendant No.1, 2, 6 & 7.</i>	Exhibit 72
6)	<i>Office copy of the letter issued by the Plaintiff to the Regional Manager, Bank of Maharashtra on 28.09.2007.</i>	Exhibit 73

7)	<i>A Receipt cum Undertaking dated 28.09.2007 executed by the Defendants in favour of the Plaintiff firm.</i>	<i>Exhibit 74</i>
8)	<i>Copy of No Dues Certificate issued by Bank of Maharashtra Bajirao Road Branch on 29.09.2007 in the name of M/s. Parakh Silk Mills.</i>	
9)	<i>Copy of No Dues Certificate issued by Bank of Maharashtra Bajirao Road Branch on 29.09.2007 in the name of M/s.Parakh Silk Mills, signed by all Defendants and handed over to Plaintiff.</i>	
10)	<i>Copy of No Dues Certificate issued by Bank of Maharashtra Bajirao Road Branch on 29.09.2007 in the name of M/s.Madhumati Textiles.</i>	
11)	<i>Copy of No Dues Certificate issued by Bank of Maharashtra Bajirao Road Branch on 29.09.2007 in the name of M/s.Ashok Textiles.</i>	
12)	<i>Copy of No Dues Certificate issued by Bank of Maharashtra Bajirao Road Branch on 29.09.2007 in the name of M/s.Mahavir Textiles.</i>	
13)	<i>Copy of the letter issued by Parakh Mills on 05.10.2007 to the Recovery Branch, Bank of India.</i>	
14)	<i>Copy of a Demand Draft for Rs.2,00,000/- in the name of Bank of India A/C Parakh Mills dated 04.10.2007 issued by the Plaintiff firm.</i>	
15)	<i>Copy of No Dues Certificate issued by Bank of Maharashtra on 05.10.2007 in the name of Shri P.D.Parakh, Partner, Parakh Mills.</i>	
16)	<i>Office copy of the letter dated 15.10.2007 sent by Plaintiff firm to the Regional Manager, Janata Sahakari Bank Ltd., signed by Defendant No.5</i>	<i>Exhibit 75</i>
17)	<i>One Time Settlement Proposal dated 20.10.2007 issued by Janata Sahakari Bank to the Plaintiff firm along with the envelop.</i>	<i>Exhibit 76</i>
18)	<i>Copy of No Dues Certificate dated 16.10.2007 issued by Janata Sahakari Bank Ltd. In the name of Parakh Synthetics and Mr.Sudhir Parakh.</i>	<i>Exhibit 77</i>

19)	<i>Office copy of the notice sent by the Plaintiff firm through Advocate Kiran Kothadiya to the Defendant No.5 on 10.06.2008 along with UPC.</i>	<i>Exhibit 78</i>
20)	<i>Certified copy of the Order passed by Civil Judge, Senior Division, Pune in Special Civil Suit No.1298/1999 below Exh.244 therein.</i>	<i>Exhibit 79</i>
21)	<i>Office copy of the Complaint lodged by the Plaintiff firm before Deputy Commissioner of Police on 12.05.2010 against the Defendants.</i>	<i>Exhibit 80</i>

31. In the present proceeding, initially the defendant no.5 filed Special Civil Suit No.1298 of 1999 for partition and separate possession of the properties between defendants. In that Suit as the Trial Court refused to grant any ad-interim relief, defendant no.5 preferred Appeal from Order No.1071 of 2002. This court by order dated 22.3.2007 in Appeal from Order No.1071 of 2002 directed parties not to create third party interest of the suit property except the property at Serial No.2 to 4 at Schedule 1 to the plaint in that Suit. Operative part of the said order reads thus:

“ORDER

- (a) The impugned judgement and order dated 4th October 2002 is quashed and set aside.*
- (b) First to fifth defendants (first to fifth respondents herein) are restrained by an order of temporary injunction till the final disposal of the suit from creating any third party interests or from transferring in any manner the suit properties except the properties at serial nos.2 to 4 at Schedule-I to the suit;*
- (c) Prayer clause (b) of application at Exhibit-5 stands rejected.*
- (d) It is made clear that no adjudication has been made in this appeal as regards the claim of the appellant as against defendant nos.6 to 12 and the contentions raised by defendant*

nos.6 to 12;

(e) *In view of disposal of the appeal, the interim order passed in the appeal stands vacated;*

(f) *All contentions of the parties in the pending suit are expressly kept open;*

(g) *No orders as to costs.”*

32. Immediately thereafter, the defendants including defendant no.5 executed Memorandum of Understanding dated 23.9.2007 (Exhibit 69) in favour of plaintiff for transferring the suit property. Pursuant to the said Memorandum of Understanding, plaintiff paid substantial amount to the defendants and also cleared their liability with financial institution. Those facts were admitted by the defendants by executing receipt cum undertaking dated 28.9.2007 (Exhibit 74). Following paragraphs of receipt cum undertaking dated 28.9.2007 makes it clear that all the defendants agreed to execute the sale deed of the suit property in favour of plaintiff.

“AND WHEREAS Bank of Maharashtra had agreed for the compromise proposal for a sum of Rs.100 lacs (Rupees One hundred lacs only) to be paid on or before 30th September 2007. Janata Sahakari Bank Ltd. Had agreed for the compromise proposal for a sum of Rs.50.50 lacs (Rupees Fifty lacs Fifty Thousand only) to be paid on or before 15th November 2007.

AND WHEREAS M/s.Shree Chaitanya Constuctions had deposited a sum of Rs.100 Lacs (Rupees One hundred lacs only) by Ch.No. 587782 dated 27th September 2007 drawn on Syndicate Bank, Shivaji Nagar Branch, Pune with the Bank of Maharashtra to be adjusted against dues of the Owners and the Confirming Party and/or their family concerns as per the compromise proposal given to the bank.

The Owners and the Confirming Parties hereby acknowledge the receipt of the said sum of Rs.100 lacs (Rupees One hundred lacs only) paid by M/s.Shree Chaitanya Constructions by Ch.No. 587782 dated 27th September 2007 drawn on Syndicate Bank, Shivaji Nagar Branch, Pune to Bank of Maharashtra as received by them against the total consideration of the Bank of Maharashtra against the sale-agreement of the said Property.

The Owners and the Confirming Parties here by undertake to make the sale deed in favour of M/s.Shree Chaitanya Constructions on making the payment to Janata Sahakari Bank Ltd. And the balance payment to the Owners and the Confirming Parties as agreed and set out in the Memorandum of Understanding.”

33. Bare reading of the receipt cum undertaking shows that inspite of injunction order dated 22.3.2007 in Appeal from Order No.1071 of 2002, defendant no.5 himself executed all documents and promised to transfer suit property in favour of plaintiff. This itself shows that defendant no.5 on his own waived his rights in respect of injunction order. Not only that the said Special Civil Suit No.1298 of 1999 stands dismissed by order dated 18.11.2014 during the pendency of the present appeal. The said order was not challenged either by defendant no.5 and or any other defendants. This itself shows that defendants on their own agreed to transfer the suit property in favour of plaintiff for valuable consideration. Apart from that when the Memorandum of Understanding dated 23.9.2007 (Exhibit 69) was executed by all the defendants, they failed and neglected to disclose their interse litigation i.e. Special Civil Suit No.1298 of 1999 and injunction order dated 22.3.2007 in Appeal from Order No.1071 of 2002 to the plaintiff. Even at the time of accepting plaintiff's proposal for clearing their liability towards financial institution, defendants failed to disclose all these

facts. This itself shows that plaintiff was the bonafide purchaser of the suit property.

34. In Trial Court except defendant no.5 no one filed their written statement. Even defendant no.5 failed to participate in the proceeding by cross-examining the plaintiff's witness. Apart from that, defendant no.5 failed to enter into the witness box to put his case for opposing the plaintiff's relief for specific performance. These facts were not considered by the Trial Court at the time of passing impugned the Judgment and Decree. Though the Trial Court answered the issue nos.1, 2, 3 and 4 in favour of plaintiff, rejected the plaintiff's claim for specific performance only on the ground that inspite of injunction order dated 22.3.2007 in Appeal from Order No.1071 of 202, they entered into Memorandum of Understanding dated 23.9.2007 (Exhibit 69).

35. During the course of argument, the learned Senior Counsel for the defendant no.5 raised objection about maintainability of the Suit itself. He submitted that Suit was filed by partnership firm but they failed to place on record any documentary evidence about the registration of partnership firm. It is to be noted that record and proceeding shows that plaintiff placed on record photocopy of registration of partnership firm dated 2.12.2009. That document shows that on the date of filing of the suit, plaintiff was duly registered as per Indian Partnership Act, 1932. Therefore, objection raised by the learned Senior Counsel for the defendant no.5 does not sustain.

36. The learned Senior Counsel for the defendant no.5 also raised

objection about admissibility of Memorandum of Understanding dated 23.9.2007 (Exhibit 69) on the ground that the same was not duly stamped. It is to be noted that the said objection was not raised by the defendant no.5 in Trial Court. As per section 35 of the Maharashtra Stamp Act, where the instrument has been admitted in evidence, such admission shall not, except as provided in section 58, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Therefore the objection raised by Senior Counsel for defendant no.5 about the payment of stamp duty on document (Exhibit 69) is not sustainable.

37. It is to be noted that section 20 of the Specific Relief Act is very clear that, it is a judicial power of the court to grant specific relief, on the basis of facts and circumstances of the case in hand. It makes it clear that the jurisdiction of the court to grant specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by the Court of appeal.

38. In the present proceeding, defendants inspite of injunction order dated 22.3.2007 executed Memorandum of Understanding dated 23.9.2007 (Exhibit 69) with plaintiff for transferring the suit property. Not only that they accepted the consideration. Apart from that, they executed the receipt cum undertaking dated 28.9.2007 (Exhibit 74) by which the plaintiff cleared the defendant's liability towards financial institution. Even financial institution in their letter dated 23.9.2007

Exhibit-72, letter dated 20.9.2007 Exhibit-73 admitted the fact that plaintiff cleared the defendant's liability. This itself shows that defendants agreed to execute the sale deed in favour of plaintiff in respect of suit property. Apart from that, except defendant no.5 other defendants filed application (Exhibit 79) in earlier Special Civil Suit No.1298 of 1999 for deleting the suit property from that litigation so that they can execute the document in favour of plaintiff.

39. It is to be noted that though the Trial Court answered all the issues in favour of the plaintiff, declined to grant specific relief only on the ground that injunction order dated 22.3.2007 is in favour of defendants in Appeal from Order No.1071 of 2002. Considering the facts on record and the conduct of the parties, the Trial Court ought to not to have rejected the plaintiff's prayer for specific relief.

40. It is to be noted that Suit No.1298 of 1999 already stands dismissed for non-prosecution. Therefore, there is no question of directing defendant nos.1 to 5 to remove / caused to be removed the suit property from the pending Special Civil Suit No. 1298 of 1999.

41. It is to be noted that Trial Court mainly dismissed the plaintiff's Suit for specific performance only on the ground that injunction order was passed by High Court in pending Appeal from Order. That Appeal from Order as well as Suit itself was disposed of. Therefore, even that hurdle is not for executing the conveyance in respect of the suit property in favour of plaintiff. Considering all these facts, point nos.1 and 2 is answered in the affirmative and point no.3 in the negative as

stated hereinabove.

42. Considering these facts and authorities cited by the parties, we are of the opinion that plaintiff has made out a case for interfering in the the Judgment and Decree passed by Trial Court and also for specific performance of Memorandum of Understanding dated 23.9.2007 (Exhibit 69) i.e. in terms of prayer clause (a) of the plaint.

- a) First Appeal is allowed with costs.
- b) Judgment and Decree dated 7.11.2012 passed by Civil Judge, Senior Division, Pune at Pune in Special Civil Suit No.2080 of 2010 is set aside.
- c) Plaintiff Special Civil Suit No. 2080 of 2010 is allowed in terms of prayer clause (a) with following modification:

Defendants are directed to execute the sale deed of the suit property described in Paragraph 1 of the Plaint, and the Defendants interalia including Defendant nos.6 to 8 be directed to deliver actual physical, vacant and peaceful possession of the suit property to the Plaintiff, against receipt of balance consideration of Rs.1,25,88,000/- from the plaintiff with interest @ 6% from the date of judgment and decree passed by Trial Court dated 7.11.2012.

d) Defendants are directed to execute the sale deed in favour of plaintiff in respect of the suit property on payment and / or deposit in the Trial Court balance consideration with interest as stated hereinabove.

e) If the defendants failed to execute the sale deed within one month from the receipt of certified copy of this order along with notice from the plaintiff, plaintiff is free to file the Execution Application in Trial Court for executing this decree and Trial Court to take appropriate steps according to law.

f) Respondents original defendants are restrained by an order of injunction from creating any third party right, title and interest in respect of the suit property till the execution of the sale deed and handing over physical possession.

g) Decree be drawn accordingly.

43. At this stage, the learned counsel for the respondent no.5 seeks stay of this order. It is to be noted that defendants have to execute the sale deed in favour of plaintiff within one month from the receipt of certified copy of this order. Considering these facts, we do not find any reason to grant stay of this order. Hence, oral request made by the learned counsel for respondent no.5 is rejected.

(SARANG V. KOTWAL, J.)

(K.K.TATED, J.)