

Arjun

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.574 OF 2019
WITH
CIVIL APPLICATION NO.998 OF 2019
IN
SECOND APPEAL NO.574 OF 2019**

1. M/s. Yash Developers
Office at : Bandal Dhankude
'C' Complex, Paud Road
Kothrud, Pune 411038

2. Shri. Sharad Sopan Shende
Age : 38, Occ. Business
R/at : Survey No. 52,
Building No. B-5,
Flat No. 7, Shantiban Society,
Kothrud, Pune 411038.

3. Shri. Rahul Vilas Nahata
Age : 37 years, Occ. Business,
R/at : 1194/27-B,
Krupa Building,
Dnyaneshwar Paduka Chowk,
Shivajinagar, Pune 411005.

...Appellants/
Applicants

V/s.

Sou. Komal Prabhakar Borkar
Age : Major, Occ. Household,
R/at : Survey No. 112,
'C' Building, Room No. 60,
Warje, Pune 411052

...Respondent

Mr. Amol Gatne, for the Appellants/Applicants.

Mr. Siddharth Wakankar a/w Ms. Aishwarya Bapat,
for the Respondent.

CORAM : MADHAV J. JAMDAR, J.
DATE : 11th JANUARY, 2023

P.C.:

1. Heard Mr. Amol Gatne, learned counsel appearing for the Appellants and Mr. Siddharth Wakankar, learned counsel appearing for the sole Respondent.

2. Mr. Amol Gatne, learned counsel appearing for the Appellants submitted that, the following substantial questions of law are involved in the present Second Appeal :

- i) Whether with respect to the suit agreement time is the essence of the contract?
- ii) Whether the finding regarding readiness and willingness as recorded by the learned Trial Court and the learned First Appellate Court is legal and in accordance with the evidence on record?
- iii) Whether the decree for specific performance can be granted in the present case as the third party interest is already created?
- iv) Whether the Plaint in the present form is maintainable in view of law laid down by the Supreme Court in the decision in *I. S. Sikandar (Dead) By Lrs. Vs. K. Subramani & Ors.*¹?

3. Before considering the substantial questions of law as submitted by Mr. Gatne, learned counsel appearing for the

¹ (2013) 15 SCC 27

Appellants, it is necessary to set out few admitted factual aspects.

(i) On 9th January, 2006, the Respondent i.e. original Plaintiff and the Appellants i.e. original Defendants executed an agreement of sale regarding Flat No.11 of area admeasuring 566 sq.ft. and attached terrace admeasuring 113 sq. ft. on third floor level in building known as “Shubham Heights”, Wing-A situated at Village-Warje, Tal-Haveli, Dist.-Pune (hereinafter referred to as “suit premises”). The said agreement dated 9th January, 2006 is registered agreement (hereinafter referred to as “suit agreement”). As per the said agreement, total consideration was Rs.5,42,700/- and total payment made of Rs.2,25,000/-. Out of said payment of Rs.2,25,000/-, Payment of Rs.2,00,000/- was made by cash and Rs.25,000/- was paid by cheque.

ii) On 15th February, 2006, first notice was issued by the Appellants to the Respondent, demanding balance consideration.

iii) On 1st May, 2006 another notice was issued

bearing Exh. 50. In that notice, also demand was regarding balance payment and, it has been stated that, the agreement would be terminated if there is failure to make the balance payment.

iv) The Plaintiff filed suit for specific performance immediately on 25th July, 2006.

The above are the admitted factual aspects.

4. As per the contention of the Appellants, the Respondent has failed to make balance payment of Rs.3,17,700/- whereas, it is the contention of the Respondent that said payment was made in cash.

5. The first substantial question of law raised by Mr. Gatne is that, time is the essence of contract and as the Plaintiff has not made the payment on time, the Plaintiff is not entitled for the relief of specific performance. Both the learned Trial Court and the learned First Appellate Court have held that, although agreement contemplates that balance payment is to be made within a period of 1 month from the date of agreement, however, other clauses in the agreement shows that, if, payment is not made within time, then, interest at the rate of 24% per annum is liable to be paid and, therefore,

on the basis of the said terms and conditions of the agreement, both the Courts have held that, the time is not the essence of the contract.

6. The relevant terms of the agreement of sale dated 9th January, 2006 are set out hereinbelow :

"The Flat Purchasers herein have paid and agree to pay the aforesaid balance agreed consideration to the Promoter herein in the following manner -

Rs.	2,25,000/-	Paid by Cheque & cash before the execution of present Articles of Agreement.
Rs.	3,17,700/-	To be paid within 1 month from the execution of present Articles of Agreement.
TOTAL Rs.	5,42,700/-	Rupee Five Lac Forty Two Thousand Seven Hundred only.

If in case there is any increase in the area of the said Flat or the Terrace than the Flat Purchaser/s have agreed to pay the additional amount for the said increased area to the Developer.

9. It is hereby agreed that the time for payment as specified above is the essence of the contract and on the failure of the Flat Purchaser/s to pay the same on due dates it shall be deemed that the Flat Purchaser/s have committed to take such action as they are entitled to take incase of breach of their agreement and also to terminate their Agreement.

10. Without prejudice to the right of the Promoter to take action for breach arising out of delay in payment of the installments on the due dates the Flat purchaser/s shall be bound and liable to pay interest @ 24% per annum with quarterly rests on all the amount which become due and payable the Flat Purchaser/s the Promoter till the date of actual payment, provided that the tender of the principal amounts and interest or tender of the interest and expenses thereof shall not itself be consider has waiver of the right of the Promoter under this Agreement nor shall it be construed as condemnation of the delay by the Promoter.

11. **On the Flat Purchaser/s committing default in payment on the due dates of any of the installments payable under this agreement** (including their proportional share of taxes levied by concerned local authority and any other out goings) and on the Flat Purchaser/s committing breach of any of the terms and conditions of this Agreement, **the Promoter shall in its sole discretion be entitled to terminate their Agreement."**

(Emphasis added)

7. The above mentioned clauses of the said agreement specifically stipulates that, the said balance consideration of Rs.3,17,700/- is to be paid within 1 month from the date of

the execution of the said agreement dated 9th January, 2006. Clause No. 9 of the said agreement contemplates that, time is the essence of the contract. Clause No.9 further contemplates that, if, Flat Purchaser fails to pay the amount within time, then, it shall be deemed that the Flat Purchaser has committed the breach of the agreement. In that case, the Appellants are entitled to terminate the agreement. Clause No. 10 of the said agreement contemplates that, without prejudice to the right of the Promoter to take action for breach arising out of delay in payment of installments on time, the flat purchaser is liable to pay interest at the rate of 24% per annum with quarterly rests on all the amounts which become due and payable. Clause No.11 of the said agreement contemplates that, on the Flat Purchaser committing default in payment on due dates of any installments the, Promoter shall in its sole discretion be entitled to terminate the Agreement.

8. The factual position on record in this case shows that, the registered agreement i.e. suit agreement is dated 9th January, 2006. Therefore, the Plaintiff was to pay said amount of Rs.3,17,700/- on or before 9th February, 2006. On

15th February, 2006, the first notice was given by the Appellants, by which, the Respondent was called upon to make the balance payment. On 1th May, 2006 another notice was given by the Appellants bearing Exh.50 asking the Respondent to pay the balance consideration with interest, failing which, it was mentioned that, the agreement would be terminated. It appears that, thereafter, the suit was filed on 25th July, 2006 and in the meanwhile, notice dated 29th June, 2006 bearing Exh. 52 was sent by the Appellants, by which, the agreement was terminated. It is admitted position that, the said notice was not received by the Respondent.

9. It is the contention of Mr. Gatne, learned counsel appearing for the Appellants that, the notice was sent on the address which was mentioned in the agreement. However, it is admitted position that, the said notice was not received by the Respondent. It is further significant to note that, in the written statement which has been filed on 8th September, 2006, there is no reference to this notice dated 29th June, 2006. For the first time, the reference is to this notice when the same was shown to the Respondent at the time of her cross-examination. Therefore, it is clear that, the terms and

conditions of the agreement contemplates that, although only one month's period is specified for making balance consideration and, it is mentioned that, time is the essence of contract still, in view of further condition that, the balance payment is to be made with interest at the rate of 24% per annum and coupled with the conduct of the Appellants in issuing notices dated 15th February, 2006 and 1st May, 2006 asking the Plaintiff to make the balance payment with interest clearly shows that, time is not the essence of the contract. Therefore, the learned Trial Court as well as the learned First Appellate Court by appreciating the terms and conditions of the agreement and the evidence on record have correctly recorded the finding that, the time is not the essence of contract.

10. In *I. S. Sikandar (D) By Lrs. (supra)*, the Supreme Court in paragraph No. 22 has emphasised about the discussion in *Hind Construction Contractors Vs. State of Maharashtra*² regarding the aspect of time as essence of the contract. The relevant portion of paragraph No. 22 reads as under :

“22. In *Hind Construction Contractors case*

² (1979) 2 SCC 70

quoting *Halsbury's Laws of England*, this Court observed at pp. 1154-55 as under:

'7. ... In the latest 4th Edn. of *Halsbury's Laws of England* in regard to building and engineering contracts the statement of law is to be found in Vol. 4, para 1179, which runs thus :

"1179. *Where time is of the essence of the contract.* — The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. *Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental; time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of*

completion.

Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed."

8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract."

(emphasis added)

11. Thus, it is clear that, even, where the parties have expressly provided that time is the essence of the contract such stipulation will have to be read with other provisions of the contract and such other provisions may, on the construction of the contract exclude the inference that the time is not the essence of the contract.

12. The factual position on record already discussed namely various relevant terms and conditions of the agreement and the notices sent by the Appellants to the Respondent seeking balance payment with interest after expiry of the time fixed for making payment clearly shows that, time is not the essence of the contract. Therefore, there is no substance in the first substantial question of law argued by Mr. Gatane.

13. As far as the second substantial question of law concerning finding regarding readiness and willingness, it is the contention of Mr. Amol Gatne, learned counsel appearing for the Appellants that, the Respondent has failed to pay entire payment as per the agreement dated 9th January, 2006. The learned Trial Court and the learned First Appellate Court have concurrently held that the Plaintiff i.e.

Respondent has failed to prove the payment of remaining consideration. It is the submission of Mr. Gatne that the Plaintiff came up with the case that the entire payment is made and nothing is due and payable and, therefore, readiness and willingness is averred. However, in the evidence affidavit, which has been filed after the written statement has been filed by the Appellants i.e. original Defendants, it is contended that if, the Court comes to the conclusion that there is any balance payment, as there is no receipt of the payment of Rs.3,17,700/- and if Court records finding that the said balance amount of Rs. 3,17,700/- is due and payable then, the Plaintiff is ready and willing to make that payment. By considering the said averment in the evidence affidavit and considering the averment in the Plaint and other contentions in the evidence affidavit, the learned Trial Court and the learned First Appellate Court have concurrently held that, the Plaintiff has proved the readiness and willingness. It is the contention of Mr. Gatne, learned counsel appearing for the Appellants that, as per Section 16(C) of the Specific Relief Act, 1963, it is necessary that, the Plaintiff should aver and prove the readiness and

willingness. He pointed out, the averments in the Plaint and submitted that, there is no averment to the effect that, the Plaintiff is ready and willing to perform her part of the contract. He further submitted that as both the Courts have concurrently held that the Plaintiff has failed to prove balance payment of Rs.3,17,700/- it has to be held that the Plaintiff has failed to prove readiness and willingness. On the other hand Mr. Wakankar, learned counsel appearing for the Respondent relied on the evidence led and findings recorded by both the Courts and submitted that the readiness and willingness is proved.

14. Perusal of the Plaint shows that, in paragraph No. 7 of the Plaint, the Plaintiff has specifically stated that, the entire consideration is paid and the said balance amount of Rs.3,17,700/- was paid from time to time in cash and the Defendants have demanded additional amount of Rs.3,00,000/-. In paragraph No.8, it is specifically mentioned that, the entire consideration has been paid and nothing remains as balance. Therefore, the Plaintiff has complied with the requirements of Section 16(C) of the Specific Relief Act, 1963 and averred that, the Plaintiff is ready and willing

to perform her part of the contract. As set out hereinabove, in the evidence affidavit, the Plaintiff again stated that, she has paid entire amount to the Defendants. She also stated that, apart from the said consideration, Rs. 45,000/- was paid towards M.S.E.B charges, Rs.15,000/- paid for society registration charges and Rs.18,000/- paid towards registration expenses and the balance payment of Rs.3,17,700/- was also paid in cash. In the said evidence affidavit, it is further stated that, although, nothing is balance to be paid, however, as the Plaintiff is not having the receipts for said payment of Rs.3,17,700/- which were paid in cash and if, the Court comes to the conclusion that, the said amount is due and payable, then, the Plaintiff has stated that, the Plaintiff is ready and willing to pay said payment. It is significant to note that, admitted payment towards sale consideration is Rs.2,25,000/- and out of that except payment of Rs.25,000/- paid by cheque, entire balance payment of Rs.2,00,000/- is paid by cash. This is admitted position as per the evidence on record.

15. The learned Trial Court and learned First Appellate Court recorded finding that, as the Plaintiff has failed to

produce the receipts and as there is no acknowledgment executed on the suit agreement regarding receipt of said balance amount of Rs.3,17,700/-, the Plaintiff has failed to prove the said payment. However, both the Courts have recorded that, the Plaintiff is ready and willing to perform her part of contract. The learned Trial Court has directed the Plaintiff to pay remaining consideration amount of Rs.3,17,700/- along with simple interest at the rate of 24% per annum from 9th January, 2006, till the date the said amount is deposited in the Court. Mr. Wakankar, learned counsel appearing for the Respondent states that, the said amount of Rs.3,17,700/- along with interest at the rate of 24% per annum has been deposited in the Court. Thus, concurrent finding of fact is recorded to the effect that, the Plaintiff is ready and willing to perform her part of contract. Nothing has been shown by learned counsel of the Appellants that the said concurrent findings are not in accordance with the evidence on record.

16. On the basis of decision of this Court in *Tousif Ahmed s/o. Abdul Aaheman Vs. Ferozkhan s/o. Sarfarzkhan & Anr.*³, it is the contention of Mr. Gatne, learned counsel appearing for

³ (2018) 6 ALL MR 800

the Appellants that, a finding on readiness and willingness of the Plaintiff is necessarily a finding of fact which has to be rendered by the Court on the basis of nature of the agreement, evidence and material on record in the context of readiness of the parties.

17. To substantiate the contention that the Plaintiff has failed to prove her readiness and willingness, Mr. Gatne has relied on the decision of the Supreme Court in *C. S. Venkatesh Vs. A. S. C. Murthy (Dead) By Legal Representatives & Ors.*⁴ He relied on paragraph nos. 16 and 20 of the said decision. The said paragraphs read as under :

"16. The words "ready and willing" imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he

4 (2020) 3 SCC 280

has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.

20. The judgment of this Court in *Umabai V. Nilkanth Dhondiba Chavan* is almost similar to the case at hand where the plaintiff had filed a suit for specific performance of the agreement to re-convey property. The plea of the plaintiff was that the transaction was one of mortgage and the sale stood redeemed and the plaintiff was discharged from the debt and he was ready to pay the defendant the amount for the property only in the alternative that the plea of mortgage was not accepted by the Court, would show that his readiness was conditional. The plaintiff did not have any income and could not raise the amount required for repurchase of the property. **In the totality of the circumstances, it was held that the plaintiff was not ready and willing to perform the contract.** The conditions laid for the specific performance of the contract are in para 30, which is as under:

“30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff- respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under

Section 16(c) of the Specific Relief Act **must be determined having regard to the entire attending circumstances.** A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. **The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidence brought on records".**"

(Emphasis added)

18. The Supreme Court has held that, the continuous readiness and willingness is condition precedent to grant the relief of specific performance. If the Plaintiff fails to either aver and prove readiness and willingness, he must fail. To adjudge whether the Plaintiff is ready and willing to perform his part of contract, the Court must take into consideration the conduct of the Plaintiff, prior and subsequent to the filing of the suit along with other attending circumstances.

19. In the present case, the Plaintiff has specifically come up with the case that she has paid entire consideration to the Appellants. In the evidence affidavit, she has stated that, if, it is found that, the Plaintiff has not paid the balance consideration then, she is ready and willing to pay the said amount. It is admitted position that, out of admitted

consideration of Rs.2,25,000/- substantial amount of Rs.2,00,000/- was paid by cash and only Rs.25,000/- was the cheque payment. Both the Courts have held that the Respondent could not prove payment of balance amount of Rs.3,17,700/- paid in cash for want of receipt for such payment. It is significant to note that, while decreeing the suit the learned Trial Court by judgment and decree dated 18th November, 2010 directed that, the Plaintiff shall pay remaining consideration amount of Rs.3,17,700/- along with simple interest at the rate of 24% per annum from 9th January, 2006, till the date of deposit of the said amount with interest in the Court and the said amount with interest is deposited in the Court.

20. Section 16(C) of the Specific Relief Act, 1963 specifically provides that, where a contract involves the payment of money, it is not essential for the Plaintiff to actually tender to the Defendants or to deposit in Court any money except when so directed by the Court. Both the Courts have concurrently held that, the Plaintiff is ready and willing to perform her part of the contract. The Plaintiff has deposited entire amount with interest in the Court as per the

decree of the learned Trial Court. Therefore, the requirements of readiness and willingness as contemplated by the relevant provisions of Specific Performance Act are complied with as held by the Supreme Court in the decision in *C. S. Venkatesh (supra)*.

21. It is the contention of Mr. Gatne, that, if it is the case of the Plaintiff that, she has already performed her part of the contract, then, she cannot take up the alternate plea that she is ready and willing to perform her part of the contract. In fact, it is the case of the Plaintiff that, although, she has paid the balance consideration of Rs.3,17,700/-, receipts were not issued by the Appellants who is the developers and, therefore, in the evidence affidavit, she has stated that, if the Court comes to conclusion that, she is not able to prove the said payment then, she is ready and willing to pay the said amount. It is further significant to note that, accordingly, the said amount with interest of 24% p.m. is actually paid as per direction of the Court. Therefore, there is no substance in the contention raised by Mr. Gatne.

22. Mr. Gatne has also relied on paragraph 30 of the decision of the Supreme Court in *Inderchand Jain (Dead)*

*Through LRS. Vs. Motilal (Dead) Through LRS.*⁵. The said paragraph 30 reads as under :

“30. Discretionary jurisdiction, it is trite, can be exercised provided there is any room for the court to do the same and not otherwise. The court while exercising its jurisdiction would not act arbitrarily or beyond the contours of law. The contention of the plaintiff that he had also prayed for grant of a decree in the alternative viz. **in the event the court came to the conclusion that there had been no novation of contract, he was ready and willing to deposit the entire amount. No conditional offer was permissible in a suit for specific performance of contract.**”

(Emphasis added)

The above observations of the Supreme Court are not at all applicable to the present case. The contention of the Plaintiff in the present case that she has paid the entire payment of Rs.5,42,700/- in cash (except Rs.25,000/- paid by cheque) and that if Court comes to the conclusion that the Plaintiff failed to prove payment of Rs.3,17,700/- in cash for want of receipt issued by the

5 (2009) 14 SCC 663

Appellants then she is ready to pay the same, can not be equated with the novation of the contract. The same will not also amount to the conditional offer. Thus, said decision of the Supreme Court has no application to the facts of this case.

23. Both the learned Trial Court as well the learned First Appellate Court have concurrently held that, the Plaintiff has proved her readiness and willingness. There is nothing on record to show that, the said finding is contrary to the evidence on record. The same is concurrent finding of fact. Therefore, there is no substance in the second substantial question of law raised by Mr. Gatne, learned counsel appearing for the Appellants.

24. The third substantial question of law raised by Mr. Gatne is that, as the property has been sold to the third party, the suit for specific performance should not have been decreed. The factual position on record clearly shows that, the Courts below have concurrently held that, the Plaintiff has proved the readiness and willingness. The Courts below have directed payment of balance consideration of Rs. 3,17,700/- along with simple interest at 24% per annum from

9th January, 2006 which has been deposited by the Respondent. The suit agreement is dated 9th January, 2006. The Appellants have issued notice dated 15th February, 2006 and 1st May, 2006, by which, the Plaintiff was asked to pay balance consideration along with interest. Thereafter, immediately the suit was filed on 25th July, 2006. It is the case of the Appellants that the Appellants have created third party interest during the pendency of the suit in 2009.

25. Mr. Gatne, on the basis of cross-examination of the Defendant No. 3 i.e. Respondent No. 3 conducted on 16th June, 2010 submitted that, the third party interest was created in 2009. It is significant to note that, the present Appellants i.e. Defendants neither in the written statement or in the Evidence Affidavit have come up with the case that the said premises is sold to third person. In the cross-examination conducted on 16.6.2010 of the D.W.1-Rahul Vilas Nahata i.e. Defendant No.3 i.e. Appellant No.3 who is partner of the Defendant No.1 i.e. Appellant No.1 stated as follows :

“It is true that as on today, there is a person residing in the suit flat. There is an agreement between myself and the person who is occupied

the said flat. The said person is residing in the suit flat as owner. About one year ago, document has taken place between myself and the said person who is residing in the suit flat. I do not know whether this Court had passed order of injunction against me for not creating any third party interest in the suit flat. It is true that I have not mentioned in my written statement about the agreement entered into by me with the person who is occupying the suit flat. I had no knowledge about the order passed on 28.7.2006 below Exh.18 in respect of the status-quo. I also do not know about the order of status-quo extended from time to time. Today, I cannot state as to whether I had executed the agreement to the person prior to filing the written statement who is not occupying the suit flat. It is true that till today, I have not informed the court in writing about the execution of document with the person who is presently occupying the suit flat. I have handed over the suit flat to the original owner of the suit land. It was not decided which flats were to be given to the original land owner in the original agreement with the land owner. I am ready to produce the development agreement entered by me with the original owner of the land. It was not decided that immediately on payment of the purchase price of the flat, the flat was to be handed over to the plaintiff. It is true that I informed plaintiff that

after the plaintiff pays Rs.3,17,700/- and the interest on it, the flat was to be handed over to him.”

(Emphasis added)

Thus, it is clear that, there is no evidence produced to support the case put forward by the Appellants that the flat has been sold to some third person. In fact as set out hereinabove the D.W.1 has given contradictory statements in his deposition. Thus, it is clear that, the contention raised that the suit flat has been sold to third person is contrary to the evidence on record.

26. It is further significant to note that, in the present case, the suit has been filed on 25th July, 2006. Therefore, the creation of the third party interest in 2009 will not have any effect, in view of Section 52 of the Transfer of Property Act, 1882. Section 52 of the Transfer of Property Act, 1882 contemplates that, during the pendency, in any Court of any suit which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the

rights in other party and thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. It is admitted position that, no permission of the Court has been obtained before such transfer, if any. Although it is the contention of the Appellants that in this case the Courts have not granted any interim injunction, it appears that the status quo order was granted on 28th July, 2006 and the same was continued from time to time. Assuming that there is no status quo order, the same will not be relevant for the purpose of Section 52 of the Transfer of Property Act, 1882.

27. The Supreme Court in the case of *Thomas Press (India) Ltd. Vs. Nanak Builders and Investors Pvt. Ltd. & Ors.*⁶ has held that, it is well settled that the doctrine of lis pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation.

⁶ (2013) 5 SCC 397

28. The Supreme Court in the case of *Madhukar Nivrutti Jagtap & Ors. Vs. Pramila Bai Chandulal Parandekar (Dead) Through Legal Representatives & Ors.*⁷ has made the following observations :

“**14.2.** In *Guruswamy Nadar*, this Court has held as under: (SCC p.1800. Para 13)

“**13.** Normally, as a 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, the principle of *lis pendens* has been evolved so that the litigation may finally terminate without intervention of a third party. This is because of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject-matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end.”

14.3. The aforesaid observations in no way lead to the proposition that any transaction on being hit by Section 52 *ibid.*, is illegal or void *ab initio*, as assumed by the High Court. In *Sarvinder Singh*, as relied upon by the High Court, the subsequent purchasers sought to

7 (2020) 15 SCC 731

come on record as defendants and in that context, this Court referred to Section 52 of the TP Act and pointed out that alienation in their favour would be hit by the doctrine of lis pendens. The said decision is not an authority on the point that every alienation during the pendency of the suit is to be declared illegal or void. The effect of doctrine of lis pendens is not to annul all the transfers effected by the parties to a suit but only to render them subservient to the rights of the parties under the decree or order which may be made in that suit. In other words, its effect is only to make the decree passed in the suit binding on the transferee i.e. the subsequent purchaser. Nevertheless, the transfer remains valid subject, of course, to the result of the suit. In *A. Nawab John*, this Court has explained the law in this regard, and we may usefully reiterate the same with reference to the following : (SCC p. 746, para 18)

“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, 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.”

14.4. Hence, the effect of Section 52 *ibid.*, for the purpose of the present case would only be that the said sale transactions in favour of the appellants shall have no adverse effect on the rights of the plaintiffs and shall remain subject to the final outcome of the suit in question. However, the High Court, while holding that the said transactions were hit by *lis pendens*, has proceeded to observe further that the sale deeds so made in favour of the present appellants were illegal. These further observations by the High Court cannot be approved for the reasons foregoing.”

29. Thus, the rights of the Respondent i.e. Plaintiff is completely protected by Section 52 of the Transfer of Property Act, 1882. Therefore assuming that the Appellants have created third party interest during pendency of the suit still the same will be subservient to the rights of the parties to a litigation and, therefore, rights of the Respondent i.e. Plaintiff are not affected by such transfer. It is settled legal

position that 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. As the suit for specific performance is decreed by the learned Trial Court and as the said decree is confirmed by the learned First Appellate Court, it is clear that assuming that the Appellants i.e. Defendants have created any third party interest with respect to the suit premises still such purchaser would be bound by the decree and would be under obligation to satisfy the decree. Therefore, there is no substance in the third substantial question of law raised by Mr. Gatne, learned counsel appearing for the Appellants.

30. The fourth substantial question of law raised by Mr. Gatne is that, the Plaint in the present form is not maintainable. For the purpose of the said contention, he relied on the notice dated 29th June, 2006 bearing Exh.52, by which, agreement dated 9th January, 2006 was terminated. It is his contention that, in view of said notice dated 29th June, 2006 of termination of the agreement and in view of the law laid down by the Supreme Court in the decision in *I. S. Sikandar (D) By Lrs. (supra)*, the said termination has to

be specifically challenged in the suit by amending the Plaint. However, it is to be seen that, there is no reference in the written statement filed by the Appellants to said notice of termination dated 29th June, 2006. The said written statement was filed on 8th September, 2006. It is further significant to note that, admittedly, the said notice was not served on the Respondent.

31. In *I. S. Sikandar (D) By Lrs. (supra)*, the Plaintiff did not perform his part of contract within extended period and, therefore, the agreement of sale was terminated as per notice dated 28th March, 1985. In that case, the suit was filed after the termination notice is served on the Plaintiff and, therefore, the Supreme Court has held that as the Plaintiff has not sought declaratory relief to declare the termination of agreement of sale as bad in law and therefore, the relief of specific performance cannot be granted. In the present case, admittedly, the said notice was not served on the Respondent. Apart from that, in the written statement which was filed by the Appellants in September, 2006, there is no reference to said notice dated 29th June, 2006.

32. It is the contention of Mr. Gatne that, after the Plaintiff

was made aware about the said termination in her cross-examination, it was her duty to amend the Plaint. However, it is significant to note that, the suit was filed on 25th July, 2006 and there is no averments in the written statement regarding the said termination, therefore, just because in the cross-examination, certain questions were put regarding said notice dated 29th June, 2006 does not make – Plaint in the present form as not maintainable. Therefore, there is no substance in the fourth substantial question of law raised by Mr. Gatne, learned counsel appearing for the Appellants.

33. As there is no substantial question of law raised in this Second Appeal, the same is dismissed with no order as to costs.

34. As the Second Appeal is dismissed, nothing survives in the Civil Application and the same is also dismissed.

(MADHAV J. JAMDAR, J.)