

Sharayu Khot.

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

SUIT NO. 1714 OF 1985

**Sadrudin Mohamed Nanavati Deleted
Abdul Aziz Fazalbhoy Rajwani Deleted
Tazaldin Sadrudin Nanavati** **...Plaintiff**

Versus

**Fredrick Fernandes Deleted
Miss Theresa Mary Almeida & Ors.** **...Defendants**

Mr. Cyrus Ardeshir, a/w Mr. Atul Daga, i/by Shane Cardoz, for the Plaintiff.

Ms. Deepti Panda, a/w Mr. M.R. Pardiwala, Ms. Shiraz Merchant, i/by Pardiwala & Co., for the Defendants No. 13, 14(a) to (c), 15 and 16.

CORAM : R.I. CHAGLA J.

DATE : 29 August 2019

JUDGMENT :

1. The present Suit has been filed for specific performance of agreement for sale dated 13th December 1975

executed between late Fedrick Fernandes, (the original Defendant No. 1) together with 11 others (Defendants No. 2 to 12 or their predecessors-in-title) and late Sadruddin Mohamed Nanavati (original Plaintiff No. 1), late Abdul Aziz Fazalbhoj Rajwani (original Plaintiff No. 2) and Tazaldin Sadruddin Nanavati (the present Plaintiff) as Chief Promoters of Andheri Kalpavruksh Co-operative Housing Society Limited (proposed), whereby the Defendants agreed to sell the property situated at Versova, Village Ambivli, Taluka Andheri, District Bombay Suburban bearing Survey No. 37 (City Survey No. 1174) and Survey No. 38-A, Hissa No. 1 (City Survey No. 1173) and Survey No. 162 (City Survey No. 117) admeasuring in aggregate 68,879 sq.yds equivalent to 57,589.73 sq.metres (hereinafter referred to as "*the suit property*"). The consideration was calculated at Rs. 30/- per square yard of the area of the suit property which was later ascertained to be Rs. 20,66,370/- to be equally divided amongst the late Fredrick Fernandes and eleven others. Accordingly, each of the co-owners was to receive towards the sale of his/her undivided share in the suit property

and sum of Rs. 1,72,197.50/-.

FACTS :

2. In pursuance of the agreement for sale dated 13th December 1975, the original Defendant No. 1 and Defendants No. 2 to 12 or their predecessors-in-title placed the Plaintiff in possession of the suit property. There are two declarations executed by Bhikaji Dhondu Pathare, the mali or gardener, who had been employed by late Fedrick Fernandes and 11 others viz. the sellers, vendors of the suit property, in which it was affirmed that as employee of the Plaintiffs, he was guarding the suit property on their behalf. It is an admitted position that the Plaintiff is in possession of the suit property. From the time, when the agreement for sale was executed on 13th December 1975 till July 1985, when the above Suit was filed, the Plaintiff had paid out of the total consideration a sum of Rs. 15,74,542/- and there remained balance amount of Rs. 4,91,828/- payable towards the balance consideration under the agreement for sale dated 13th December 1975. There are receipts issued by the

Defendants who were paid the consideration for purchase of their respective shares in the suit property and which have been taken on record during the trial.

3. Out of the 12 co-owners, it was only 5 co-owners viz. Defendant No. 2, Defendant No. 3, original Defendant No. 4, Defendant No. 7 and Defendant No. 8 who had purported to terminate the agreement for sale dated 13th December 1975 and for which certain correspondence would be necessary to refer to.

4. The then Advocates for Defendants No. 2, 3, 7 and 8 and original Defendant No. 4 addressed a letter dated 30th September 1982 which claimed that on account of a letter dated 18th July 1980 issued by the authorities under the Urban Land (Ceiling & Regulation) Act, 1976 (for short "**ULCR Act**"), the agreement for sale dated 13th December 1975 had come to an end. This was responded to by a letter dated 21st October 1982 addressed by the Advocates on behalf of the Plaintiff and

whereby the Plaintiff's denied that the agreement for sale dated 13th December 1975 had come to an end, for any of the alleged reasons. By a further letter dated 20th June 1983 addressed by the then advocates of Defendants No. 2, 3, 7 and 8 and original Defendant No. 4 to the Plaintiff's Advocate reiterated the contentions raised in the prior letter dated 30th September 1982. Thereafter, the Plaintiff's advocates by their letter dated 11th January 1984 addressed to the then Advocates of these Defendants pointed out that despite alleging that agreement for sale dated 13th December 1975 had come to an end on account of the letter dated 18th July 1980 addressed by the authorities under ULCR Act, these Defendants had continued to accept the consideration from the Plaintiff's under the agreement for sale dated 13th December 1975. Thus, the allegations contained in the letter dated 20th June 1983 as well as in the prior letter dated 30th September 1982 were denied by the Plaintiff.

5. The competent authority under ULCR Act by their letter dated 1st December 1984 granted exemption under

Section 20 of the ULCR Act to the Plaintiffs, as Chief Promoters of Andheri Kalpavruksh Co-operative Housing Society Limited (proposed) for construction of buildings of the suit property.

6. The above Suit was filed on 3rd July 1985. The Plaintiffs sought a declaration of this Court that the agreement for sale dated 13th December 1975 is valid, subsisting and in full force and effect and to grant specific performance of the agreement for sale. Further, in the alternative, the Plaintiff claimed damages and in the further allegations the Defendants be ordered and decreed to refund to the Plaintiffs the amount of Rs. 15,75,542/- together with interest at the rate of 18 percent per annum from the date of the receipt of payment till realization thereof and the costs and expenses of the Suit. A declaration has also been sought that there is a statutory charge upon the suit property. Further, in the event of the Defendants' failing to refund the sums paid by the Plaintiff and/or damages then the suit property be sold and/or rights of development in respect of the suit property be sold by and under the directions

of this Court and the sale proceeds thereof be appropriated in or towards payment of the sums so claimed.

7. A Notice of Motion had been taken out in the Suit by the Plaintiffs and by the order dated 29th April 1986, this Court had upheld the claim of the Plaintiffs that they are in possession of the suit property, as there was no challenge to the factum of possession of the suit property being with the Plaintiffs. The Plaintiffs were granted relief in terms of prayer clause (b) of the Notice of Motion and the Plaintiffs were directed to deposit the amount of Rs. 5,00,000/-, although the sum of Rs. 4,91,828/- remained payable to the Defendants No. 1 to 12 under the agreement for sale. The sum so deposited with the Prothonotary & Senior Master was to be invested in nationalized bank for a period of three years and thereafter, renewed from time to time. The Plaintiff has deposited the said sum of Rs. 5,00,000/- with the Prothonotary & Senior Master and with that deposit, the consideration for purchase of the suit property under the agreement for sale had been paid. In fact a sum over and above

the balance sum payable.

8. Defendants No. 2, 3, 7 and 8 have filed their respective Written Statements dated 9th November 1987, 26th February 1988 and 6th November 1987 respectively wherein they have made identical averments stating that they had withdrawn the letters dated 30th September 1982 and 20th June 1983 wherein as mentioned above they had alleged that the agreement for sale dated 13th December 1975 had come to an end and affirmed that they were ready and willing to perform their obligation under the agreement for sale. They were not interested in contesting the claim of the Plaintiffs. Thus, there is no opposition from these Defendants and it is an admitted fact that they have received full consideration for their share in the suit property.

9. On 8th April 2014 Mr. S.J. Kathawalla, J. framed the issues in the Suit against which are the findings as under:-

: ISSUES :

SR. NO.	ISSUES	FINDINGS
1.	Whether the Plaintiffs prove that the agreement dated 13th December, 1975, is valid, subsisting and in full force and effect?	Yes.
2.	Whether the Plaintiffs prove that they are entitled to a decree for specific performance of the agreement dated 13th December, 1975?	Yes.
3.	Whether the Plaintiffs prove that at all material times they had been ready and willing and continue to be ready and willing to perform its obligation under the suit agreement dated 13th December, 1975?	Yes.
4.	In the event this Hon'ble Court is not inclined to grant a decree of specific performance of the agreement dated 13th December, 1975, whether the Plaintiffs are entitled to a decree of Rs. 2 crores with interest as damages as set out in their particulars of claim?	Does not survive.

5. In addition to issue No.3 and in the event this Hon'ble Court not being inclined to grant a decree of specific performance of the agreement dated 13th December, 1975, whether the Plaintiffs are entitled to refund of Rs. 15,75,542/- with interest as damages as set out in their particulars of claim? Does not survive.
6. In the event this Hon'ble Court not being inclined to grant a decree of specific performance of the agreement dated 13th December, 1975, whether the Plaintiffs prove that the amounts claimed in prayer clauses (b) and (e) of the plaint are secured by a valid charge on the suit property better described in Exhibit 'A' in the Plaint and if the Defendants are unable to pay the amounts claimed in prayer clauses (b) and (e) of the plaint, the said property and rights of development therein should be sold under the directions of this Hon'ble Court to recover the same? Does not survive.
7. Whether Defendant No. 4 (a) proves that there is no cause of action against him to sustain the present suit? No.

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| 8. | Whether Defendant No. 4 (a) proves that the suit should be dismissed as there is no privity of contract between himself and the Plaintiffs? | No. |
| 9. | Whether Defendant No. 4 (a) proves that the suit should be dismissed on the ground that the same has abated? | No. |
| 10. | Whether Defendant No. 4 (a) proves that the suit is barred by limitation? | No. |
| 11. | Whether Defendant No. 4 (a) proves that the suit agreement dated 13th December, 1975, is a forged and fabricated document? | No. |
| 12. | Whether Defendant No. 4 (a) proves that the suit agreement dated 13th December, 1975 came to an end on 18th July, 1980, as alleged in para 5 (iii) of his written statement? | No. |
| 13. | Whether Defendant No. 4 (a) proves that agreement dated 13th December, 1975, was executed on the basis of fraud, misrepresentation and coercion as alleged in para 9 of the Additional Written Statement of Defendant No. 4 (a)? | No. |
| 14. | Whether Defendant No. 4 (a) proves that | No. |

the 'writing of possession' is bogus as alleged in paras 17 and 19 of the Written Statement of Defendant No. 4 (a)?

15. Whether Defendant No. 4 (a) proves that No.
the suit is not valued as per the provisions
of the Bombay Court Fees Act, 1959?

Pleadings and Evidence :

10. It is necessary to note that the original Plaintiff No. 1 died on 9th February 1999 and the original Plaintiff No. 2 died on 10th July 2015. Hence, the above Suit is pursued by the sole surviving Plaintiff (as a Chief Promoters of Andheri Kalpavruksh Co-operative Housing Society Limited (proposed)). Pursuant to the demise of original Plaintiff No. 2, some of his legal heirs filed a Chamber Summons for impleadment as party Plaintiffs and by order dated 31st July 2018, the heirs of deceased Plaintiff No. 2 were joined as Defendants No. 13 to 16.

11. The only opposition to the above Suit was from the original Defendant No. 4 who had filed Written

Statement dated 7th June 1999 wherein various allegations were raised. There were raised for the first time and did not form part of the termination letter dated 30th September 1982 as well as the subsequent correspondence dated 20th June 1983 which had been addressed *inter alia* by him. Since the original Defendant No. 4 died, the Plaintiffs amended the Plaint by bringing on record the legal representatives representing the estate of original Defendant No. 4 being Defendants No. 4(a) and 4(h). Defendant No. 4(a) had thereafter, filed the Written Statement dated 27th February 2014 wherein the same allegations were made as has been made by the original Defendant No. 4. Upon the death of Defendant No. 4(a), Defendant No. 4(b) to 4(h) who are the heirs were already on record and now additionally represented the estate of Defendant No. 4(a). The Defendants No. 4(b) to 4(h) have neither entered appearance nor have they filed any Written Statement. This Court had issued directions vide order dated 28th February 2019 to the Plaintiff to publish notice and writ of summons dated 6th March 2014 in the Free Press Journal and Navshakti,

on the Defendants No. 4(b) to 4(h) as heirs of the original Defendant No. 4 and Defendant No. 4(a).

12. In spite of the writ of summons dated 6th March 2014, the Defendants No. 4(b) to 4(h) did not enter appearance in the above Suit. Hence, the Suit has gone unopposed, considering that the remaining Defendants either by their declarations or by filing Written Statements confirmed that they were willing to convey the suit property unto the Plaintiff and confirmed that agreement for sale dated 13th December 1975 is valid and subsisting. Defendants No. 13 to 16 who are the heirs of the original Plaintiff No. 2 are in support of the Suit. Thus, the Suit filed has gone unopposed.

13. The Plaintiff has filed his Affidavit of evidence dated 7th January 2019 and additional Affidavit of evidence dated 8th March 2019, wherein formal questions were put to the witness in examination in chief on 7th August 2019 and the Affidavit in lieu of examination in chief dated 17th June 2019

and further Affidavit in lieu of examination in chief of the Plaintiff has been taken on record and marked as Exh.P1A and Exh.P1B.

Submissions :

14. The learned Counsel for the Plaintiff has taken this Court through the pleadings, particularly in paragraph 19, where the Plaintiff has averred that he is always been and still is ready and willing to perform his part of the agreement for sale. He has also taken this Court through the documents on record including the termination letter dated 30th September 1982 and has submitted that the only ground for termination of the agreement for sale was on account of the letter/notice dated 18th July 1980 issued by the authorities under the ULCR Act not granting exemption to the suit property and by which it was alleged that the agreement for sale had come to an end. He has submitted that this ground no longer stands, as the competent authority under ULCR Act by order dated 1st December 1984

granted exemption under Section 20 of the ULCR Act to the Plaintiffs as Chief Promoters of Andheri Kalpavruksh Co-operative Housing Society Limited (proposed) for construction of buildings in the suit property for unit or units of Andheri Kalpavruksh Co-operative Housing Society Limited (proposed).

15. He has submitted that the Written Statement filed by the Defendants No. 2, 3, 7 and 8 are to the same effect wherein they have stated that they withdraw the purported termination of the agreement for sale dated 13th December 1975 and withdraw all allegations, statements and contentions in letter dated 30th September 1982 and letter dated 21st June 1983. It is stated that these were made on wrong and incorrect advise given to them and by which that they had contested the claim of the Plaintiff. They have stated that they have always been ready and willing and even today are ready and willing to perform agreement for sale. These Defendants have supported the Plaintiff's case and admits the claim of the Plaintiff and they have stated that the purported termination by these Defendants

is wrongful, illegal and bad in law.

16. He has submitted that the only opposition to the Suit by the original Defendant No. 4 is by making various fallacious statements in the Written Statement and which were made for the first time by way of the Written Statement. In the notice of termination, the only ground for termination of the agreement for sale was on account of the letter/notice from the authority under ULCR Act not granting exemption under Section 20 of the ULCR Act. He has submitted that in fact in the notice of termination, the Defendant No. 4 had admitted execution of the agreement for sale as well as stating that the agreement for sale which had been executed with the Plaintiff, requires to be terminated on the said ground of non grant of exemption under the ULCR Act. However, in the Written Statement, the Defendant No. 4 has altogether denied the execution of the agreement for sale by claiming that the signature of this Defendant was forged in the alleged agreement and that this Defendant never put his signature on the alleged agreement.

The original Defendant No. 4 has in fact, denied that the Defendants had agreed to sell the immovable property to the Plaintiff and has alleged that the agreement is a forged and fabricated document and could not have been entered into, as at the material time, the prevalent market price in the said locality in respect of similar land was over 20 times the alleged price per square yard in the agreement for sale. The Defendant No. 4 in the Written Statement has denied that the Plaintiff has paid any amount towards the consideration for purchase of the suit property under the agreement for sale. He has submitted that this defence should not be taken into consideration, as it has been raised for the first time in the Written Statement and is nowhere found in the notice of termination and/or in any correspondence addressed by Defendant No. 4.

17. He has further submitted that Defendant No. 4(a) has filed the Written Statement which is nothing but a reiteration of what has been stated by the original Defendant No. 4. He has submitted that upon the demise of the original

Defendant No. 4 and Defendant No. 4(a), the heirs of these Defendants were brought on record. Defendants No. 4(b) to 4(h) have chosen not to appear in this proceedings, despite writ of summons having been served upon them. By their non-appearance, the defence taken by the original Defendant No. 4 and original Defendant No. 4(a) cannot be considered as the Defendants No. 4(b) to 4(h), who have been brought on record as their heirs are not interested in opposing the Suit and accordingly, the suit has gone unopposed.

18. He has further relied upon the receipts issued by the Defendants which establish that the purchase consideration had been paid by the Plaintiff under the agreement for sale to these Defendants. He has submitted that the Defendants No. 13 to 16 who have been joined as parties to the Suits are joined in their capacity as heirs of the original Plaintiff No. 2 who had executed the agreement for sale with the sole surviving Plaintiff and thus, are in support of the Suit.

19. The learned Counsel for the Defendants No. 13 to 16 is present in Court and submits that these Defendants support the Plaintiff to the extent in terms of the order dated 10th January 2019 and more particularly, paragraph 2 thereof.

Reasons :

20. Having considered these submissions, it is apparent that the Suit has gone unopposed, as the Defendants are in receipt of their respective shares of consideration under the agreement for sale dated 13th December 1975 towards the purchase of the suit property. This is evident from the receipts which are on record. These receipts are marked as Exh.P10 to Exh.P58, Exh.P69 to Exh.P73, Exh.P75 and Exh.P79. Further, there are declarations from the Defendants as well as the heirs of the original Defendants who have been joined as Defendants whereby they have declared that they have agreed to sell the suit property and the agreement for sale is binding on them and they will execute the conveyance in favour of the Plaintiff.

Further, there are irrevocable Power of Attorney given by the Defendants dated 15th February 1985 which are on record and marked Exh.P77 which confer upon the Plaintiffs several powers in respect of their respective shares in the suit property including power to execute the conveyance.

21. It is apparent from the notice of termination dated 30th September 1982 that the sole reason for termination was the exemption not being granted by the authorities under Section 20 of the ULCR Act vide letter dated 18th July 1980. It is on this ground that the Defendants No. 2,3,4,7 and 8 sought to terminate the agreement for sale. However, this ground no longer survives by reason of the competent authority thereafter, by order dated 1st December 1984 granting exemption under Section 20 of the ULCR Act unto the Plaintiffs as Chief Promoters of Andheri Kalpavruksh Co-operative Housing Society Limited (proposed) for construction of the building on the suit property for unit or units of Andheri Kalpavruksh Co-operative Housing Society Limited (proposed). Further, the Plaintiff has

admittedly been in possession of the suit property and this is apparent from the order dated 29th April 1986 passed in the Notice of Motion taken out in the above Suit whereby this Court had observed that there was no serious challenge to the factum of the Plaintiff's possession of the suit property. The Plaintiff had been directed to deposit an amount of Rs. 5,00,000/- in Court, which was over and above the balance purchase consideration being in the sum of Rs. 4,91,828/- payable to the Defendants under the agreement for sale. Upon deposit of balance consideration of Rs. 5,00,000/- as directed by this Court, the Plaintiff has paid the entire balance consideration for the suit property. The amount of Rs. 5,00,000/- deposited with the Prothonotary & Senior Master has been directed by this Court to be invested in a nationalized bank for a period of three years and thereafter renewed from time to time.

22. I have considered the defence of the sole opposing Defendant No. 4 and I am of the view that this defence cannot be taken into consideration, particularly, on account of

the defence being contrary to the notice of termination which proceeded on the premise that the agreement for sale had been validly executed between the Plaintiff and the Defendants. The agreement for sale was being terminated solely on account of non grant of exemption under the ULCR Act. The Defendants No. 4(b) to 4(h) who are on record as heirs of original Defendant No. 4 and also as the heirs of original Defendant No. 4(a) are also not opposing the Suit by failing to enter appearance, despite being served with the writ of summons. Further the only evidence recorded is the examination-in-chief of the Plaintiff by which the Affidavit of evidence and further Affidavit of evidence was taken on record. Accordingly, the defence in the Written Statement of original Defendant No. 4 and original Defendant No. 4(a) is required to be disregarded.

23. Considering that the Defendants have no opposition to the Suit and that the only reason for seeking termination of the agreement for sale viz. non grant of exemption under Section 20 of the ULCR Act by the authorities

no longer survives on account of exemption having been granted by the authorities under the ULCR Act vide order dated 1st December 1984, the Suit is required to be decreed.

24. The original Defendant No. 4 and the Defendant No. 4(a) had in their Written Statements contended that the Suit is barred by limitation. However, they have not elaborated the manner in which the Suit is barred. In fact, the notice of termination of the agreement for sale is dated 30th September 1982 and the Suit was filed on 3rd July 1985, thus, within the period of three years from the date of purported termination of the agreement for sale. Thus, the Suit has clearly been filed within the time prescribed by the Limitation Act, 1963 and thus, this contention of these Defendant is also not accepted.

Order and Decree :

25. Accordingly, the issues having been answered, the Suit is decreed as follows:

- (i) The agreement for sale dated 13th December 1975 is valid, subsisting and in full force and effect.
- (ii) The Plaintiff is granted specific performance of the agreement for sale of the suit property and the Defendants are ordered and decreed to perform their part of contract under the agreement for sale.
- (iii) The sum of Rs. 5,00,000/- (Rupees five Lakh only), which has been deposited in this Court pursuant to the order dated 29th April 1986 and is lying with the Prothonotary & Senior Master and which has been invested in the nationalized bank, shall be withdrawn by the Prothonotary & Senior Master and this sum together with the accrued interest shall be forthwith paid over in the following manner:-

(a) The sum of Rs. 4,91,828/- (Rupees Four Lakh Ninety One Thousand Eight Hundred Twenty Eight only) shall be paid to the Defendants No. 1 to 12 in their respective shares as provided in the last column of the table which is titled "Balance to be paid" at paragraph 6 of the Plaint. The interest accrued on sum of Rs. 4,91,828/- shall also be distributed amongst Defendants No. 1 to 12 in proportion of their respective shares of balance sum to be paid as provided in the last column of the table at paragraph 6 of the Plaint.

(b) The sum of Rs. 8,172/- (Rupees Eight Thousand One Hundred Seventy Two only) (i.e. difference between Rs. 5,00,000/- and the sum of Rs. 4,91,828/-

to be paid to the Defendants No. 1 to 12)
together with interest shall be paid to the
Plaintiff and the Defendants No. 13 to 16
in equal shares.

(iv) The Defendants No. 1 to 12 shall execute the
Deed of Conveyance in respect of the suit
property with the Plaintiff and/or his nominees
in terms of Clause 8 of the agreement for sale
and have it registered within a period of three
months from the date of uploading of this
judgment.

(v) In the event of the Defendants No. 1 to 12 not
executing the Deed of Conveyance in respect of
the suit property within the stipulated period,
the Prothonotary & Senior Master shall execute
the Deed of Conveyance with the Plaintiff
and/or his nominees in terms of Clause 8 of the

agreement for sale and get it registered within a period of three weeks from the date of expiry of three months.

(vi) There shall be no order as to costs.

[R.I. CHAGLA, J.]