

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL SUIT NO. 696 OF 2017
WITH
NOTICE OF MOTION NO. 1608 OF 2018
IN
COMMERCIAL SUMMERY SUIT NO. 696 OF 2017**

Vijay Jamnadhhar Agarwal

...Plaintiff/Applicant

Vs.

M/s. Raghavji Anandji & Co.,

...Defendant

Adv. Rohaan Cama a/w Adv. Ayushi Anandpara a/w Adv. Girish Kedia a/w. Adv. Krushang Kedia a/w Adv. Ujawala Karpe i/b. Girish Kedia for Plaintiff/Applicant.

CORAM : ARIF S. DOCTOR, J.

DATE : 25th JANUARY, 2023

P.C. :

1. The present Commercial Suit has been filed inter-alia seeking specific performance of Memorandum of Understanding ("the said MoU") dated 25th April 2000 entered into between the Plaintiff and Defendant the material facts set out in the Plaint are as follows:

(i) Defendant is the owner/landlord in respect of a building Known as Chikal House, Kalbadevi Road, Mumbai 400 002 (hereinafter 'the said property') and the land beneath the same. The Plaintiff was a monthly tenant in

respect of the first floor of the said property. The said property consists of a ground plus two upper floors. The two upper floors were then occupied by tenants.

(ii) Pursuant to negotiations entered into between the Plaintiff and the partners of the Defendant some time in the year 2000, the parties entered into the said MoU. By and under the said MOU the Defendant agreed to lease and/or sell all their right, title and interest in respect of the said property along with the existing tenants/occupants to the Plaintiff for the consideration of Rs.21,00,000/- (Rupees Twenty One Lakhs only). The said MoU also provided that the Defendant would attorn the tenancies of the tenanted premises (1st and 2nd floors) in favour of the Plaintiff. The Defendant further represented to the Plaintiff that the Defendant's title in respect of the said property was marketable and free from all encumbrances and that the Defendant was not prohibited in any manner from dealing with and disposing of the said property. The MOU describes the Plaintiff as "the Purchaser" and the Defendant as "the Vendor".

iii. The Plaintiff at the time of execution of the said MoU paid an amount of Rs.2,00,000/- (Rupees Two Lakhs only) to the Defendant and further agreed to pay the balance amount of Rs.19,00,000/- (Rupees Nineteen Lakhs only) on or before completion of the sale subject to Defendant executing the Conveyance in favour of the Plaintiff and making out the marketable title in respect of the said

property. The said MoU was duly executed by the Plaintiff on the one hand and Defendant through all its partners on the other hand.

iv. After the said MoU was entered into, the Defendant put the Plaintiff in exclusive use, occupation and possession of the said property with a right to negotiate, settled and acquire the tenancy premises of the other tenants occupying the 1st and 2nd floors. On being put into possession, the Plaintiff negotiated with the existing tenants and after making substantial payment acquired right, title and interest of all the tenants in the said property. The other tenants viz. (1) Bombay Cycle and Motor Co., (2) Ramkripa Pandey and two others, and (3) Aangan Traders all surrendered possession of their respective premises to the Plaintiff. Thus the Plaintiff was in exclusive use, occupation and possession of the entire property from where the Plaintiff has been carrying business under the name of M/s. Candy Industries Pvt. Ltd. for the last several years.

v. That Plaintiff has, subsequent to the execution of the said MoU, at the request of the Defendant, paid further sum of Rs.12,00,000/- (Rupees Twelve Lakhs only) to the Defendant. Thus the Plaintiff, has paid the Defendant a total sum of Rs.14,00,000/- (Rupees Fourteen Lakhs only). That The Plaintiff has also discharged all outgoings attached to the said property i.e. electricity dues, collector's bill and other dues attached to the said property. However the property tax in respect of the said property is being paid by the Defendant with

the consent of the Plaintiff.

vi. The Defendant, despite being called upon from time to time to execute and register the sale deed in respect of the said property in favour of the Plaintiff has failed and neglected to do so. That the Plaintiff therefore vide notice dated 14th May 2015 called upon the Defendant to execute and register the Deed of Conveyance in respect of the said property in favour of the Plaintiff. By the said letter the Plaintiff also offered to pay balance sum of Rs.7,00,000/- (Rupees Seven Lakhs only) to the Defendant. Despite due receipt of the said notice, the Defendant failed and neglected to respond the same. The Plaintiff through his Advocate's once again by a letter dated 4th July 2017 called upon the Defendant to execute and register the Deed of Conveyance in respect of the said property to the Plaintiff. However, this request was also not complied with by the Defendant. It was thus that the present suit has been filed.

SUBMISSIONS OF MR. ROHAAN CAMA, LEARNED COUNSEL APPEARING ON BEHALF OF THE PLAINTIFF:-

2. Mr. Cama invited my attention to the following clauses of the said MoU and pointed out therefrom that by and under the said MoU, the Defendant had unequivocally agreed to transfer all its right, title and interest in the said property to the Plaintiff. The said MoU inter-alia provided as under :-

"1. The Party of the First Part shall lease and/or sell and the Party of the Second Part shall take on lease and/or purchase all that piece or parcel of land or ground together with the structure of ground and two upper floors known as "Chikhal House" standing thereon situate on Kalbadevi Road within Greater Mumbai and more particularly described in the Second Schedule hereunder written and delineated by stroked red coloured boundary lines on the plan thereof hereto annexed as Annexure "A" with their appurtenances on "as is where is basis" at or for the lump sum of Rs. 21,00,000/-.

2. The Party of the Second Part shall pay to the Party of the First Part the consideration mentioned in clause 1 hereof in the manner following, that is to say:

(a) a sum of Rs. 2,00,000/- (Rupees Two lacs only) at or before the execution hereof, as and by way of earnest (the payment and receipt whereof the Party of the First Part do and each of them doth hereby admit and acknowledge); and

(b) the balance sum of Rs. 19,00,000/- (Rupees Nineteen lacs only) at or before the completion of sale on the Party of the Second Part accepting the title of the Party of the First Part to the said property;

(c) the payment of the balance consideration on the date of payment as aforesaid shall be of the essence of the contract;

(d) In the event of any delay or default on the part of the Party of the Second Part of the balance consideration as per clause 2(b) above then and in such case, the Party of the Second Part shall be liable, without prejudice to all other rights and remedies of the Party of the First Part hereunder or in law, to pay to the Party of the First part hereunder or in law, to pay to the Party of the First Part interest at the rate of 24% per annum in respect of the balance consideration from the date the same ought to have been paid till the date the same shall have actually been paid.

3. *The Party of the First Part shall within 10 days from the execution hereof deliver or cause to be delivered to the advocates of the Party of the second part on accountable receipt all certified copies of the title deeds of or relating to the said property in possession of the Party of the First Part to enable the advocates of the Party of the Second Part to examine the title of the Party of the First Part thereto. The root of the title of the Party of the First Part shall be from 1977. The party of the Second Part agrees not to raise any requisitions on the title of the Party of the First Part prior to the year 1977.*

4. *The Party of the First have intimated to the Party of the Second Part that there exist on the said property a building and structure known as "Chikhal House" of ground and two upper structure known as "Chikhal House" of ground and two upper floors which is in occupation of six tenants/occupiers viz. M/s. Bombay Cycle & Motor Co., (ground floor, monthly rent Rs. 445/-), Shri. Ramkripal Bholenath Pandey (ground floor, monthly compensation Rs. 121/-) Shri. Rameshwar Bholenath Pandey (ground floor, monthly compensation Rs. 91/-) Shri. Rudranarayan R. Pandey (ground floor, Licensee, monthly compensation Rs. 25/-) (M/s. Jamnadhhar Vijaykumar (first floor, monthly rent Rs. 430/-). The Party of the First Part will not be under any obligation to deliver vacant possession of any portion of said building and structure on the said property and it shall be the obligation of the Party of the Second part to arrive at such agreement and/or arrangement with the tenants/occupiers thereof as to him it may deem proper.*

7. *Upon the Party of the Second Part accepting the title of the Party of the First Part to the said property and upon he paying to the Party of the First Part the balance consideration of Rs. 19,00,000/- (Rupees Nineteen lacs only) referred to in sub-clause (b) of clause 2 hereinabove, the Party of the First Part shall complete the lease/sale of the said property in favour of the Party of*

the Second Part or his nominee or nominees by putting Party of the Second Part or his nominee or nominees in factual possession of the said property as the whole of the said property is occupied by the tenants/occupiers and the Party of the First Part shall call you the said tenants/occupiers to attorn their tenancies in favour of the said Party of the Second Par or his nominee or nominees.

12. The sale shall be completed by the Party of the First Part executing a lease in perpetuity at the nominal rent of Rs. 1/- (Rupees One only) in favour of the Party of the Second Part or his nominees or nominee or in the alternative at the option the Part of the First Part execute a conveyance without obtaining sub-division thereof in favour of the Party of the Second Part or his nominees or nominee.

14. The Party of the Second Part shall be entitled to a proper lease and/or conveyance by the Party of the First Part and xerox certified true copies of all muniments of title relating to the said property in the possession of the Party of the First Part.

15. The Party of the First Part shall get the consent of all persons interested in the said property hereby agreed to be leased and/or sold and shall get all necessary documents duly executed by them. "

3. He submitted that the Plaintiff though not being required to do so in terms of the said MoU had in fact made payment of a sum of Rs.14,00,000/- (Rupees Fourteen Lakhs) to the Defendant towards consideration for the said property. He submitted that the Plaintiff had, pursuant to the understanding between the parties and the said MoU, obtained vacant possession of the entire property and was in fact in sole use, occupation and possession of the said

property. He submitted that all outgoings of the said property were being discharged by the Plaintiff, save and except the property tax which was being paid by the Defendant with the consent of the Plaintiff.

4. He submitted that the Defendant despite being repeatedly called upon had failed and neglected to comply its obligations under the said MoU. He submitted that the Defendant was clearly therefore, trying to resile from its obligations under the said MoU possibly in view of the increases in the property price in the vicinity of the said premises. It was thus that the present Suit came to be filed.

5. Even though, the Writ of summons had been served upon Defendant along with a true copy of the Plaint on 5th October, 2017. The Defendant has chosen not to appear. An Affidavit of Service dated 16th December, 2017, proving service of Writ of Summons and the Plaint upon the Defendant has also been filed. The Defendant despite receipt Writ of Summons, has not entered appearance. The Plaintiff has filed his affidavit in lieu of examination-in-chief dated 18th January, 2023 as also a compilation of original documents in support of the Plaint.

6. To satisfy a query of the Court as to how the Suit would be within the limitation, Mr. Cama invited my attention to Article 54 of the Limitation Act which reads thus:-

"54.	<i>For specific performance of a contract.</i>	<i>Three years</i>	<i>The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."</i>
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Mr. Cama submitted that in matters pertaining to the sale of immovable property time is normally not of the essence. He pointed out that the Suit would be within time since there is no date fixed for performance. He submitted that the limitation if at all ought to be construed from the date of the letter dated 14th May, 2015 by which the Plaintiff called upon the Defendant to perform its obligations. He submitted that the Suit being filed on 2nd August 2017 would therefore within time and in support of his contention Mr. Cama placed reliance upon a judgment of the Hon'ble Supreme Court in the case of ***Rathnavathi and another v/s. Kavita Ganashamdas***¹ in which the Hon'ble Supreme Court considering limitation under Article 54 was pleased to hold as follows :-

"37. Applying the aforesaid principle of law laid down by this Court to the facts of the case at hand, we have no hesitation in holding that the time was not the essence of agreement for its performance and the parties too did not intend that it should be so.

39. Reading both the clauses together, it is clear that time to perform the agreement was not made an essence of contract by the

¹ (2015) 5 SCC 223

parties because even after making balance payment after the expiry of lease period, which was to expire in 1995, Defendant 2 as owner had to make efforts to transfer the land in the name of the plaintiff. That apart, we do not find any specific clause in the agreement, which provided for completion of its execution on or before any specific date.

40. *Since it was the case of the plaintiff that she paid the entire sale consideration to Defendant 2 and was accordingly placed in possession of the suit house, the treat of her dispossession in 2000 from the suit house coupled with the fact that she having come to know that Defendant 2 was trying to alienate the suit house, gave her a cause of action to serve legal notice to Defendant 2 on 6-3-2000 calling upon Defendant 2 to perform her part and convey the title in the suit house by executing the sale deed in her favour. Since Defendant 2 failed to convey the title, the plaintiff filed a suit on 31-3-2000 for specific performance of the agreement.*

41. *Article 54 of the Limitation Act which prescribes the period of limitation for filing suit for specific performance reads as under:*

"54.	<i>For specific performance of a contract.</i>	<i>Three years</i>	<i>The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."</i>
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42. *A mere reading of Article 54 of the Limitation Act would show that if the date is fixed for performance of the agreement, then non-compliance with the agreement on the date would give a cause of action to file suit for specific performance within three years from the date so fixed. However, when no such date is fixed, limitation of three years to file a suit for specific performance would begin when the plaintiff has noticed that the defendant has refused the performance of the agreement."*

7. He also placed reliance upon a judgment of the Hon'ble Supreme Court in the case of ***Ahmadsahab Abdul Mulla (2) (Dead) by Proposed LRs. v/s. Bibijan and others***² and submitted that in the context of immovable properties the reference of time would mean a fixed calendar date. In support of his contention he placed reliance upon paragraphs 9, 10 and 11 of the said Judgment which read as under :-

"9. According to Advanced Law lexicon by P. Ramanatha Aiyar, 9rd Edn., 2005, the word "date" means as follows:

"Date.-(As a noun) The point of time at which a transaction or event takes place; time given or specified time in some way ascertained and fixed; in a deed, that part of the deed or writing which expresses the day of the month and year in which it was made, (2 B1. Commn. 304; Tomlin). In Bement & Dougherty v. Trenton Locomotive, etc., Co.¹⁵ (NJ Law at P. 515) it is said: 'The primary signification of the word date, is not time in the abstract, nor time taken absolutely but, as its derivation plainly indicates, time given or specified time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed but the time of its execution, as given or stated in the deed itself.'

'Where a deed bears no date, or an impossible date, and in the deed reference is made to the "date", that word must be construed "delivery"; but if the deed bears a sensible date, the word "date", occurring in the deed, means the day of the date, and not that of the delivery' (Elph. 123, citing Styles v. Wardle¹⁶;...).

'Date', though sometimes used as the shortened form of 'day of

² (2009) 5 SCC 462

the date', is not its synonym; but means the particular time on which an instrument is given, executed, or delivered (Howard case¹⁷; Armitt v. Breame¹⁸ and Pewtress v. Annan¹⁹, Dowl at pp. 934-35)....

'The word "date" is much more commonly descriptive of a day than of any smaller division of time' (per Stormonth Darling, L.O., Simpson v. Marshall²⁰).

Date means day, so that where a cover note providing for temporary insurance of a motor car expires '15 days after date of commencement' it runs for the full 15 days after the day on which it was to commence (Cartwright v. MacCormack²¹)."

10. *"Fixed" in essence means having final or crystallised form or character not subject to change or fluctuation.*

11. *The inevitable conclusion is that the expression "date fixed for the performance" is a crystallized notion. This is clear from the fact that the second part "time form which period being to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on "when the plaintiff has notice that performance is refused". Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances."*

8. Basis the above, Mr. Cama therefore submitted that in the present case there was no time fixed for performance much less any specific calendar date. He thus submitted that given the failure of the Defendant to perform its obligations the Plaintiff would be entitled to approach this Court for a decree of specific performance.

REASON AND FINDINGS

9. I have heard learned Counsel for the Plaintiff as also considered affidavit of evidence in lieu of examination-in-chief of the Plaintiff and perused the compilation of original documents filed by the Plaintiff. Clause 12 of the MoU equivocally provided as follows:-

“12. The sale shall be completed by the Party of the First Part executing a lease in perpetuity at the nominal rent of Rs. 1/- (Rupees One only) in favour of the Party of the Second Part or his nominees or nominee or in the alternative at the option the Part of the First Part execute a conveyance without obtaining sub-division thereof in favour of the Party of the Second Part or his nominees or nominee.”

10. The Plaintiffs have performed all their obligations under the said MoU. In fact the record sets out that the Plaintiffs even though not required to have made payment of amounts in excess of what was required under the said MoU. The Plaintiff has in his evidence deposed as follows:-

“5. I say that the cheque issued by me for the sum of Rs. 2,00,000/- was not initially deposited by the Defendant. On 28th July, 2000 Ranchhoddas Narangi, Parner of Defendant once again approached me and executed a writing dated 28th July, 2000 confirming the sale of the said property for the sum of Rs. 21,00,000/- against which execution, I again issued a cheque bearing Cheque No. 635231 dated 28.07.2000 for the sum of Rs.2,00,000/- drawn on Bank of Maharashtra and the balance amount of Rs. 19,00,000/- to be paid subject to clear and marketable title and on execution of Conveyance in my favour. The Defendant’s Mr. Rachhoddas Narangi against receipt of the said

payment has signed in my presence. I produce herewith original writing dated 28.07.2000/-, duly signed in my presence. The contents thereof are true and correct. The same may be taken on record and marked as **EXHIBIT-4**. I say that upon receipt of the said cheque of Rs.2,00,000/-, said Ranchhoddas Narangi also signed a Voucher confirming the receipt of Rs. 2,00,000/-. I tender herewith Original Voucher dated 28.07.2000 as Exhibit duly signed by Ranchhoddas Narangi who has signed the same in my presence, the same may be marked as **EXHIBIT-5**. The contents thereof are true and correct. I also produce a Bank Certificate dated 22.09.2022 reflecting the encashment of the said cheque in favour of the Defendant on 5th August, 2000. The same may be taken on record and marked as EXHIBIT-6. The contents thereof are true and correct. Said Bank Certificate issued by the Bank of Maharashtra as per the request made by me in the normal and ordinary course of business.

6. I say that thereafter on 3rd March, 2001, the Defendant again approached my and requested me to pay the Property tax of Rs. 1,28,013/- for which a Cheque bearing No. 733188 dated 03.03.2001 for Rs. 1,28,013/- along with letter dated 03.03.2001 was issued by me. I identify my signature on the said cheque as well as the covering the letter. The contents thereof are true and correct. The said letter dated 03.03.2001 along with cheque for Rs. 1,28,013/- was duly received by Mr. Ranchholddas Narangi on behalf of the Defendant by endorsing on the covering letter. I also identify the signature of Defendant's Ranchhoddas Narangi which may be taken on record I tender herewith letter dated 03.03.2001 as **EXHIBIT-7**. The said Cheque was duly encashed on 7.3.2001 and appropriate entry is reflecting in the Bank Statement at Exh. 6 above.

7. I say that vide my letter dated 3rd March, 2001 I have handed over another Cheque bearing No. 985025 dated 1st March, 2001 for Rs.12,00,000/- drawn on Bank of Maharashtra, Delisle Road, Branch. The said letter was received by Ranchhoddas Narangi under his signature. I tender herewith Original Letter dated 03.03.2001 issued by me as **EXHIBIT-8**. The contents thereof

are true and correct. Said Cheque of Rs. 12,00,000/- was duly encashed.

8. I say that since April, 2000 I was occupying the entire Chikhal House i.e. suit property. I say that the Electricity in the said premises is provided by BEST under Consumer No.362255015. I am producing herewith 6 Electricity Bills reflecting that the electricity given to M/s. Jamnadhhar Agarwal which may be taken on record and collectively marked as EXHIBIT-9.

9. I say that thereafter acquisition of the larger property including the suit property admeasuring 2477.44 Sq. mtrs. was confirmed by a registered Conveyance Deed dated 20.02.2009. Subsequently, I constantly following with the Defendants to register a Conveyance Deed in my favour, however, except the assurances, the Defendants ailed and neglected to do so."

11. The above evidence of Plaintiff has gone unchallenged. From a reading of the Complaint and evidence, it is clear that the Plaintiff have performed and are ready and willing to perform their obligations from the MoU and have always been ready and willing to perform their obligations. This can be no manner of doubt that a) the Plaintiffs have duly complied with all their obligations under the said MoU and b) that the Defendants have also in fact treated the Plaintiffs as owners of the said property pursuant to execution of the MoU. This is evident from the fact that i) Defendants have called upon the Plaintiff to make payment of property tax and ii) that the Plaintiff have been exclusively using and occupying the entire suit property since, April, 2000. In view of this I find that the Plaintiffs therefore, entitled to the decree as prayed for. The evidence of the Plaintiff has gone uncontroverted and there is no

occasion for me to disregard the same. The evidence of the Plaintiff supports the case in the Plaintiff.

12. The Suit is therefore decreed in terms of prayer clauses (a) and (b) which read as under :-

“(a) This Hon’ble Court be pleased to declare that there is a legal, valid and enforceable binding Memorandum of Understanding dated 25.4.2000 entered into and executed by the Defendants in favour of the Plaintiff;

(b) This Hon’ble Court be pleased to pass an order and decree directing the Defendants to specifically perform their obligations under the MoU dated 25.4.2000 by executing and registering the Conveyance in respect of the said property in favour of the Plaintiff upon payment of balance consideration.”

13. It is clarified that the Defendant shall be required to either execute a Deed of Conveyance or a Lease Deed in respect of the said property as more particularly set out in Clause-12 of the MoU. In the event that the Defendant does not comply with prayer clause (b) within a period of 8 weeks from the date of the decree, then the Prothonotary and Senior Master to execute and register the Conveyance in terms of prayer clause (c) which reads as under :-

“(c) In the alternative to prayer (b) above, this Hon’ble court be pleased to appoint the Prothonotary and Senior Master, High Court to appoint an officer to execute and register the Conveyance in respect of the suit property in favour of the Plaintiff upon making the payment of stamp duty and registration charges by the Plaintiff.”

14. It is made clear that the Plaintiff to pay to the Defendant the balance consideration of Rs.7,00,000/- at the time of execution of the Deed of Conveyance. I am not inclined to enhance this amount since none had appeared on behalf of the Defendant when in the normal course the Court were to grant a decree of specific performance.

15. In these circumstances, the Court would well consider and enhance the value given on a sharp appreciation of prices of the immovable properties in the city of Mumbai.

16. The Suit is decreed in above terms.

17. Decree be drawn up accordingly.

18. In view of disposal of the Suit, Notice of Motion No.1608 of 2018 does not survive and the same is also disposed of.

19. Refund of Court fees, if any, as per Rules.

(ARIF S. DOCTOR, J)