IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 79 OF 2005

1. Shri Roque Fredrick Ladinho Collasso
   aged 67 years, occupation business,

2. Smt. Flory Collasso,
   aged 59, wife of Appellant No.1,
   occupation housewife.

   Both residing at H.No.213, Bepquegal,
   Curchorem, Goa.

3. Shri Peter Santiago Collasso
   aged 59 years, occupation teacher.

4. Smt. Fatima Collasso,
   aged 57 years, wife of Appellant No.3
   occupation housewife.

   Both resident of House No.133 Khamamol,
   Curchorem, Goa. **.... Appellants**
   Original Plaintiffs

Versus

1. Shri Camilo Antonio Aquaviva
   Sebastiao Robero Aquino Jose
   Eucides De Figueiredo E Melo,
   bachelor, (Expired)

2. Shri Antonio Camilo Guilherme
De Figueiredo E Melo (Expired)
through legal representatives:
a) Smt. Claudina Sacrafamilia Gonsalves,
widow of Respondent No.2,
b) Shri Trecor Alex De Melo,
son of Respondent No.2, major, married,
c) Smt. Raquela De Figueiredo E Melo,
wife of Respondent No.2(b)
d) Smt. Nonna Marie Aitken,
daughter of Respondent No.2
e) Shri David Aitken,
Husband of Respondent No.2(d)

3. Smt. Claudina Sacrafamilia De
Pinto E Melo, widow of Respondent No.2,

4. Shri Avelino Jose Luis De Figueiredo E Melo,(deceased)
major, married, landlord,
Santerxet, Aldona, Bardez-Goa
4a) Smt. Alzira De Figueiredo Melo }(since deceased through
Major of age, widow of Respondent }her legal representatives,
No.4, Resident of Santerxet, Aldona }No.4(b) to 4(g).
Bardez-Goa.

4b)Smt. Blanche De Figueiredo Melo
Major of age, daughter of Respondent No.4.
4c)Shri Jose de Melo,
Major of age, married,
Husband of Smt. Blanche de De Figueiredo Melo,

Both residents of Parmeshwar Darshan
2nd Hasnabad, LQ-54
Khar West, Bombay.

4d) Shri Roland de Figueiredo Melo
Major of age, son of Respondent No.4
4e) Smt. Carol de Figueiredo Melo
Major of age, wife of Respondent No.4d
Both residents of Santerxet, Aldona
Bardez, Goa.

4f) Smt. Ludmila De Figueiredo Melo
Major of age, daughter of Respondent No.4
4g) Shri Nainesh Malhotra
Major of age, married,
Both residing near Galaxy Centre,
Miramar, Panaji, Goa.

5. Smt. Argilia Jovita Faria,
wife of Respondent no.4, major,
occupation housewife.

6. Shri Antonio Sebastiao Vital Domingos
Figueiredo E Melo,
(Expired) through legal representatives:
a) Smt. Cristina Madgaonkar
daughter of Respondent No.6, major, married,
b) Shri Anil Madgaonkar
husband of Respondent No.6(c),
c) Shri Julius D'Melo,
Son of Respondent No.6, major, married,
d) Smt. Effie D'melo,
Wife of Respondent No.6(c).
e) Smt. Mary Francis Mendonza
Daughter of Respondent No.6, major, married
f) Shri Carol Mendonza,
Husband of Respondent no.6(e)

7. Smt. Olive Genevieve Regina Saldanha
widow of Respondent No.6

8. Shri Carlito Pascoal Gonsalves,
brother-in-law of Respondent No.6

Respondents No.2(a) to 2(e), 3, 5, 6(a) to 6(f),
7 and 8 are represented by Respondent No.4,
their constituted attorney and address for the
purpose of service of the Respondents is
Santerxete, Aldona, Bardez-Goa. **.... Respondents**
Original Defendants

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

Mr. A. D. Bhobe with Ms. A. Fernandes, Advocates for the Respondents.

Coram :- BHARATI H. DANGRE, J.
Reserved on: 29.01.2021
Pronounced on: 25.02.2021

JUDGMENT:

1. While admitting the appeal on 06.10.2005, the following substantial questions of law are framed:

> '*(1) Whether the Courts below have committed error of law in holding that the suit instituted by the Appellants is barred by the law of limitation,*

> *recording the finding that the suit for specific performance of agreement of sale arrived at on 15/01/1971 ought to have been filed within 3 years from May 1971 (that is the time fixed for execution of sale deed and making balance payment)?*
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> *(2) Whether the findings of the Courts below that the suit ought to have been filed 3 years from May 1971 is sustainable in law when admittedly it was the case of imperfect title or lack of title as contemplated in Sction 13(1) of the Specific Relief Act and there being also bar against alienation in view of Section 52 of the Transfer of Property Act?'*

2. The appellant, who is the plaintiff in the Special Civil Suit no.97/94 assail the concurrent findings rendered against him in a suit for specific performance of contract and for consequential relief. The suit came to be instituted by the plaintiff on 25.07.1994 as it was alleged that the defendants, the owners in possession of landed property known as 'Carriachi Moddi' situated at Kakoda Village of Quepem Taluka bearing Land Registration no.14380 and enrolled in Revenue Office under no.97 was sub-divided into plots which were put up for sale for construction and the defendant no.4 acting as an attorney on behalf of the other defendants sold 2 plots vide no.23 and 24 adjacent to each other to the father of the plaintiff no.1 and 3 in January 1971. It is pleaded that the defendant no.4 agreed to sell the 2 plots jointly

admeasuring 1600 sq.mts and for a sum of ₹18,750/- out of which a sum of ₹1500/- was paid as earnest money and receipt was issued acknowledging the said payment on 15.11.1971. The balance amount of ₹17250/- was agreed to be paid at the time of executing final sale deed. The case of the plaintiff is that the writing dated 15.01.1971 incorporated a clause to the effect that final sale deed was to be drawn by end of May 1971, on payment of balance amount, failing which the advance was to be forfeited. However, it was on account of the fault of the defendants, the sale deed could not be executed within the stipulated time, as there was a litigation between the vendors of the plaintiff and one late Mauricio Pereira & Others, who were owners of eastern half of the said property, when the father of the plaintiffs was ready and willing to pay the balance amount and execute the sale deed. It is also pleaded that the plaintiffs or their father were not aware of the litigation involving plot no.23 and 24 and the defendant no.4, knowing that the plots are in dispute entered into an agreement of sale vide the writing dated 15.01.1971. The case ultimately resulted in compromise before the High Court Panaji Bench somewhere in the year 1985 and the plaintiffs were informed by letter dated 03.12.1985 that plot no.23 and 24 went to the share of the opponent in the said case and in the alternative plot no. 57 admeasuring 800 sq.mts was offered. The price of the plot was quoted as ₹180/- per sq.mt.

Further correspondence was made seeking willingness of the plaintiff as regards plot no.57 at the given rate. The said offer was declined by the plaintiffs and some other plot corresponding to the area of 1600sq.mts was demanded for the same price as agreed in the writing dated 15.07.1971 since the non-execution of the sale deed was attributed entirely on account of the fault of the defendants. On 28.01.1986 the alternate plot was sought or the money was demanded back so that they could purchase a plot at some other place.

As per the plaint a false plea was set by the defendant in their reply dated 04.03.1986, alleging that the father of the plaintiffs knew about the dispute and in spite of this he had entered into the deal and paid the earnest money to defendant no.1 and had expressed that he is ready to wait, though the offer was given to him to take back his deposit. It is pleaded that on 07.10.1993 the defendant no.4 for the first time raised a legal plea opposing the claim of the plaintiffs as being time barred and contended that in terms of the writing dated 15.01.1971, defendant had right to forfeit the advance, in case the sale deed was not executed by end of May 1971. It is further averred that when the plaintiffs obtained the certified copy of the compromise terms in the second appeal, they came to know that plot no.23 and portion of plot no.24 was still in the ownership and possession of the defendants and the defendant no.4 has mislead the plaintiffs by stating that both the plots had been lost to the opponent in the litigation. Finally, the plaintiffs sent a notice on 12.10.1993 calling upon the defendant no.4 to convey the area of 1600sq.mts in favour of the plaintiff, at the rate of ₹70/- per square meter as originally agreed and sought demarcation of area for execution of sale deed within 30 days. The said relief is sought since time was not the essence of the agreement, and since the plot no.23 is still available for sale and in plot no. 24 some portion has been reserved for road, it is possible for the defendants to perform their part of agreement on payment of balance amount of ₹17250/- by the plaintiff. Alleging that the defendants are not willing to perform their part of contract, a decree for specific performance was prayed for execution of conveyance by way of sale deed in respect of plot no. 23 admeasuring 800sq.mts and moreover rights corresponding to 800sq.mts from the area allotted to the defendants during the settlement/compromise terms dated 27.04.1984.

3. In response the defendants pleaded in the written statement, that in terms of the agreement, the father of the plaintiffs was required to effect payment of balance amount so that the sale deed of plot no.23 and 24 could be duly executed in his favour.

Reliance was placed on receipt dated 15.01.1971, clearly recording that if deed is not drawn by end of May 1971 by paying the balance, the amount of ₹1500/- will be forfeited. The defence raised is that there was a failure on the part of the plaintiff to pay balance amount by the agreed timeline and therefore sale deed could not be drawn, resulting in the amount of ₹1500/- being forfeited in favour of defendants. Alleging that since late Afonsinho Collasso had forfeited the right to purchase plot no.23 and 24 by default on not effecting payment before end of May 1971, the defendant no.1 offered another plot at the prevalent price if plaintiff no.1 and 3 are still interested in purchasing any plot. Plot no.24 was pleaded to be not saleable as portion of the said plot was being affected by a road. Defendant no.4 expressed his willingness to offer plot no.23 but at the prevailing market rate. The defendants also raised a plea of limitation and averred that the suit for specific performance is beyond limitation prescribed in Article 54 of the Limitation Act. It is also the case of the defendants that there was no restrain order passed by any Court thereby restraining the defendants from entering into any agreement in relation to the suit property and there is failure on part of the plaintiffs to demonstrate "readiness and willingness" to perform the agreement.

4. The Civil Judge Senior Division, Quepem answered the

issue of entitlement of plaintiff for specific performance in the negative and the issue about the suit being time barred in favour of the defendants and dismissed the suit. The Appellate Court on the appeal by the plaintiffs, answered the primary issue as to whether they are entitled to purchase plot no.23 admeasuring 800sq.mts and offer area corresponding to 800sq.mts as a substitute for plot no.24 in terms of the agreement in the negative. It concurred with the findings recorded by the Trial Court and dismissed the appeal.

Being aggrieved, the present appeal is preferred by the appellant which is admitted on the two substantial questions of law reproduced above.

5. On the first substantial question of law, the learned counsel Mr. Sudesh Usgaonkar submit that the present case is peculiar where the parties themselves decided to extend the time for performance of agreement and in such circumstance whether the Court is justified in strangulating the same and whether the Courts below were justified in holding that Article 54 of the Limitation Act is attracted. He submit that the performance of the agreement qua plot no.23 and 24 was postponed/deferred between the parties is clearly reflected from the conduct and hence the limitation of 3 years cannot come into picture. The learned counsel would submit

that the Courts below have erred in holding that the limitation for filing of suit commenced when the pending suit instituted by the third party was compromised in appeal by filing consent terms in the year 1985 and this is contrary to Article 54 of the Limitation Act which only contemplate two contingencies. His submission is that the reliance of the appellate court in decision in the case of ***K. S. Vidyanadam And Others v/s. Vairavan***[1] is erroneous.

Mr. Bhobe, the learned counsel for the respondents invited my attention to the receipt brought on record by the plaintiffs which stipulate time as the essence of contract and he submit that when the parties had, by agreement determined the date of performance of the contract, the limitation will begin to run from the date stipulated. By inviting attention to Article 54 of the Limitation Act, the learned counsel would submit that the limitation prescribed for bringing the suit of specific performance of contract is 3 years either from the date fixed for performance or if no such date is fixed, when the plaintiffs had noticed that the performance is refused. Mr. Bhobe would also submit that even assuming that time was not made the essence of contract, still going by the second contingency contemplated, when in the year 1986, the plaintiffs gained knowledge that there is a refusal to execute the agreement in respect of plot no.23 and 24 by communication dated

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1 (1997) 3 SCC 1

03.12.1985 for the first time, the suit is filed only in the year 1993 and the plaintiffs kept quite all along this period and on the other hand the defendants offered him to take a new plot at the market rate or leave it. In any case, according to Mr. Bhobe the case pleaded by the plaintiffs as in para 8 reveal the knowledge on part of the plaintiff no.1 in the year 1980 that there was a dispute between the plaintiffs and late Maurico Pereira and others and the sale deed would be executed after the dispute is over. Mr. Bhobe has placed reliance on the judgment of the Apex Court in the case of ***Saradamani Kandappan v/s. S. Rajalakshmi And Others***[2] and he submit that though in the agreement for sale of immovable property, time is not the essence of contract unless the intention is made out either in the express terms of contract or implied intention of the parties, the Apex Court had revisited the position of law, due to change in underlying basis thereof, with time. He also relied on the judgment of the Apex Court in the case of ***S. Brahmanand And Others v/s. K. R. Muthugopal (Dead) And Others***[3] in support of his submission.

6. The defendants agreed to sell plot no.23 and 24 adjacent to each other and jointly admeasuring 1600sq.mts to the

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2 (2011) 12 SCC 18
3 (2005) 12 SCC 764

father of the plaintiffs and the consideration agreed was ₹18,750/- out of which sum of ₹1500/- was paid as earnest money. The receipt is issued on 15.01.1971 acknowleding the said payment. The said receipt is brought on record by the PW-1 who had deposed in support of the plaintiff's claim. The receipt marked as Exhibit PW1/A acknowledge the receipt of advance sum of ₹1500/- from Afonsinho Colaco towards payment of plot no.23 and 24 and is dated 15.01.1971. It contain the following writing "If deed is not drawn by the end of May 1971 by paying full balance, the above amount of ₹1500/- will be forfeited by me." The receipt clearly reflect that time was made essence of the agreement and the final sale deed was to be executed by the end of May 1971, on payment of balance amount. The case of the plaintiff is his father was always ready and willing to perform his part of the agreement, i.e. pay the balance consideration and it is deposed that on many occasions prior to May 1971 he approached the defendants with request to execute the sale deed but he was informed that the sale deed cannot be executed due to civil litigation pending between them and one late Mauricio Pereira. It is also the case of the plaintiffs that after May 1971 his father as well as the plaintiff himself contactedthe defendant no.4 in respect of the sale of the plot whenever he used to visit the suit property. Though there was a promise to execute the sale deed it was never done. It has come in evidence of the plaintiffs that at times his father asked the defendants to return the money so that he could buy some other plot. As per PW-1, his father was not aware about the dispute revolving around the property i.e. plot no.23 and 24 when the agreement was executed and this fact was not disclosed by the defendants. However, in the year 1985 when the dispute was put to rest through the High Court, they became aware of the compromise being effected and the correspondence between the parties was initiated by the defendant no.4 on 03.12.1985 stating that since plot no.23 and 24 have fallen on the portion of his opponent, Mauricio Pereira, he was offered an alternate plot no.57 of 800sq.mts was offered and in the subsequent correspondence the price of the said plot was fixed at ₹180/- per square metre. The correspondence between the parties is placed on record which put the blame on one another.

7. The case of the plaintiff is that the defendant no.4 was avoiding execution of sale deed of plot no.23 and 24 and therefore, the present suit was filed for specific performance alongwith a bank draft of ₹17250/- demonstrating the willingness to pay the amount. The issue regarding readiness and willingness being a question of fact was gone into by the Courts below and by the concurrent findings, it is held that nothing has been brought on record to show

that the plaintiffs' father after entering into agreement with defendant no.4 in January 1971 and till his death in the year 1978 was ready and willing to perform his part of the contract or made any attempt in this regard barring a plea in the plaint and mere submission in the evidence of PW-1. In the light of the position of law that the readiness and willingness has to be determined from the entirety of the facts and circumstance relevant to the intention and conduct of the party and it cannot be assumed, the finding is returned against the plaintiffs. Since the said issue is being determined as a question of fact, it is not permissible for me while dealing with the Second Appeal to go beyond the findings of fact concurrently recorded by the two fact finding Courts. Necessary ingredients of granting specific performance of contract being the readiness and willingness to perform the essential terms of the contract has thus been held as an impediment in not granting the relief of specific performance sought by the plaintiffs. The relief of specific performance of the contract dated 15.01.1971 has therefore been refused to the plaintiffs.

8. On the issue whether the plaintiff has approached seeking the specific performance within the time prescribed or whether the suit filed by the plaintiff is barred by limitation, the

issue has to be considered by adverting to the arguments of Mr. Usgaonkar that the limitation stipulated by the parties to perform has been extended by consent of parties and therefore Article 54 which prescribe the limitation of three years cannot be invoked. According to Mr. Usgaonkar, the heap of correspondence exchanged between the parties reflect mutual understanding between them leading to an inference that the parties had decided to extend the time of performance of agreement since the defendants were unable to perform their part, being execution of sale deed as the suit property was embroiled in a litigation. The plaintiffs submit that for the first time the defendants raise a plea to the effect that the claim of the plaintiffs seeking allotment of plot no.23 and 24 as per the agreement has been time barred and since the parties were mutually continuing with the transaction, the cause of action arose on the receipt of reply of the defendant no.4 raising legal and technical objection that the claim of the plaintiffs over the suit plot or money was time barred. Counting the limitation from the said date, the suit filed on 25.07.1994 is within limitation is the submission. I cannot pursuade myself, to accept the said contention of Mr. Usgaonkar. In the receipt dated 15.01.1971 the parties had agreed that the final sale deed was to be drawn by the end of May 1971 by the defendants, which was depending on the condition of payment of balance amount by the plaintiffs. By another recital, failure on payment of balance amount was to result in forfeiture of the advance. This condition was accepted by the plaintiffs' father who tendered the advance amount as earnest money towards execution of the sale. The timeline was specifically incorporated in the receipt i.e. end of May 1971. It do not lie in the mouth of the plaintiffs to submit that time was not the essence of contract. As a general proposition of law, in the case of sale of immovable property there is no assumption as to time being the essence of contract. In cases where it is not made an essence of the contract the Court may infer that it is to be performed in a reasonable time, if the conditions are evident from the expressed terms of the contract, the nature of the property and the surrounding circumstances. In cases where it is specifically stipulated that time will be an essence of contract or that it clearly emerges so by way of implication, time would be an essence of contract. Such situations are exception to the well accepted principle that in case of sale of immovable property time is never regarded as essence of contract and presumption existing against the same. However, if the parties intend to make time as essence of contract it must be expressed in unequivocal language. Intention to make time as the essence, if expressed in writing must be in language which is unmistakable; it may also be inferred from nature of the property agreed to be sold, conduct of the parties and surrounding circumstances prevailing at the time of the contract.

Section 55 of the Contract Act provide for effect of failure to perform the contract at a fixed time where time is essential. In cases where the time is the essence of contract and is so stipulated in writing, the extension if any should and ought to be categorical in nature rather then being vague or based on presumption and would not contemplate the unilateral extension.

In order to deal with the submission that the time for performance of contract was extended mutually by the parties, reference necessarily has to be made to the correspondence. After the receipt was passed on 15.01.1971, the first correspondence from the defendants addressed to the plaintiffs is dated 03.12.1985 where it is informed that plot no.23 and 24 cannot be offered but plot no.57 admeasuring 800sq.mts was available for sale with the price of ₹180/-per sq.mt. The offer is subsequently reiterated in a communication, accompanied with the location of the plot offered. The plaintiffs have responded by referring to the earlier agreement between the parties as regards plot no.23 and 24 and reiterate that everything was ready on their part to execute the sale deed but difficulty expressed was on the part of the defendants as the suit was pending in Quepem Court. It is also asserted that his father had approached the defendants seeking alternate plot or return of the money advanced but, was assured the same plots and therefore he did not even accept the refund. Expressing that the plaintiffs were cheated, demand was reiterated for the same plot covered by the agreement and the rate of ₹180/- per sq.mt. for the said plot was clearly turned down. The correspondence continue with the clause of readiness and willingness on the part of the plaintiff being reiterated and it was only on 02.11.1993 while responding to the Advocate's notice the plaintiff was informed that his father was aware of the litigation and in fact an offer was made to return the advance amount and that it was made clear to him that in lieu if he desire to purchase any plot it would be at the prevailing price. This letter has been projected as a cause of action for institution of suit seeking specific performance and the question that arise for consideration is whether this could be construed as a starting point for the purpose of limitation. The answer has to be in the negative for more than one reason.

9. The period of three years contemplated in Article 54 of the Limitation Act, in the first contingency, begins to run from the date fixed for performance and since in the agreement the date fixed was specific, i.e. end of May 1971, the limitation would start running from the said period. Even going by the contingency in the alternative prescribed in Section 54, where no date is fixed, the time start running from the date when the plaintiffs have noticed that the

performance is refused. In the plaint, the plaintiffs have specifically pleaded that somewhere in the year 1980 the defendant no.4 informed the plaintiff no. 1 that the plots are in a dispute in a Court case and therefore as soon as the dispute is over he would execute the Sale Deed. The plaintiff no.1 has deposed that his father had approached the defendant on many occasions prior to May 1971 with a request to execute the Sale Deed but the defendants had informed that the Sale Deed cannot be executed on account of pending civil litigation. This is the date on which the plaintiff's father was refused the performance of the contract. Plaintiff no.1 has also specifically stated that even after May 1971 also he and his father contacted the defendant no.4 for the desired purpose but the defendant no.4 kept on promising execution of the Sale Deed but it was not done and even on some occasion his father had sought refund of the money, but even that was no done. The performance of the contract was therefore refused as per the plaintiff even prior to expiry of the date i.e. May 1971 and also subsequent to May 1971 when attempts were made on behalf of the plaintiff himself to get the deed executed but there was a refusal on the pretext that the suit property is in litigation. Thus, even the second limb of Article 54 i.e. "when the plaintiff had noticed that the performance is refused" get attracted and limitation start running. The issue of limitation being a mixed question of fact and law, on appreciation of the evidence brought on record the suit filed by the plaintiffs is barred by limitation.

In order to attract the first part of Article 54 which stipulated "the date fixed" which would mean a specific date in calendar and even assuming for a moment that there was no fixed date as intended to be covered by the limb of Article 54, going by the alternative, in terms of the 2nd part the suit filed by the plaintiffs is barred by limitation. The question no.1 is therefore answered in the negative by answering that under Article 54 of the Limitation Act, in the suit for specific performance of a contract, if a date is fixed for performance of an agreement, then non-compliance with the agreement on the date would give a cause of action to file a suit for specific performance within 3 years from the date so fixed. But if no such date is fixed the limitation of 3 years would begin when the plaintiffs have noticed that the performance is refused by the defendants. In case of ***Madina Begum & Anr v/s. Shiv Murti Prasad Pandey & Ors.***[4], the Apex Court dealing with an agreement to sell the suit land with a stipulation that the sale price would be paid by party "within the period of 6 months from this date", the Apex Court has overturned the decision of the High Court holding the suit to be barred by limitation on the ground that admittedly a date of performance was fixed, i.e. 6 months from the deed of

4 (2016) 15 SCC 322

execution of the contract and therefore the period of limitation would be 3 years w.e.f the date when the period of 6 months for execution of sale deed lapses. On reversing the said finding of the High Court their Lordships of the Apex Court held that under Article 54 of the Limitation Act, in the suit for specific performance of contract if the date is fixed, then the non-compliance of the agreement on that date would give a cause of action to file a suit for specific performance within 3 years from the date so fixed. The expression "date" is definitely suggestive of specified date in the calendar, however, since, in case the said agreement do not specify calendar date as a date for performance of the agreement consequently first part of Article 54 was held to be not applicable and the High Court is said to have fallen in error.

10. The second question of law framed is whether the concurrent finding that the suit ought to have been filed within 3 years from May 1971 is sustainable when ultimately it was the case of imperfect or lack of title as contemplated under Section 13(1) of Specific Relief Act and there being also bar against alienation in view of Section 52 of the Transfer of Property Act. The case of the plaintiffs while seeking the reliefs of specific performance of the agreement is that fraud was played on the plaintiffs by not making

them aware about the property covered by the agreements dated 15.11.1971 being embroiled in Court case No.45/70 filed by Mauricio Pereira & Others against the defendants. The plaintiffs' case is they got knowledge about the said case on 19.01.1971, when they received the summons for the said suit whereas the writing is dated 15.01.1971 and there was refusal on part of the defendants to execute the sale deed, though the plaintiffs were always ready and willing to perform their part of contract, i.e. to pay the balance consideration towards sale of plot no.23 and 24. The submission is, the defendants lacked the title or had an imperfect title and there was also a bar against alienation in view of Section 52 of the Transfer of Property Act. The submission of Mr. Bhobe is that there was no restrain order passed by any Court restraining the defendants from alienating suit property and therefore according to him the doctrine of *lis pendens* contemplated under Section 52 of the Transfer of Property Act do not come into picture. The learned counsel would also submit that this is not a case of imperfect title or having no title as contemplated under Section 13 of the Specific Relief Act.

11. The principle embodied under Section 52 of the Transfer of Property Act is based on the premise that it is necessary for administration of justice that the decision of a Court in suit should

bind not only the litigating parties but also those who derive title pendente lite. The transfer pendente lite is neither illegal nor void and the provisions of Section 52 of the Transfer of Property Act do not have effect of annulling the conveyance or the transfer otherwise but such conveyance or transfer remains subservient to a writing of the parties to a litigation. Section 19(B) of the Specific Relief Act articulate that a suit of specific performance cannot be enforced against a person who is the transferee from the vendor for valuable consideration and when notice of the original contract which is sought to be enforced in the suit and a decree for specific performance of a contract may be enforced against a person claiming under the defendants by virtue of a title acquired subsequent to a contract. In case of ***Thomson Press (India) Ltd. V/s. Nanak Builders & Investors P. Ltd. & Ors.***[5]***,*** the Apex Court dealing with the issue whether the transferee/purchaser pendente lite in a pending suit for specific performance of prior agreement to sell/contract for sale (CFS) filed by the buyer noted that the suit property was purchased by the appellant, despite having notice and knowledge of intimation by Court passed in such pending suit, prohibiting transaction or alienation of suit property and in the suit filed by the buyer under the prior CFS against the Vendor for specific performance and when the application was filed for

5 (2013) 5 SCC 397

impleadment by the subsequent buyer the High Court rejected the said application by holding that the appellant had purchased the property knowing fully well that there was an indication by Court prohibiting any transaction and held as under:

> *'49. The second aspect which the proposed judgment succinctly deals with is the effect of a sale pendete lite. The legal position in this regard is also fairly well settled. A transfer pendete lite is not illegal ipso jure but remains subservient to the pending litigation. In Nagubai Ammal Ors. v. B. Shama Rao & Ors. AIR 1956 SC 593, this Court while interpreting Section 52 of the Transfer of Property Act observed:*
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> > *"25. …the words 'so as to affect the rights of any other party thereto under any decree or order which may be made therein', make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. It is in this view that transfers pendente lite have been held to be valid and operative as between the parties thereto." '*
>
> *'50. To the same effect is the decision of this Court in Vinod Seth v. Devinder Bajaj (2010) 8 SCC 1 where this Court held that Section 52 does not render transfers affected during the pendency of the suit void but only render such transfers subservient to the rights as may be eventually determined by the Court. The following passage in this regard is apposite:*
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> > *"42. It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section*

52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit."

'51. The decision of this Court in A. Nawab John & Ors. v. V.N. Subramaniyam (2012) 7 SCC 738 is a recent reminder of the principle of law enunciated in the earlier decisions. This Court in that case summed up the legal position thus:

"18. …'12. …..The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject- matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court.'"

'52. We may finally refer to the decision of this Court in Jayaram Mudaliar v. Ayyaswami and Ors. (1972) 2 SCC 200 in which were extracted with approval observations made on the doctrine of lis pendens in Commentaries on the Laws of Scotland, by Bell". This Court said:

"43……….Bell, in his Commentaries on the Laws of Scotland said, that it was grounded on the maxim: Pendente lite nibil innovandum. He observed:

It is a general rule which seems to have been recognised in all regular systems of jurisprudence,

> *that during the pendence of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the claims which shall ultimately be pronounced."'*

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

12. The doctrine of lis pendens which has been acclaimed as a matter of public policy, once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, principle of lis pendens has been evolved so that litigation may finally terminate without intervention of third party. The principle evolved is a matter of public policy aimed at discouraging that the same subject matter of property being

subjected to subsequent sale to third person and this kind of transaction being kept under check. This principle is based on equity, good conscience or justice rest upon equitable and just foundation that it will be impossible to bring an action or suit to successful termination, if alienations are permitted to prevail. The cardinal principle in Section 52 imply that the litigating parties are exempted from taking notice of the title acquired during pendency of litigation, however, the mere pendency of suit does not prevent one of the parties from dealing with the property constituting subject matter of the suit. The section only postulate a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with permission of the Court.

13. In ***T. Ravi & Anr. V/s. B. Chinna Narasinha & Ors***[6]**,** their Lordships of the Apex Court reiterated the position of law as under:

> *'34. Reliance has been placed on A. Nawab John v. V.N. Subramaniyam (2012) 7 SCC 738, laying down thus :*
>
> > *"18. It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually,*

6 (2017) 7 SCC 342

determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court.

> *"12. … The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court." (Sanjay Verma v. Manik Roy (2006) 13 SCC 608)'*

14. In light of the authoritative pronouncements of the Apex Court, in absence of any material brought on record to reflect that there was any restrain order passed in the pending suit, restraining the defendants from in any way alienating the property, there was no legal impediment in executing the sale deed except that the plaintiff as the transferee pendente lite would be bound by the decree as much as he was a party to the suit. The effect of section 52 of the Transfer of Property Act as has been held by the Apex Court is not to render the transfer of property effected during the pendency of suit by a party, to be void but only to render such transfer subservient to the rights of a party to such suit. In other

words, the transfer of property by its terms are valid subject to the result of the suit. Succumbing to the pendente lite procedure, the plaintiff would have suffered the same legal rights or would have been entitled to the benefits which his vendor i.e. the defendant would have been conferred upon by the Court. In any contingency the sale deed if executed would have been void but only valid to the extent of share of the vendor, i.e. defendants. The sale deed if at all executed would have been subject to the outcome of the suit and since at the end of litigation of the defendants and his opponent, would have entitled, the plaintiff, for execution of sale deed in respect of plot no.23 and 24. The stand taken by the plaintiff that there was a bar of alienation and therefore the defendant did not execute the sale deed though the plaintiff was ready and willing to perform his part of the contract is therefore not acceptable. Since plaintiffs are not able to justify their non-performance of the contract on the basis of section 52 of the Transfer of Property Act, i.e. on the basis of *lis pendens,* it cannot be said that the defendant/his vendor lacked the title or had an imperfect titile on the date of the contract. The provision adumberated in Section 13 of Specific Relief Act rather protect the purchaser against a person who has contracted to sell certain immovable property though he had no title or his title was an imperfect one and the said section protect such purchaser by conferring upon him certain rights which include a right of the purchaser to compel the vendor to make good the contract out of such interest, when the vendor subsequently acquire any interest in the property. The sale deed on payment of the balance consideration by the plaintiff if at all was executed, it was the plaintiff who would have been entitled to enjoy the benefit under clause (a) of sub-section (1) of section 13 and by this means he would have been in a position to compel the defendant to make good the contract, i.e. on the same terms and conditions as were agreed between the parties qua plot no.23 and 24. The plaintiff therefore is not entitled to extend the period of limitation in initiating the suit for specific performance by pleading a case that the defendants lacked the title or his title was imperfect and also there was a bar against the alienation in view of Section 52 of the Transfer of Property Act. The question of law framed as Point No.2 is therefore answered to the effect that the period of limitation cannot be extended by taking a plea of an imperfect title or lack of title as contemplated under Section 13(1) of the Specific Relief Act and that there was bar to alienate in view of Section 52 of Transfer of Property Act particularly when the plaintiff has failed to establish the readiness and willingness on his part of performing the contract.

15. At this stage it is appropriate to make reference to the paradigm shift in the approach of the Court with reference to the

aspect of time, not being considered as an essence of contract on the sale of immovable property unless intention was expressly made out in the terms of contract and implied from the conduct of parties. Taking cognizance of the change in the scenario where there is a steep increase in prices of immovable property and on galloping inflation by leaps and bounds and where the marketable value of the property are no longer stable or steady, the Apex Court in the case of ***Saradamani Kandappan v/s. S. Rajalakshmi And Others***[7]***,*** relying upon the decision of the Constitution Bench of the Apex Court in case of ***Chand Rani (Smt) (Dead) by LRs. V/s. Kamal Rani (Smt) (Dead) by LRs.***[8] formulated a principle of "Time being not the essence" for future consideration and taking note of the scenario when market values of immovable property are on the rise and have ceased to be stable, observed thus:

> *'37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchase does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness".*

7 (2011) 12 SCC 18
8 (1993) 1 SCC 519

The precedents from an era, when high inflation was unknown holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.'

'41. A correct perspective relating to the question whether time is not of the essence of the contract in contracts relating to immovable property, is given by this Court in K.S. Vidyanadam v. Vairavan (by Jeevan Reddy, J. who incidentally was a member of the Constitution Bench in Chand Rani). This Court observed: (SCC pp. 7 & 9, paras 10-11)

> *"10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically*

> *provided to that effect. … in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades—particularly after 1973. …*
>
> *11. … We cannot be oblivious to the reality—and the reality is constant and continuous rise in the values of urban properties—fuelled by large-scale migration of people from rural areas to urban centres and by inflation. … Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties—evolved in times when prices and values were stable and inflation was unknown—requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so."*

16. Based on the facts and the aforesaid principle of law as laid down by the Apex Court, I do not find any reason to deviate from the findings recorded by the two Courts and on answering the question of law framed in the Appeal as above and against the appellants, the appeal deserve a dismissal and is accordingly dismissed.

BHARATI H. DANGRE, J.

msr.