

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

VISHAL
SUBHASH
PAREKAR

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**FIRST APPEAL NO. 777 OF 2017
WITH
CIVIL APPLICATION NO. 2371 OF 2017
WITH
CROSS OBJECTION (ST) NO. 18630 OF 2018**

Mohan Vishnu Satardekar (since deceased)
Through LRs Prashant Prabhkar
Satardekar and ors.

...Appellants

Versus

The Life Insurance Corporation of India and
anr.

...Respondents

Mr. Atul Damle, Senior Advocate, i/b Mr. Avinash Fatangare,
for the Appellants.

Mr. Harihar Bhate, a/w Mr. Rupa Bhawe, Ms. Divya Menon,
i/b Bhawe and Co., for Respondent No.1.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 18th AUGUST, 2022

PRONOUNCED ON: 17th FEBRUARY, 2023

JUDGMENT:-

1. This appeal is directed against a decree passed by the learned Judge, City Civil Court, Greater Mumbai in S.C. Suit No. 8228 of 1984 whereby and whereunder the suit for specific performance instituted by the appellants came to be dismissed.

2. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they were arrayed before the trial Court.

3. The background facts leading to this appeal can be stated, in brief, as under:-

(a) The plaintiff Nos.1 to 5 claimed to be the tenants of the premises forming part of the chawls namely Mandodari, Tara, Bangali, Sita, Ahilya and Draupadi and corrugated tin sheds situated at New Badam Wadi, V.P. Road, Mumbai standing on a free hold land admeasuring about 3032 sq. mts. (hereinafter referred to as the 'suit property'), owned by the defendant - the Life Insurance Corporation of India, a Public Sector Corporation established under the provisions of Life Insurance Corporation Act, 1956.

(b) The defendant Corporation had floated tenders for sale of the suit property. The plaintiff Nos.1 to 5 claimed to have formed Girgaum Griha Nirman Mandal, an Association of tenants, and submitted an offer to purchase the suit property for a consideration of Rs.4,25,000/- vide letter dated 20th January, 1981. Along with the said offer the plaintiff Nos. 1 to 5 deposited a sum of Rs. 50,000/- with the defendant which was duly acknowledged by defendant by passing a receipt dated 22nd January, 1981. The said offer was accepted by the

defendant vide letter dated 27th February, 1981 incorporating therein the material terms and conditions of sale.

(c) It was, *inter alia*, provided that the suit property was to be purchased for a consideration of Rs. 4,25,000/- on “as is where is basis”. A sum of Rs. 50,000/- was already deposited. The balance amount of Rs. 3,75,000/- was to be paid within one month of the said acceptance of the offer. The plaintiffs shall get the proposed society registered within three months from the date of the execution of the agreement for purchase and complete the transaction within six months from the date of the agreement for purchase. Conveyance was to be executed in favour of the co-operative housing society proposed to be formed by the sitting tenants in the suit property. If the society could not be registered for any reason, the sale transaction shall be completed, notwithstanding the non-registration of the society, and the plaintiff would be liable to take conveyance of the property and complete the sale transaction within the stipulated period of six months.

(d) The plaintiffs averred, a lengthy correspondence, thereafter, ensued. Vide letter dated 27th March, 1981 the plaintiff called upon the defendant to give list of tenants and title documents. Simultaneously, the plaintiffs delivered a demand draft for the balance consideration of Rs. 3,75,000/-. By a further communication dated 31st March, 1981 the plaintiffs made it clear that they had agreed to purchase the suit property on behalf of the tenants. However, at that stage, only the plaintiff Nos. 1 to 5 had contributed for the consideration. The defendant was further informed that the plaintiffs were making an earnest endeavor to form a cooperative society of the tenants.

(e) In the further correspondence, that ensued between the plaintiff Nos. 1 to 5 and defendant, the plaintiffs conveyed the difficulties in forming co-operative society in accordance with the letter of acceptance dated 27th February, 1981. Repeated request of the plaintiffs to share the draft conveyance in order to execute the Deed of Conveyance did not elicit any response.

(f) Eventually, vide letter dated 25th September, 1981 the defendant took an unreasonable and unjustifiable

stand that it had offered to sale the suit property only to the sitting tenants in the suit property. Initial offer by the plaintiff was for and on behalf of the tenants in the suit property and the defendant had accepted the said offer. In the meanwhile, the defendant had received a grievance from some of the tenants that no efforts were made by the plaintiffs to approach the sitting tenants and form a cooperative society of the tenants. Therefore, the defendant was not inclined to accede to the request of the plaintiff Nos. 1 to 5 to execute conveyance.

(g) Since the further correspondence, which the plaintiff Nos.1 to 5 had with defendant, did not yield any positive result, the plaintiffs were constrained to institute the suit for a decree for specific performance of the agreement for sale of the suit property along with consequential reliefs of obtaining Income Tax Certificate under section 230A of the Income Tax Act, 1961 and permission of the competent authority under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 and, thereafter, execution of conveyance and delivery of possession.

(h) The defendant resisted the suit by filing a written statement. The substance of the resistance put forth by the defendant was that the defendant had accepted the offer of the plaintiff Nos.1 to 5 as it was made to believe that the offer was made for and on behalf of the sitting tenants in the suit property. There was an express representation on the part of the plaintiff Nos.1 to 5 that they would form a cooperative society of the sitting tenants. It was only on the strength of the said representation, the defendant had agreed to sale the suit property in accordance with the terms and conditions incorporated in the letter of acceptance dated 27th February, 1981.

(i) The defendant contended that, it transpired that out of plaintiff Nos.1 to 5 only plaintiff Nos.1 - Prabhakar Satardekar and 4 - Arvind Datta Naik were the tenants of the tenements in the suit property. False representation was thus made, purportedly on behalf of the tenants as a body under the name and style of Girgaum Griha Nirman Mandal. Adverting to the lengthy correspondence which ensued between the plaintiff Nos.1 to 5 and defendant it was contended that draft conveyance forwarded on behalf of the plaintiff Nos.1 to 5 did not contain any recital to the

effect that the suit property was to be purchased for and on behalf of the sitting tenants in the suit property. On the contrary, bifurcation of individual share of plaintiff Nos.1 to 5 in the consideration parted with, was provided therein. The plaintiff Nos.1 to 5 thus professed to purchase the suit property in their individual capacity. This betrayed a dubious design on the part of the plaintiff Nos. 1 to 5 to acquire the suit property under a subterfuge of representing a body of tenants.

(j) The defendant further contended that vide letter dated 13th August, 1981 some of the sitting tenants in the suit property apprised the defendant that the plaintiffs had not approached any of the tenants for the purpose of forming cooperative society of tenants and no efforts were made in that direction. In view of the aforesaid development, according to the defendant, it was justified in conveying to the plaintiffs that the defendant cannot execute conveyance in favour of the plaintiffs as the consent of defendant was vitiated by a false representation. The defendant further asserted that vide letter dated 8th /11th December, 1985 the Government of India had advised the defendant to execute the conveyance only with the

proposed cooperative society of the sitting tenants. In the circumstances, the claim of the plaintiff Nos. 1 to 5 for specific performance of the agreement for sale does not deserve to be countenanced.

4. It would be contextually relevant to note that during the pendency of the suit on 16th January, 2006 the plaintiff No. 6 (original defendant No.2) - New Badam Wadi Rahivashi Seva Sangh took out a Chamber Summons No. 48 of 2006 to implead it as a party defendant to the suit. By an order dated 19th December, 2006 the Chamber Summons was allowed and plaintiff No. 6 came to be impleaded as defendant No. 2. In the written statement filed on behalf of defendant No. 2 (now plaintiff No. 6), it was, *inter alia*, contended that defendant No. 2 was the real society of the sitting tenants in the suit property. The claim of the plaintiff Nos.1 to 5 was thus resisted by defendant No.2.

5. Subsequently, pursuant to a purported understanding arrived at between the plaintiff Nos.1 to 5 and defendant No. 2, Chamber Summons No. 2183 of 2014 was taken out to transpose defendant No. 2 as plaintiff No.6. Pursuant to an order dated 3rd July, 2015 defendant No. 2 came to be transposed as plaintiff No. 6. Thereupon, the defendant No. 1 (now sole defendant) filed an additional written statement.

6. The defendant assailed the claim of plaintiff No.6 for specific performance of the contract on the ground that there was no privity of contract between plaintiff No.6 and the defendant as plaintiff No.6 was never a party to the contract and, therefore, cannot profess to enforce specific performance of the said contract. The defendant also adverted to the written statement filed on behalf of defendant No.2, before its transposition as plaintiff No.6, whereby defendant No.2 had specifically contended that plaintiff Nos.1 to 5 were not entitled to seek specific performance of the contract and categorically opposed the reliefs sought by plaintiff Nos.1 to 5. Defendant No.2 had also questioned the locus of the plaintiffs by contending that only two of the five plaintiffs were, in fact, the tenants of the tenements in the suit property. In substance, the amended claim for specific performance in favour of plaintiff Nos.1 to 5 and 6 was resisted on the ground of absence of privity of contract and diametrically opposite stand of plaintiff No.2 (defendant No.2 before transposition).

7. In the wake of the aforesaid pleadings, the issues were settled thrice. First, whilst the contest was between the plaintiffs and the defendant. Second, post the impleadment of defendant No.2 – Society and the written statement on behalf of defendant

No.2. Third, after the transposition of defendant No.2 as the plaintiff.

8. The trial court recorded the evidence of three witnesses for the plaintiffs namely; Arvind Datta Naik (PW-1); plaintiff No.4, Mr. Harbans Singh Kohli (PW-2) and Mr. Sunil Sitaram Newalkar (PW-3); a committee member of plaintiff No.6. The defendant also examined three witnesses namely Vinod L. Bhoyar (DW-1), Gajanan Mahadev Patil (DW-2) and Mrs. Kavita Shridharan (DW-3) the officers of the defendant. The parties tendered a number of documents for the perusal of the Court.

9. After evaluation of evidence and appraisal of the documents tendered for perusal, the learned Judge, City Civil Court, was persuaded to dismiss the suit by judgment and decree dated 30th September, 2016. The learned Judge found that the existence of the agreement for sale of the suit property in accordance with the terms and conditions incorporated in the letter dated 27th February, 1981 (Exhibit-29) was an admitted fact. Passing of the entire consideration of Rs.4,25,000/- was also not in contest. The learned Judge also came to the conclusion that the plaintiffs had succeeded in proving that they were and have always been ready and willing to perform their part of the contract. The issue

of termination of contract by the defendant was also answered in negative.

10. The plaintiffs were, however, non-suited on the ground that the defendant had agreed to sale the suit property to the plaintiffs only upon formation of Co-operative Housing Society of the tenants in the suit property and, so far as plaintiff No.6, there was no privity of contract between plaintiff No.6 and the defendant. Since specific performance is an equitable relief, plaintiff Nos.1 to 5 being guilty of making a false representation that they were the representatives of the sitting tenants in the suit property, in the opinion of the learned Judge, plaintiffs were not entitled to the relief of specific performance of the contract.

11. Being aggrieved and dissatisfied, the plaintiffs have preferred this appeal. The primary challenge to the impugned decree is that having entered findings on all material points in favour of the plaintiffs, the learned Judge committed a manifest error in declining to pass a decree for specific performance, especially when it is incontestible that plaintiff No.6 is a co-operative society formed by the sitting tenants and the defendant has taken a consistent stand that they had always been ready to execute the conveyance in favour of a Co-operative Society of the sitting tenants.

12. The defendant has also preferred a cross-objection, taking exception to few of the findings recorded by the trial Court. In particular, the defendant assailed the finding that there was a valid agreement to sale the suit property in favour of the plaintiffs. According to the defendant, there was no concluded contract. Nor the finding of the trial Court that the defendant had agreed to sale the suit property upon formation of a co-operative housing society of sitting tenants is borne out by the evidence on record.

13. In the light of the aforesaid pleadings and evidence, I have heard Mr. Damle, the learned Senior Counsel for the appellants – plaintiff Nos.1 to 6 and Mr. Bhave, the learned Counsel for the respondent – defendant, at some length. The learned Counsel took the Court through the pleadings and evidence.

14. Mr. Damle, the learned Senior Counsel for the appellants, submitted that the trial Court fell in error in not properly construing the terms of the contract incorporated in the letter of acceptance dated 27th February, 1981 (Exhibit-29). Formation of a Co-operative Housing Society of the tenants was not a *sine qua non* for execution of the conveyance. The parties had specifically provided for a situation where the plaintiffs could not form a Co-operative Society of the tenants, and decided that,

notwithstanding the non-formation of the society, plaintiff Nos.1 to 5 shall purchase the suit property. In the backdrop of such a stipulation when plaintiff Nos.1 to 5 had parted with the entire consideration and there is voluminous evidence to show the willingness on the part of plaintiff Nos.1 to 5 to obtain the conveyance, the trial Court was not at all justified in non-suiting the plaintiffs.

15. In any event, plaintiff No.6 – Society having been formed, and joined plaintiff Nos.1 to 5 in seeking the specific performance of the contract, the basis of the objection on behalf of the defendant that it had agreed to sale the property only to the Co-operative Society of the sitting tenants gets dismantled. Inviting the attention of the Court to the manner in which DW Nos.1 to 3 fared in the cross-examination and conceded in no uncertain terms that the defendant had agreed and shown willingness to execute a conveyance in favour of the Co-operative Society of the sitting tenants, Mr. Damle would urge that the refusal to exercise the discretion to grant the specific performance by the learned Judge is unsustainable, and, thus, requires to be corrected in appeal.

16. In opposition to this, Mr. Bhave, the learned Counsel for the respondents, submitted with tenacity that the fact that the

transaction since its inception was tainted with fraud cannot be lost sight of. Not only under the letter dated 27th February, 1981 (Exhibit-29) the defendant had made it explicitly clear that the property would be conveyed in favour of the Society of the sitting tenants but also in the offers, which were made by plaintiff Nos.1 to 5, dated 17th January, 1981 and 20th January, 1981 (Exhibit-22), the defendant was made to believe that the offers were for and on behalf of the sitting tenants, who were represented to be the members of Girgaum Griha Nirman Mandal. Mr. Bhave laid emphasis on the fact that there are clear and categorical admissions to the effect that only plaintiff Nos.1 and 3 were the tenants of the tenements in the suit premises. Moreover, contrary to representation, it has emerged that Girgaum Griha Nirman Mandal was, in fact, a partnership firm and Mr. Harbans Singh Kohli (PW-2) had a domineering role in the said firm.

17. In the backdrop of this nature of evidence, according to Mr. Bhave, the fact that plaintiff Nos.1 to 5 deliberately made a fraudulent representation can hardly be contested. An inference that the fraud had vitiated the consent of the defendant is inexorable, urged Mr. Bhave. The learned Judge, thus, misdirected himself in recording the finding that there was a valid contract to sale the suit property.

18. Mr. Bhave further urged that the transposition of plaintiff No.6 does more harm than good to the cause of plaintiff Nos.1 to 5. On the date of the transaction, evidenced by the letter dated 27th February, 1981 (Exhibit-29), plaintiff No.6 was not at all in the frame. On the own showing of the plaintiffs, plaintiff No.6 was registered in the year 2005. There was simply no privity of contract between plaintiff No.6 and the defendant. In the context of the written statement of the defendant No.2, before it came to be transposed, no decree for specific performance can be claimed, much less, granted, submitted Mr. Bhave.

19. To start with few uncontroverted facts. First, indisputably, the defendant is the owner and the landlord of the suit property. Second, again indisputably, the defendant was intending to sale the suit property and had invited offers. Third, offers were made by few of the plaintiffs to purchase the suit property for the consideration of Rs.4,25,000/-. Fourth, by letter dated 27th February, 1981 (Exhibit-29) the offer was accepted subject to the terms and conditions incorporated therein. Fifth, indisputably the entire consideration of Rs.4,25,000/- has been paid to the defendant as evidenced by the receipts dated 22nd January, 1981 (Exhibit-28) and 31st March, 1981 (Exhibit-32). The controversy

between the parties essentially revolves around the entity in whose favour the defendant had agreed to sale the suit property.

20. In the context of the aforesaid core controversy, to gather the real intention of the parties, it would be necessary to extract the material terms of the letter dated 27th February, 1981 (Exhibit-29). Relevant part of the said letter reads as under:

“1. You are agreeable to purchase the above mentioned property on ‘as is where is’ basis for Rs.4,25,000/-.

2. You have already deposited with us a sum of Rs.50,000/- (Rupees fifty thousand only) vide our Misc. Receipt No.2355 dated 22nd January as earnest money deposit. You are also agreeable to deposit with us the entire balance purchase price viz., Rs.3,75,000/- (Rupees three lakhs seventy five thousand only) within one month from the date of this letter, time being the essence of the contract.

3. You shall enter into an agreement for purchase of the abovementioned property with the Life Insurance Corporation of India as per the draft agreement enclosed, within one month from the date of the acceptance of this letter.

.....

7. You shall get the proposed society registered within 3 months from the date of execution of the agreement for purchase and in any event complete the purchase at your cost within 6 months from the date of the agreement for purchase.

8. The conveyance deed in respect of the above mentioned property shall be executed in favour of the co-operative housing society proposed to be formed by the sitting ... of the above property.

9. If the society is not registered for any reason whatsoever as provided in clause No. 7, the sale deed shall be completed notwithstanding the non-registration of the society and you shall be bound and liable to take the conveyance of the property and complete the sale.... Within the stipulated period of 6 months from the date of agreement for purchase.”

21. It is trite that to gather the real intention of the parties to the contract regard shall be had to the terms of the contract. The contract shall be read as a whole is also well recognized. I propose to ascertain the intent of the parties in the light of the terms of the letter dated 27th February, 1981 (Exhibit-29) and the attendant circumstances borne out by the record.

22. Mr. Bhave made an endeavour to urge that there was no concluded contract. Support was sought to be drawn from Clause 3 (extracted above) which provided for execution of an agreement for purchase in accordance with the draft enclosed with the letter dated 27th February, 1981 (Exhibit-29) within one month of the acceptance thereof. Since no formal agreement for purchase was executed, there was no concluded contract, submitted Mr. Bhave.

23. I am afraid to accede to the aforesaid submission as the letter dated 27th February, 1981 (Exhibit-27) incorporates all the terms and conditions requisite to construe an agreement for sale. It is well settled, a contract can be inferred from the terms of the correspondence exchanged between the parties. In the case at hand the acceptance of the offer by the plaintiffs is established beyond the pale of controversy by payment of the entire balance consideration of Rs.3,75,000/. Further correspondence

exchanged between the parties unmistakably indicates that the parties were *ad idem* as to the terms of the contract except the entity in whose favour the conveyance was to be executed. Hence, the submission on behalf of the respondents that there was no concluded contract does not merit countenance.

24. Mr. Damle strenuously submitted that even the identity of the purchaser was not in the arena of controversy. Comparing and contrasting the stipulations 7, 8 and 9 (extracted above), Mr. Damle would urge that the parties had factored in the possible non-registration of the society of sitting tenants. Thus, the defendant had stipulated in Clause 9 that if the Society is not registered for any reason whatsoever the Sale Deed shall be completed notwithstanding the non-registration of the society and the plaintiff Nos.1 to 5 shall be bound and liable to take the conveyance of the property and complete the sale transaction within the stipulated period of six months from the date of agreement for purchase. Non formation of the society of the sitting tenants was thus a mere subterfuge to avoid the obligation under the contract, urged Mr. Damle.

25. Mr. Bhave joined the issue by canvassing a submission that Clause (9) cannot be read in isolation. It has to be read not only in conjunction with the other stipulations in the letter dated 27th

February, 1981 (Exhibit-29) but also the correspondence which preceded and succeeded the letter dated 27th February, 1981 (Exhibit-29) and the attendant circumstances.

26. The aforesaid submission of Mr. Bhave appears impeccable. Upon a meaningful reading of the letter dated 27th February, 1981 (Exhibit-29), as a whole, the intent of the defendant to effect the sale of the suit property in favour of the Society of the sitting tenants becomes manifest. The opening part of the said letter indicates in no uncertain terms that the defendant reckoned that the offer was submitted on behalf of the sitting tenants vide letter dated 20th January, 1981 (Exhibit-22). Clause 7 makes it further clear that the defendant called upon the signatories to the said letter dated 20th January, 1981 (Exhibit-22) to get a Society of the tenants registered within three months from the date of the execution of the agreement for purchase. In Clause 8, the defendant made it abundantly clear that the conveyance will be executed in favour of the Co-operative Housing Society proposed to be formed by the sitting tenants in the suit property.

27. The letter which contained the offer, accepted by the defendant vide letter dated 27th February, 1981 (Exhibit-29), make the position absolutely clear. The letter dated 20th January, 1981 (Exhibit-22) was addressed on the letter head of Girgaum

Griha Nirman Mandal. It was signed by M. V. Satardekar, Gajanan Vartak and Tejprakash Jaiswal – plaintiff No.5, for and on behalf of Girgaum Griha Nirman Mandal. It expressly records that the signatories were tenants of the buildings forming part of the suit property and they proposed to purchase the suit property on behalf of the tenants. It was reiterated that the signatories desired to purchase the suit property for and on behalf of the tenants thereof and sought preferential right to purchase in the said capacity of the sitting tenants. It was this offer, which was accepted by the defendant under letter dated 27th February, 1981 (Exhibit-29).

28. When plaintiff Nos.1 to 5 sought the execution of instrument in their favour, the defendant, vide letter dated 4th March, 1981, made it's stand clear that the fact that the consideration was contributed by plaintiff Nos.1 to 5 did not entitle them to seek the execution of conveyance in their favour as in accordance with the agreed term, the conveyance was to be executed in favour of a Co-operative Housing Society. It would be contextually relevant to note that in the draft conveyance shared by plaintiff Nos.1 to 5 alongwith the letter dated 8th August, 1981 (Exhibit-67) the plaintiff Nos.1 to 5 professd to purchase the property in the capacity of the individual purchasers and the

specific shares of plaintiff Nos.1 to 5 in the corpus of consideration were also provided.

29. It would be superfluous to refer to the further correspondence exchanged between the parties except to note that plaintiff Nos.1 to 5 could not succeed in forming a Co-operative Housing Society of the sitting tenants and insisted on execution of the conveyance in their individual names on the strength of Clause 9 of the letter dated 27th February, 1981 (Exhibit-29). It would suffice to make a reference to the communication dated 25th September, 1981 (Exhibit-34) in response to the letter dated 5th September, 1981 (Exhibit-33), emanating from the defendant to the effect that the defendant had accepted the offer submitted by a group of tenants on behalf of the sitting tenants and not on behalf of five persons whose names were shown in the draft conveyance as purchasers of the said property in their individual capacity.

30. The aforesaid documents, if construed in conjunction with the terms of the letter dated 27th February, 1981 (Exhibit-29), make it explicitly clear that not only there was an offer on the part of the signatories to the letter dated 20th January, 1981 (Exhibit-22) that the suit property was to be purchased for and on behalf of the sitting tenants but the defendant construed the

same as an offer on behalf of the sitting tenants. From this standpoint in Clause 9, banked upon by plaintiff Nos. 1 to 5 which stipulated that even in the event of non-formation of the Co-operative Society of the sitting tenants, plaintiff Nos.1 to 5 shall purchase the property, cannot be construed torn out of context.

31. What is of decisive significance is the representation which was made by the signatories to the offer letters dated 17th January, 1981 and 20th January, 1981 (Exhibit-22). The defendant was made to believe that the offer was for and on behalf of the tenants. The defendant explicitly accepted the offer made on behalf of the sitting tenants. Stipulations were, therefore, made in the letter of acceptance dated 27th February, 1981 (Exhibit-29). In this context, the trial Court, in my view, committed no error in arriving at a finding that the defendant had agreed to effect the sale in favour of the Co-operative Society of the sitting tenants. This has also been the consistent stand of the defendant. This stand is required to be appreciated in the light of the character of the defendant as a public sector enterprise. There was thus clear and explicit intent to convey the property in favour of the tenants.

32. Mr. Bhave made an endeavor to draw home the point that the false representation made by plaintiff Nos.1 to 5 rendered the agreement void. Mr. Bhave pressed into service the circumstances which according to him indicate that plaintiff Nos.1 to 5 had a design to indulge in profiteering by purchasing the suit property in their individual names.

33. There is no evidence to indicate that Girgaum Griha Nirman Mandal was registered as a society when the representations were made by plaintiff Nos.1 to 5. Nor there is evidence to demonstrate that at any subsequent point of time Giragaon Grihanirman Mandal came to be registered as the Co-operative Society of the sitting tenants in the suit property. In contrast, the correspondence exchanged between the parties shows that plaintiff Nos.1 to 5 claimed to have encountered difficulties in forming the Co-operative Society of the sitting tenants and, thus, instead sought the conveyance in their individual names.

34. The matter does not rest at mere non-registration of the society, when the offer was made, and subsequent failure to register the Society. What impairs the plaintiffs case is the legal character of Girgaum Griha Nirman Mandal, emerged from the record. PW-2 asserted that Girgaum Griha Nirman Mandal came

to be registered as a partnership firm under a Deed of Partnership dated 7th March, 1983 executed by and between him and plaintiff Nos.1, 2 to 4 and one Bhupindersing Shetty. The said firm was carrying on the business of builders, contractors and dealers and agents in real estate Mr. Harbans Singh Kohli (PW-2) conceded in the cross-examination that Mr. R. M. Patel, and Mr. Tejprakash Jaiswal, plaintiff Nos.3 and 5 were not the tenants of any tenements in the suit property. Mr. Bhupinder Shetty joined Girgaum Griha Nirman Mandal in the year 1982 in place of Mr. Tejprakash Jaiswal – plaintiff No.5. Mr. Shetty took over the rights of Mr. Jaiswal for consideration. Whereas he had taken over the rights of Mr. R. M. Patel – plaintiff No.3.

35. The situation which thus obtains is that when the offer was made the plaintiffs knew that all of them were not the tenants of the tenements in the suit property. Secondly, they were aware that Girgaum Griha Nirman Mandal was not a society, much less of the sitting tenants in the suit property. Thirdly, it was a firm engaged in the business of builders and contractors. Fourthly, the entire consideration was contributed by plaintiff Nos.1 to 5 in specific proportion, who also sought the conveyance of the property with the rights corresponding to their share in the consideration. All these factors lead to an inescapable inference

that a facade of representing the sitting tenants in the suit property was created and the defendant was made to believe and accept the said offer.

36. The aforesaid inference, however, does not necessarily render the agreement void, as was sought to be urged on behalf of the defendant. There is an essential distinction between a fraud or misrepresentation as to the character of the instrument and contents thereof. In the case at hand, the defendant was fully aware of the character of the transaction and the jural relationship sought to be established thereunder. The defendant knew that the property was to be conveyed. However, the misrepresentation was as to the entity for whom the offer was made and in whose favour the sale was to be effected.

37. A useful reference, in this context, can be made to the judgment of the Supreme Court in the case of *Ningawwa vs. Byrappa Shiddappa Hireknrabar and others*¹. The relevant paragraphs read as under:-

4] On behalf of the respondents Mr. Naunit Lal, however, stressed the argument that the trial court was wrong in holding that the gift deed was void on account of the perpetration of fraud. It was submitted that it was only a voidable transaction and the suit for setting aside the gift deed would be governed by Article 95 of the Indian Limitation Act. In our opinion, the proposition contented for by Mr. Naunit Lal must be accepted as correct. It is well-

1AIR 1968 SCC 956.

established that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded.

"The fact that the contract has been induced by fraud does not make the contract void or prevent the property from passing, but merely gives the party defrauded a choice on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm the contract and resume the property. If it can be shown that the party defrauded has at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, his election determined for ever. The party defrauded may keep the question open so long as he does nothing to affirm the contract. *Clough v. L. & N. W. Ry.*, (1871) LR 7 Ex 26 at P.34.

5] The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable. In *Foster v. Mackinnon*(2) the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. In holding that such a plea was admissible, the Court observed :

"It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not

merely as to the legal effect, but as to the 'actual contents' of the instrument."

This decision has been followed by the Indian courts-Sanni Bibi v. Siddik Hossain, AIR 1919 Cal 728 and Brindaban v. Dhurba Charan, AIR 1929 Cal 606. It is not the contention of the appellant in the present case that there was any fraudulent misrepresentation as to the character of the gift deed but Shiddappa fraudulently included in the gift deed plots 91 and 92 of Lingadahalli village without her knowledge. We are accordingly of the opinion that the transaction of gift was voidable and not void and the suit must be brought within the time prescribed under Article 95 of the [Limitation Act](#).

38. The aforesaid judgment was followed by the Supreme Court in the case of *Dularia Devi vs. Janardan Singh and Others*².

39. In the light of the aforesaid exposition of law, since the misrepresentation, in the instant case, is not as regards the character of the transaction, the agreement would not be void and would be voidable at the option of the defendant.

40. An endeavour was made on behalf of the plaintiffs to draw home the point that there was never a proper termination of the contract nor there is material to indicate that the defendant professed to avoid the contract. This submission is simply against the weight of the record. The defendant asserted, time and again, that it had never agreed to execute the conveyance in favour of plaintiff Nos.1 to 5 and the agreed term was to effect the sale in favour of a co-operative society of the sitting tenants. On

21990 (Supp) Supreme Court Cases 216.

the said count, the defendant declined to execute the conveyance in favour of plaintiff Nos.1 to 5. This constitutes a clear manifestation of intent to avoid the contract. The learned Judge, City Civil Court, did not advert to this aspect of the matter and went on to record a finding that the defendant did not terminate the contract. To this extent, the learned Judge was clearly in error.

41. Mr. Damle attempted to salvage the position by urging, with a degree of vehemence that, with the incorporation of plaintiff No.6 society which is admitted to be formed by the sitting tenants in the suit property, the defendant, can still be called upon to perform its obligation. Mr. Damle would further urge that it has been the consistent stand of the defendant, as conceded to by the witnesses examined on behalf of the defendant, that the defendant was willing to execute the conveyance in favour of the society of the sitting tenants. Therefore, according to Mr. Damle, there is no impeadment in passing a decree for specific performance.

42. I find it rather difficult to accede to this submission which seeks to over-simplify the matter. First and foremost, there was no privity of contract between plaintiff No.6 and the defendant. Secondly, plaintiff No.6 was not incorporated on the date the

defendant accepted the offer by letter dated 27th February, 1981 (Exhibit-29). Thirdly, it is not the case that the contract was executed by the promoters for and on behalf of plaintiff No.6 and, therefore, now plaintiff No.6 can seek enforcement of the contract. Fourthly, plaintiff No.6 came to be registered as a society after almost 25 years of the acceptance of the offer i.e. on 4th October, 2005. Post incorporation plaintiff No.6 initially sought to resist the plaintiff Nos.1 to 5s prayers for specific performance of the contract. Fifthly, it is the case of plaintiff No.6 that a society namely Panchkanya Co-operative Housing Society was proposed to be formed and, as conceded by Mr. Sunil Newalkar (PW-3), a letter (Exhibit-56) was addressed on 11th October, 2010 proposing new terms and conditions for the transfer of the suit property.

43. The aforesaid factors cumulatively lead to no other inference than that of complete absence of privity of contract between plaintiff No.6 and the defendant. Nor there is a case of novation of contract. In the circumstances, the endeavour on the part of the plaintiffs to now seek the specific performance of the contract for the reason that the defendant had agreed to convey the suit property in favour of a society of the sitting tenants does not merit acceptance.

44. The upshot of the aforesaid consideration is that the defendant was within its rights in avoiding the agreement as its consent was vitiated by misrepresentation. Consequently, it would be unwarranted to delve into the considerations which are germane for determining the exercise of discretion to grant the specific performance of a contract.

45. One aspect which warrants consideration is the indisputable fact of parting of entire consideration by plaintiff Nos.1 to 5. In the plaint, the plaintiffs have not sought the relief of refund of the consideration. Nonetheless, in my view, the Court is not precluded from ordering the refund of the consideration. Absence of prayer does not constitute an impediment for granting said relief for a substantive reason.

46. Under Section 64 of the Indian Contract Act, when a person at whose option a contract is voidable rescinds it, he is under an obligation to restore the benefit derived under the said contract. The defendant is therefore liable to refund the amount of consideration to plaintiff Nos.1 to 5 which it had indubitably received under the agreement. I am also of the considered view that the defendant should pay interest on the said amount at a reasonable rate.

47. I must note that the defendant had made an endeavour to demonstrate that the amount was received under a miscellaneous head and had not been appropriated. In my view, the question as to how the defendant had dealt with the said amount ought not preclude the Court from awarding interest. It is more so for the status of the defendant as a public sector enterprise. To this extent, the appeal deserves to be allowed. Resultantly, the decree is required to be modified.

Hence, the following order:

: O R D E R :

- (i) The appeal stands partly allowed.
- (ii) The suit stands partly decreed.
- (iii) The defendant shall refund the amount of Rs.4,25,000/- to plaintiff Nos.1 to 5 alongwith simple interest at the rate of 6% p.a. within a period of six weeks from the date of this order.
- (iv) The aforesaid amount be deposited in the trial Court.
- (v) If the aforesaid amount alongwith interest is not deposited within the stipulated period, the amount shall carry interest at the rate of 9% p.a. till payment and/or realization.

- (vi) The decree stands modified to the aforesaid extent.
- (vii) The cross-objection stands dismissed.
- (viii) The parties shall bear their respective costs throughout.
- (xi) Decree be drawn accordingly.
- (x) Interim application(s), if any, stand(s) disposed.

[N. J. JAMADAR, J.]