

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

**APPEAL NO.171 OF 2010
IN
SUIT NO.1642 OF 1984
WITH
INTERIM APPLICATION [LODGING] NO.8008 OF 2026
IN
APPEAL NO.171 OF 2010**

Kanchan G. Rohira ...Appellant
Versus
Nirman Constructions Pvt. Ltd. ...Respondent

**....
WITH
APPEAL NO.490 OF 2010
IN
SUIT NO.1642 OF 1984**

Suresh Bhagwandas Dhoot ...Appellant
Versus
Kanchan Gopal Rohira
and others ...Respondents

Mr. Shailesh Shah, Senior Advocate a/w. D. Banerji, Niranjan Jagtap i/b. M/s. Niranjan Jagtap & Co. for the Appellant in Appeal No.171/2010
Mr. Simil Purohit, Senior Advocate a/w. Rubin Vakil, Faran Khan, Manish Doshi, Anjali Ajmera i/b. Vimadalal & Co. for the Appellant in Appeal No.490/2010 and for the Respondent No.4 in Appeal No.171/2010.

**CORAM : SARANG V. KOTWAL &
SANDESH D. PATIL, JJ.**

**RESERVED ON : 11th MARCH, 2026
PRONOUNCED ON : 02nd APRIL, 2026**

JUDGMENT: [Per Sarang V. Kotwal, J.]

1. Both these Appeals are decided by this common judgment because they arise out of the same judgment and decree

dated 14.1.2010 passed in Suit No.1642/1984. For convenience, the parties are referred to by their original status in the Suit. Appeal No.171/2010 is preferred by the original Plaintiff Kanchan Rohira and Appeal No.490/2010 is preferred by the original Defendant No.4 Suresh Dhoot.

2. The Suit was filed by the Plaintiff for specific performance of the agreement dated 9.1.1977 executed between the Plaintiff and the Defendant No.1 Nirmal Constructions Private Limited. Initially, the suit was filed only against the Defendant No.1. However, during pendency of the Suit, the Defendant No.1 had informed the Plaintiff that the flat which was the subject matter of the agreement was already sold by the Defendant No.1 to the Defendant No.3 M/s. Ravi Overseas Corporation by an agreement for sale dated 18.11.1981. The Defendant No.2 Girish Jalani had informed that he was an employee of the Defendant No.3 and was in occupation of the said flat in that capacity. The Defendant No.3, in turn, sold the said flat to the Defendant No.4 vide agreement for sale dated 12.5.1986.

3. The Suit was filed by the Plaintiff for specific performance of the agreement for sale dated 9.1.1977. The

learned Judge partly decreed the suit. The prayer for specific performance was dismissed but the decree was passed in terms of prayer clauses (d) and (e) which read as follows :

- “(d) that in the alternative to prayer (c) above and in the event of this Hon'ble Court not granting specific performance as prayed for, the 1st Defendant be ordered and decreed to pay to the Plaintiff a sum of Rs.1,52,250/- as and by way of damages in lieu of the specific performance as per particulars of damage hereto annexed and marked Exhibit 'H'.
- (e) that in the alternative to prayer (c) and (d) above and in the event of this Hon'ble Court not granting specific performance or damages as prayed for, the 1st Defendant be ordered and decreed to pay to the Plaintiff the sum of Rs.10,500/- being the sum already paid by the Plaintiff to the 1^a Defendant as advance towards the price of the said flat with interest at the rate of 12% per annum from the date of payment till return of the same as per particulars hereto annexed and marked Ex. 'I'.”

On the amount of Rs.1,52,250/- interest was directed to be payable @ 6% P.A. from the date of decree till realisation.

4. Aggrieved by the refusal to grant decree of specific performance, the Plaintiff has preferred Appeal No.171/2010 whereas the Defendant No.4 has challenged the finding recorded by the learned Judge on the first three issues where the learned Judge has held that the Plaintiff has proved that she was always ready and willing to perform her part of the obligation under the agreement of sale dated 9.1.1977; that she had proved that the notice of termination dated 30.9.1981 is illegal and bad in law; and that the Defendant Nos.3 and 4 had failed to prove that they were bonafide purchasers without notice.

5. Heard Mr. Shailesh Shah, learned Senior Counsel for the Appellant in Appeal No.171/2010, Mr. Simil Purohit, learned Senior Counsel for the Appellant in Appeal No.490/2010 & for the Respondent No.4 in Appeal No.171/2010.

6. The case of the Plaintiff, as mentioned in the Plaint, in short is as follows :

- i. The Defendant No.1 was a Company incorporated under the Companies Act, 1956 having its registered office at Samuel Street, Mumbai. They were in the business of contractors,

dealers etc.. The Defendant No.3 was a Partnership Firm registered under the Indian Partnership Act, 1932 having its office at Warden Road, Mumbai.

ii. It is mentioned in the plaint that the Defendant No.4 was an individual who had allegedly purchased Flat No.15 in building No.11, on Plot 'G', Rani Sati Nagar, Chincholi, Malad, Mumbai (hereinafter referred to as the 'said flat'). It was further mentioned in the plaint that by an agreement for sale dated 9.1.1977 executed between the Plaintiff and the first Defendant, the Plaintiff agreed to purchase the said flat from the Defendant No.1, as per the terms and conditions set out in the said agreement, for the price of Rs.26,000/- to be paid in the manner set out in that agreement. Said agreement of sale was duly registered under the Indian Registration Act, 1908.

iii. The plaint then referred specifically to Clause Nos.3, 4 and 38 of the said agreement. Clause (3) mentions the schedule of payment, Clause (4) mentions the date of 30.5.1977 on which the possession was to be handed over to the purchaser, and clause (38) provided for the consequences if terms and

conditions were not complied with. Since these three clauses are important, they are reproduced hereinbelow:

3. The Buyer/s hereby agree/s to acquire Flat No. 15th on the 4th Floor of the said building No. 11 (.....) as per the plans and specifications seen and approved by him/her/them with the amenities set out in the list hereto annexed and marked Exhibit 'B' at or for the price of Rs.26,000/- (Rupees Twenty Six Thousand only) which shall be paid in the manner given below:

(a) By the payment of Rs.5000/- (Rupees Five Thousand only) as earnest on the execution of this Agreement;

(b) The Balance of the purchase price in the manner indicated below within seven days (time being essence of the contract) from the date specified herein:-

Rs.5500/- (Rupees Five Thousand Five Hundred only) already paid;

Rs.5000/- (Rupees Five Thousand only) on or before the 7th day of February, 1977;

Rs.5000/- (Rupees Five Thousand only) on or before the 7th day of March, 1977;

Rs.5000/- (Rupees Five Thousand only) on or before the 7th day of April, 1977;

and the balance of Rs.500/- (Rupees Five Hundred only) against delivery of possession of the said Flat/shop/stall/garage/godown/ open space (time being of the essence of the contract)."

"4. The Sellers agree to handover the possession of the said flat/shop/stall/ garage /open space to the Buyer/s on or

before the day of 30.5.77 subject to the availability of cement, steel or other building materials as also subject to any act of God such as earthquake, floods or any other natural calamity, and of enemy war or any other cause beyond the control of the Sellers. Garage in this Agreement shall mean open or covered car-parking place.”

“38. If the Buyer/s neglect/s omit/s or fail/s for any reason whatsoever to pay to the Sellers any of the amounts dues and payable by the Buyer/s under the terms and conditions of this Agreement whether before or after delivery of possession within the time herein contained or referred to the Sellers shall be entitled to enter upon and resume possession of the said flat/shop/stall/godown/garage and open space and everything whatsoever therein and this Agreement shall cease and stand terminated and the earnest money and all other amounts already paid by the Buyer/s to the Seller/s shall stand absolutely forfeited to the Sellers and the Buyer/s shall have no claim for refund or repayment of the said earnest money and/or the said other amounts already paid by the Buyer/s or any part thereof and the Buyer/s hereby agree/s to forfeit all his/her/their rights, title and interest in the said flat/shop/stall/godown/garage and open space and all amounts already paid and in such event the Buyer/s shall also be liable to immediate ejection as trespasser but the right given by this cause to sellers shall be without prejudice to any other rights, remedies and claims whatsoever at law or under this Agreement of Sellers against the Buyer/s”

- iv. It is the further the case of the Plaintiff in the plaint that between 12.9.1976 and 13.10.1976, the Plaintiff had paid Rs.10,500/- to the first Defendant by two cheques as advance amount towards the purchase price of the said flat. The first Defendant had passed three receipts of Rs.5,000/- and Rs.500/- both dated 12.9.1976; and of Rs.5,000/- dated 13.10.1976.
- v. The Plaint further mentions that after execution of the said agreement, some disputes arose in different groups of the first Defendant; and some of the share holders filed a Company Petition No.355/1977 in this Court on 10.6.1977 under Sections 397, 398, 402 and 403 of the Companies Act. On 4.3.1980, the consent terms were filed in the said Company Petition. Those consent terms mentioned the list of agreements for sale entered into between the first defendant and various purchasers. In those consent terms, the said flat concerning the Plaintiff was also mentioned but the purchase price was wrongly mentioned as Rs.31,000/- instead of Rs.26,000/-. After this settlement, the Plaintiff approached

the first Defendant enquiring about the probable date of handing over the possession and the new schedule of payment of the balance purchase price. The first Defendant wrongfully demanded additional amount of Rs.10,000/- out of which Rs.5,000/- was asked to be paid in cash and the Plaintiff was told that unless the additional amount was paid, the first Defendant would not accept any other amount and would terminate the agreement for sale.

- vi. According to the Plaintiff, on several occasions, she offered to pay the agreed balance purchase price but the first Defendant refused to accept it.
- vii. On 7.10.1981, the Plaintiff received a letter dated 30.9.1981 sent by the first Defendant alleging that the Plaintiff had failed and neglected to pay the balance purchase price and to take possession of said flat and vide the same letter unilaterally terminated the said agreement and forfeited the amount of Rs.10,500/- which was already paid by the Plaintiff.

- viii. The Plaintiff responded to this letter vide her Advocate's letter dated 18.11.1981 pointing out that there

was no progress in the construction and, therefore, the payment of balance amount did not arise. The Defendant No.1's right to terminate the agreement was challenged. The Plaintiff enclosed a cheque of Rs.5,000/- towards the purchase price of the said flat along with said letter dated 18.11.1981.

- ix. The Defendant No.1 then responded by its letter dated 26.11.1981 mentioning that the building was completed and possession of all other flats was taken by the respective buyers. It was also mentioned that the flat was already sold to another buyer. The first Defendant returned the cheque of Rs.5,000/- by enclosing it with the said letter.
- x. Vide her Advocate's letter dated 3.12.1981, the Plaintiff again pointed out that that the first Defendant could not have unilaterally terminated the agreement. She demanded the name and address of the purchaser of the said flat and other details. She also enclosed a cheque for Rs.15,500/- as balance purchase price of the said flat.
- xi. The first Defendant through its Advocate's letter dated 15.3.1982 returned said cheque of Rs.15,500/- and informed

that the said flat was sold to somebody else.

- xii. After that the Plaintiff repeatedly requested the Defendant to comply with the terms and conditions of the said agreement for sale. Since there was no compliance by the first Defendant she had filed the suit. During pendency of the Suit, the first Defendant had informed her that the said flat was sold to the third Defendant and then subsequently to the fourth Defendant. And, therefore, the plaint was amended to incorporate the pleadings against the third Defendant and the fourth Defendant. The amended plaint then mentions the subsequent developments during pendency of the suit and as to how the Defendant Nos.1 and 3 entered into agreement in respect of the said flat taking advantage of pendency of the Suit and the Notice of Motion. It was the case of the Plaintiff in her plaint that the transfer of the said flat by the third Defendant to the fourth Defendant was a sham and bogus transaction and has been concocted by the Defendants in collusion only to deprive the Plaintiff of her right and interest in the said flat. It was her specific case that the fourth Defendant all along had knowledge of the

proceedings pending in the Court and had taken possession of the said flat being fully aware of the consequences of his actions and, therefore, the agreement for sale dated 12.5.1986 in favour of the Defendant No.4 was illegal and not binding upon the Plaintiff. It was her case that the third Defendant did not have a valid title to the said flat and, therefore, could not have transferred the said flat to the fourth Defendant.

7. Based on these pleadings, the Plaintiff filed the Suit with various prayers including the prayer for declaration that termination of the agreement for sale dated 9.1.1977 was illegal, bad in law and not binding on the Plaintiff; for declaration that the agreement for sale dated 9.1.1977 was valid, subsisting, and binding on the first Defendant and the main prayer for specific performance against the first Defendant directing him to perform the agreement for sale dated 9.1.1977.

8. In the alternative, as mentioned hereinabove, the Plaintiff has sought sum of Rs.1,52,250/- by way of damages in lieu of the specific performance; and in addition; directions to the first Defendant to pay a sum of Rs.10,500/- with interest @ 12% per

annum from the date of payment till its return as it was the amount paid by the Plaintiff to the first Defendant.

9. By other prayers, the Plaintiff sought declaration that all the subsequent agreements between the Defendant Nos.1, 3 & 4 to be declared as sham and bogus.

10. The Defendant Nos.1, 2 & 3 did not file any written statement. The Defendant No.4 contested the Suit. He filed the written statement. It is his case in the written statement that the Defendant No.4 was a bonafide purchaser of the said flat, without notice by sale deed executed on 12.5.1986 for consideration of Rs.1,40,000/-. It was paid by two cheques i.e. (i) cheque Nos.037121 & 037222 dated 12.5.1986 both drawn on State Bank of Indore, Fort Branch for total amount of Rs.1,30,000/- and (ii) cheque No.037123 for Rs.10,000/- dated 12.7.1986 drawn on State Bank of Indore, Fort Branch, Mumbai. On 28.5.1986, he filed the necessary forms under Section 269AB(2) of the Income Tax Act, 1961 with the agreement for sale to the Income Tax Department. On 22.6.1986, he performed *vastu shanti*. On 11.8.1986 the defendant No.3 addressed a letter to the Secretary of the Society intimating sale of the flat and for transfer of the share certificate in

the name of the Defendant No.4. The share certificate was initially in the name of the Defendant No.3 and it was transferred in the name of the Defendant No.4. The sale deed was duly stamped on 8.9.1986 by paying stamp duty of Rs.14,000/- and it was registered with the Sub-Registrar on 10.9.1986. He was asked to pay the additional stamp duty of Rs.1995/ on 11.1.1996. The sale deed was duly registered and copy of the Index-II was also received from the Sub-Registrar.

11. It was further the case of the Defendant No.4 in the written statement that the suit was barred by limitation. It was also averred that the Plaintiff had failed to perform her part of the performance of the agreement between the Plaintiff and the Defendant No.1. According to the Defendant No.4, the Plaintiff was aware that the share certificate was in the name of the Defendant No.3 and, therefore, if the Plaintiff had any objection she should have raised dispute under the Maharashtra Co-operative Societies Act.

12. It was the specific case of the Defendant No.4 that he was a bonafide purchaser and was in use and occupation of the said flat after getting possession on 12.5.1986. He got married on

15.12.1986 and in the invitation card also the Defendant No.4's address was mentioned in respect of the said flat. The Defendant No.4 annexed copies of the relevant documents to his written statement.

13. On 4.12.2007, when the Suit was listed on board for settlement of issues, an Application was made orally on behalf of the first Defendant for permission to file the written statement. That Application was rejected and the court proceeded to settle the issues which read thus :

- “1) Whether the Plaintiff proves that she was always ready and willing to perform her part of the obligations under the Agreement for Sale dated 9th January 1977?
- (2) Whether the Plaintiff proves that the notice of termination dated 30th September, 1981 is illegal and bad in law as alleged in para 13 of the Plaintiff?
- (3) Whether Defendant Nos.3 and 4 prove that they are bonafide purchasers without notice?
- (4) Whether Defendant No.4 proves that this Honourable Court has no jurisdiction for the reasons alleged in para 7 of his written statement?
- (5) Whether the suit agreement is registered as alleged in paragraph 2 of the Plaintiff?
- (6) What reliefs is the Plaintiff entitled to?
- (7) What order?”

14. After the issues were framed, the evidence of the Plaintiff was recorded. She was cross-examined and then the Defendant No.4 also adduced evidence. He was also cross-examined.

15. The Plaintiff led her evidence through her affidavit-in-chief. It was in consonance with her plaint. The important documents viz. the agreement for sale dated 9.1.1977 and other documents were produced on record. Some further questions were asked in examination-in-chief and then the Plaintiff was cross-examined on behalf of the Defendant No.4. In the cross-examination, the Plaintiff stated that the said agreement was signed by one Muralilal Madanlal Jalan and he had mentioned to her that he was a Director at that time, but, she did not ask for any Board Resolution. She was shown a receipt dated 2.9.1976. She accepted that the payment was towards the flat No.15. She further stated that the advance was paid in respect of Flat No.11, but subsequently she decided to change the flat to flat No.15 which was a bigger flat and was informed that the Defendant No.1 would make necessary adjustment. It was orally agreed. The receipt

dated 2.9.1976 was seemingly signed by Mr. Madanlal Jalan and the receipt dated 12.9.1976 was probably signed by Mr. Muralilal Jalan. The receipt dated 13.10.1976 was signed by Mr. Muralilal Jalan. Rs.5,000/- was paid on 13.10.1976. It was paid before signing the agreement but the Plaintiff was told that the agreement would be prepared. She was asked whether she had made any payment after 13.10.1976. She answered that she went to offer payment but she was told that there were some internal disputes and there was nobody to receive the payments. She denied the suggestion that she did not make the balance payment because she did not have the sufficient money to make those payments. Then she was cross-examined as to whether she addressed any letter when the Defendant No.1 refused to accept the cheques. She answered that she went on the due dates and offered the cheques. She did not expect any dispute to be dragged to the Court.

16. She was asked about whether her Advocate had advised her to file *lis pendens* in respect of the Suit. She stated that she did not know what *lis pendens* was.

17. These are some of the relevant highlights from her cross-examination.

18. The Defendant No.4 led his evidence through his affidavit in the nature of examination-in-chief. It was also on similar lines as that of his written statement. He was cross-examined on behalf of the Plaintiff. He was asked whether he had taken any search in the land records maintained by the Sub-Registrar. He answered that he had checked through a Clerk at the Sub-Registrar's office whether any *lis pendens* was pending and the answer was no. He was asked whether he took search of the land records to verify whether there were verified documents relevant/relating to the said flat. He answered that he had a cheque receipt dated 17.3.1982 regarding registration in favour of Ravi Overseas Corporation and was informed that the receipt was genuine and correct.

19. The sale deed on behalf of Ravi Overseas Corporation was signed by Ravi Dalmia and the registered sale deed was signed by Ravi Dalmia and Shashi Dalmia. He was also asked if the market value of the property was Rs.3,39,500/- but the price was paid for Rs.1,40,000/-. He stated that what was mentioned in the document stood as it is; and that he had paid the stamp duty of Rs.14,000/- as he was told to pay that stamp duty but he did not

remember as to who had told him to pay Rs.14,000/- as stamp duty. He clarified that he paid Rs.1,30,000/- through cheques on 12.5.1986. However, the third cheque was dated 12.7.1986. They were as follows :

- i. Cheque No.37121 for Rs.90,000/- dated 12.5.1986
- ii. Cheque No.37122 for Rs.40,000/- dated 12.5.1986
- iii. Cheque No.37123 for Rs.10,000/- dated 12.7.1986 They were drawn on State Bank of Indore, Fort Branch, Bombay.

20. These are some of the highlights from his cross-examination. Both these parties had produced their respective documents in their evidence.

21. After considering the evidence and the submissions made by the learned counsel for the contesting parties, the learned Judge recorded the findings. The learned Judge referred to the dispute between the two groups of Directors of the Defendant No.1 resulting in the Company Petition. As per the consent terms filed in those proceedings the list of flat purchasers were attached to the consent terms. They were filed on 4.3.1980. Thus, according to the learned Judge at least on that date the suit agreement was subsisting and on that day it was obvious that the construction was

not completed. The letter dated 15.3.1982 sent by the Advocate for the defendant No.1 addressed to the Advocate for the Plaintiff contended that the building was completely constructed by January, 1981 and the occupation certificate was granted on 22.7.1981. The learned Judge observed that the suit agreement for sale related to the immovable property and, therefore, normally the time was not essence of the contract. The conduct of the first Defendant Company showed that the time was never intended to be the essence of the contract. In those circumstances by giving notice dated 30.9.1981, the first Defendant could not have straightway terminated the suit agreement. The learned Judge further observed that the first Defendant ought to have first issued a notice making the time essence of the contract and calling upon the Plaintiff to pay the balance consideration within the time stipulated in the notice. Observing thus, the learned Judge held that the Plaintiff had proved that the notice of termination dated 30.9.1981 was illegal and bad in law.

22. As far as the issue of readiness and willingness was concerned, the learned Judge observed that the first Defendant did not come out with the case in the letter dated 30.9.1981 that the

flat was ready for possession and at any time the Plaintiff was called upon to take the possession. The learned Judge observed that the Plaintiff had offered to pay the balance amount of Rs.15,500/- by cheque sent along with letter dated 3.12.1981 and that it was true that the balance amount could have been forwarded earlier but considering these reasons, the learned Judge held that the Defendant No.4 had failed to prove that the Plaintiff had not shown readiness and willingness to perform her part of the agreement.

23. As far as the question whether the Defendant Nos.3 & 4 were the bonafide purchasers, the learned Judge observed that no evidence was adduced by the Defendant No.3 and it was not proved that the third Defendant was a bonafide purchaser.

24. According to the learned Judge, the Defendant No.4 had not specifically stated that a search was caused to be taken in the office of the Registrar of Assurances before entering into the agreement for sale with the third Defendant and though notice of *lis pendens* was not registered; but since the suit agreement was registered, the Defendant No.4 had constructive notice of the said agreement between the Plaintiff and the Defendant No.1. It was

observed that the Defendant No.4 had not taken precautions which any prudent purchaser ought to have taken and, therefore, that particular issue was held in favour of the Plaintiff meaning thereby the Defendant No.4 had failed to prove that he was a bonafide purchaser without notice.

25. As far as the issue regarding the jurisdiction was concerned, it was observed that the said objection was not pressed by the learned counsel for the Defendant No.4 and, therefore, it was answered against the Defendant No.4 meaning thereby that the learned Judge has jurisdiction to decide the Suit.

26. The issue No.5 was whether the suit agreement was registered. There was no dispute on this aspect as well and, therefore, it was held that the suit agreement was registered. Thus, all these issues from 1 to 5 were held in favour of the Plaintiff but the decree of specific performance was not granted in her favour by the learned Judge by exercising discretion under Section 20 of the Specific Relief Act. The learned Judge observed that the Defendant No.4 established that under the sale deed dated 12.5.1986 he had purchased suit flat for consideration of Rs.1,30,000/-. The payment was proved through the certificate issued by the State Bank of

Indore. On 12.7.1992, the share certificate in respect of the said flat was transferred in favour of the Defendant No.4. On 8.9.1986, he had paid the deficit stamp duty. He had submitted a statement to the Income Tax Authorities regarding such payment. The invitation card at Exhibit-D11 showed that with effect from 22.6.1986 the Defendant No.4 had occupied the said flat after performing the religious ceremony. There were number of documents, such as, the receipts issued by the Co-operative Housing Society, the bills of purchase of television, refrigerator etc. on record. He got married on 15.12.1986. The marriage invitation card at Exhibit-D17 also showed the address of the said flat for the Defendant No.4. In his employment with a College, his residential address was shown in respect of the said flat. The Exhibits-D22 to D27 showed the correspondence received by Defendant No.4 from July, 1986 onward at the address of the said flat. The electricity bill was produced at Exhibit-D28. The ration card was taken at the same address. Thus, it was observed that there were voluminous documents to show that from May 1986 the Defendant No.4 was in possession of the said flat which was purchased by him for valuable consideration of Rs.1,30,000/-. The learned Judge

observed that as against this background, the Plaintiff offered to pay the balance consideration of Rs.10,500/- two months after the notice of termination was served on the Plaintiff. In this background, the learned Judge observed that this was a case where discretion under Section 20 had to be exercised in favour of the fourth Defendant by not granting a decree for specific performance.

27. However, the learned Judge considered the alternate prayer for specific performance. The Plaintiff had shown that the market value of the flat in the locality was Rs.350/- per square feet when the Suit was filed. The area was 435 sq. ft. and, therefore, she had sought decree in the sum of Rs.1,52,250/- as the alternative. In addition, the Plaintiff had also prayed for return of consideration of Rs.10,500/- with interest @ 12% per annum. Both these claims made by the Plaintiff were accepted and the impugned decree was passed.

Submissions of learned Senior Counsel Shri Shah appearing for the Plaintiff :

28. Shri Shah submitted that the learned Judge erred in not granting the decree for specific performance in favour of the Plaintiff. The evidence shows that even the discretion was not

properly exercised. The electricity bills in favour of the Defendant No.4 were only upto the year 2000 and thereafter upto 2009 there was no consumption of electricity which meant that the Defendant No.4 was not residing in said flat and, therefore, the learned Judge ought to have held that the Plaintiff had suffered more hardship than the Defendant No.4. The evidence shows that the price of the flat was much higher, but it was sold only at the half price as distress sale to the Defendant No.4.

29. Shri Shah submitted that the learned Judge has not given cogent reasons for exercising his discretion in favour of the Defendant No.4. The Defendant No.4 was aware of the past transactions but if it is held that he was not knowing about the past transaction he was not diligent and, therefore, this transaction lacks bonafide. If it was held that he ought to have enquired in the Sub-Registrar's office about the registered document for agreement for sale it would mean that he deliberately did not do so because he knew about the existence of the earlier transaction between the Plaintiff and the Defendant No.1.

30. Shri Shah submitted that the learned Judge erred in holding that the discretion had to be exercised in favour of the

Defendant No.4. It was overlooked that the Defendant No.4 had not pleaded hardship neither he had led any evidence in that behalf. Shri Shah relied on the observations of the Hon'ble Supreme Court in the case of **A. Maria Angelena (Dead) and others Vs. A.G. Balkis Bee**¹ in support of his contention. He also relied on the observations of the Hon'ble Supreme Court in the case of **Prakash Chandra Vs. Narayan**² wherein it was observed that in the case where no issue relating to the hardship was framed and, therefore, though in a case of specific performance hardship is a good defence, the benefit can be given to the Defendant provided such defence is taken by the Defendant and evidence in support of such defence is brought on record.

31. Shri Shah also relied on the judgment of the Hon'ble Supreme Court in the case of **Sunkara Lakshminarasamma (Dead) by Legal Representatives Vs. Sagi Subba Raju and others**³ wherein it was observed that when the hardship was neither pleaded nor proved and when no issues were raised relating to the hardship before the trial Court it cannot be allowed to be raised for the first time before the Appellate Court.

1 (2002) 9 SCC 597

2 (2012) 5 SCC 403

3 (2019) 11 SCC 787

32. Shri Shah submitted that the Defendant No.4 cannot be termed as a bonafide purchaser without notice. Burden of proving this defence squarely rested on the shoulder of such subsequent transferee as the Defendant No.4. In support of this contention, Shri Shah relied on the observations of the Hon'ble Supreme Court in the case of **Jagan Nath Vs. Jagdish Rai and others**⁴.

33. Shri Shah submitted that the Hon'ble Supreme Court in the case of **Prakash Chandra Vs. Angadlal and others**⁵ had observed that ordinarily the specific performance should be granted; it ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. In the present case granting damage of Rs.1,52,000/- can hardly be described as an adequate compensation.

34. Shri Shah submitted that the Defendant No.4 was neither a bonafide purchaser nor it can be said that he was without notice. He relied on the definition of the phrase "a person who is said to have notice" as mentioned under Section 3 of the Transfer of Property Act, 1882 which was the interpretation clause. Shri

4 (1998) 5 SCC 537

5 (1979) 4 SCC 393

Shah submitted that as per that interpretation, the Defendant No.4 had constructive notice of the agreement between the Plaintiff and the Defendant No.1 because it was a registered document.

35. Shri Shah referred to Section 114 of the Evidence Act, and in particular to illustration (c), to submit that the Court may presume that judicial and official acts have been regularly performed. Hence there was a presumption that all the steps while registering the suit agreement were completed by the Registrar's office.

Submissions of learned Senior Counsel Shri Simil Purohit, appearing for the Defendant No.4:

36. Shri Purohit submitted that the Plaintiff had not shown readiness and willingness to perform her part of the contract. She had not offered to make the balance payment within the time schedule. The agreement itself mentions that time was essence of contract. He submitted that when the termination notice was received by the Plaintiff, even at that time she did not offer to pay the entire balance amount but offered only Rs.5,000/- and after about two months she offered to pay the balance amount. Hence, it cannot be said that there was readiness and willingness on her part

to perform her part of the agreement.

37. Shri Purohit relied on the judgment of the Hon'ble Supreme Court in the case of **K.S. Vidyanandam and others Vs. Vairavan**⁶ wherein it was observed that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect; and in the present case it was specifically provided so in the suit agreement.

38. Shri Purohit submitted that there was legal bar in granting decree of specific performance in view of Section 19(1) of the Specific Relief Act. He submitted that the Defendant No.4 was a bonafide purchaser without notice. The learned Judge himself had observed that the Defendant No.4 had paid the consideration of Rs.1,30,000/- for the flat and was in possession of the said flat since May, 1986. The share certificates were transferred in his name. There was no mention of the Plaintiff's name in the share certificates or in the record of the co-operative housing society. There was sufficient evidence on record to show that he had occupied the flat from 1986 onwards. He submitted that though for some period he could have resided in a different accommodation that does not mean that he was not a bonafide purchaser of the

⁶ (1997) 3 SCC 1

flat.

39. Shri Purohit submitted that he could not be said to have had constructive notice of the suit agreement. There was nothing on record to show that the requirements mentioned under Section 3 of the Transfer of Property Act and in particular its proviso regarding the notice was satisfied. There is nothing to show that the registration of agreement for sale between the Plaintiff and the Defendant No.1 was entered into in Index-II. Admittedly the *lis pendens* notice was not registered and, therefore, there was no way for the Defendant No.4 to have known about the said contract.

40. Shri Purohit submitted that the Defendant No.4 was entitled to contend that he was a bonafide purchaser without notice to contest the said issue held in favour of the Plaintiff; without filing a formal document in the nature of cross-objection.

41. In support of this contention, he relied on the judgment of the Hon'ble Supreme Court in the case of **Ravinder Kumar Sharma Vs. State of Assam and others**⁷ and **S. Nazeer Ahmed Vs. State Bank of Mysore and others**⁸

⁷ (1999) 7 SCC 435

⁸ (2007) 11 SCC 75

42. Shri Purohit submitted that the three conditions mentioned in the proviso of clause (3) 'a person is said to have notice' under the Transfer of Property Act has to be fulfilled before it is held that the Defendant No.4 had constructive notice. He relied on the judgment of the Single Judge Bench of the Allahabad High Court in the case of **Dinesh Chandra Vs. Santosh Kumar and others**⁹. He submitted that the SLP filed against that judgment was dismissed.

43. Shri Purohit also relied on the observations of the Hon'ble Supreme Court in this behalf in the judgment of **Dattatreya Shanker Mote and others Vs. Anand Chintaman Datar and others**¹⁰

44. Shri Purohit submitted that Section 20 of the Specific Relief Act is in two parts. Sub-section (1) is wider. Sub-section (2) gives illustrations but they are not exhaustive and, therefore, the discretion envisaged under Section 20(1) is much wider and that discretion is not limited by illustrations under Section 20(2). Therefore, though it is laid down that the hardship had to be pleaded and proved and issues had to be framed, all that relates only to Section 20(2) of the Specific Relief Act.

⁹ Decided on 8.5.2024 in Second Appeal No.350/2024 (Allahabad High Court)

¹⁰ (1974) 2 SCC 799

45. He submitted that the observations of the Hon'ble Supreme Court in the case of **Azhar Sultana Vs. B. Rajamani and others**¹¹ are applicable to the present case. It was observed that it was a well settled principle of law that, not only the original vendor but also the subsequent purchaser would be entitled to raise a contention that the Plaintiff was not ready and willing to perform his part of the contract. It was also observed that grant of decree for specific performance of contract was discretionary. In that case before the Hon'ble Supreme Court, the Respondents were living in the property for quite some time in their own right and, therefore, the Hon'ble Supreme Court had declined to pass the order forcing them to vacate the property. In the present case, the Defendant No.4 is in occupation of the said flat from 1986 and it would not be proper to pass an order asking him to vacate the premises.

46. Shri Purohit submitted that the field occupied by Section 20(1) is unoccupied by the three cases mentioned in the illustrations. In support of this submission, he also relied on the observations of the Hon'ble Supreme Court in the case of **Mademsetty Satyanarayana Vs. G. Yelloji Rao and others**¹²

11 (2009) 17 SCC 27

12 1964 SCC OnLine SC 33

47. Shri Purohit submitted that in an Appeal, the scope for interference with the exercise of discretion is limited. He relied on the observations of the Hon'ble Supreme Court in the case of **Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and another**¹³. The view taken in the present case is a plausible view insofar as the exercise of discretion is concerned. The damages, as prayed for in the suit, were fully granted.

48. In response, Shri Shah reiterated his stand taken in the main arguments. In addition, he submitted that no pleading was taken about the registered suit agreement not being entered in the Index-II Register. The fact that the Registrar had returned the original documents would indicate that requirement of Sections 52 to 60 of the Registration Act were complied with. He further submitted that the observations made in the judgments cited by Shri Purohit were distinguishable on facts.

Reasons and conclusions :

49. Based on the above discussion and the submissions made by both learned counsel, following points arise for our determination :

¹³ (1977) 2 SCC 457

- i. Whether the Plaintiff proved that she was always ready and willing to perform her part of the obligations under the agreement for sale dated 9.1.1977.
- ii. Whether the finding recorded that the Plaintiff has proved that the notice of termination dated 13.9.1981 was illegal and bad in law; is correct.
- iii. Whether Defendant No.4 is a transferee for value, who has paid his money in good faith and without notice of the original contract, and whether Defendant No.4 can raise an objection to a finding to the contrary without filing a formal memo of cross-objection.
- iv. Whether the discretion exercised in favour of the Defendant No.4 while denying the relief for specific performance of the agreement for sale dated 9.1.1977 to the Plaintiff is proper.
- v. Whether the decree needs to be interfered with.

50. At the outset, it must be noted the three issues framed and answered during the suit do not survive anymore. The issue No.3 was whether the Defendant Nos.3 & 4 proved that they were bonafide purchasers without notice. The Defendant No.3 had not contested the suit and, therefore, the finding recorded against

Defendant No.3 cannot be interfered with. The issue No.4 was regarding the jurisdiction of the Court to try the Suit was held in favour of the Plaintiff . That issue is not seriously challenged before us. Issue No.5 was whether the suit agreement was registered. There was no dispute about the suit agreement having been registered. Therefore, these issues need not be considered in the present Appeals.

51. The first point needs to be determined as to whether the Plaintiff proved that she was always ready and willing to perform her part of obligation under the agreement for sale dated 9.1.1977. Learned Senior Counsel for the Defendant No.4 submitted that she had not paid the installments within the time schedule. Clause (3) of the agreement mentions the schedule of payment of the purchase price. The agreement mentions that the price of the flat was fixed at Rs.26,000/-, out of which payment of Rs.5000/- as earnest money and payment of Rs.5,500/- were accepted as already paid. Thus, the Plaintiff had paid Rs.10,500/-. The next payment was due on 7.2.1977 for Rs.5000/-, Rs.5000/- on 7.3.1977, Rs.5000/- on or before 7.4.1977 and balance of Rs.500/- against possession of the flat. Said clause mentions that

time was essence of the contract. Shri Purohit, therefore, submitted that the Plaintiff had not made the payment of the balance amount within the time schedule and hence she has not proved that she was ready and willing to perform her part of the agreement. He further submitted that at the first instance when the letter of termination was given to the Plaintiff in 1981 even then she had not offered to make the entire balance amount. She had sent a cheque of only Rs.5000/-. Only on the second occasion, she had sent a cheque of the balance amount as per her own case. Therefore, her case that she was ready and willing to perform her part of the agreement cannot be accepted by the Court. As against these submissions, Shri Shah had pointed out that there was litigation in the form of Company Petition because of the dispute *inter se* between the Directors of the first Defendant Company. There was nobody to accept the balance payment. The time in the schedule was meaningless because possession was also not given on the scheduled date.

52. Having considered the evidence on record, we are inclined to agree with the submissions made by Shri Shah that it was not the Plaintiff's fault that the balance payment was not paid

to the Defendant No.1. The said agreement itself mentions that the possession of the flat was to be delivered on 30.5.1977. It is an accepted fact that by that time there was a dispute between the Directors and the correspondence shows that construction ultimately was completed only in the year 1981. The evidence is led by the Plaintiff that when she went to the office of the Defendant No.1 for making the balance payment nobody accepted it. Her case finds support from the circumstances and the evidence on record.

53. Shri Purohit relied on the judgment of the Hon'ble Supreme Court in the case of **K.S. Vidyadnam** to support his contention. In the said judgment, the Hon'ble Supreme Court has observed that it had been consistently held by the Courts in India that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. Shri Purohit submitted that in the present case clause (3) specifically provided that time was the essence of the agreement. However, as discussed above, the Defendant No.1 also did not adhere to the schedule and, therefore, by the conduct of the parties it was clear that the schedule to make

payment had lost its significance. In this background, it cannot be said that since the Plaintiff did not make payment as per the schedule mentioned in the contract she failed to prove that she was ready and willing to perform her part of the agreement. Hence, we are of the view that the Plaintiff has proved that she was ready and willing to perform her part of the agreement. The finding to that effect is correctly recorded in the impugned judgment. On the same reasoning the learned Judge has rightly decided the issue No.2 that the Plaintiff has proved that the notice of termination dated 30.9.1981 is illegal and bad in law. We do not find any reason to take a contrary view on this issue.

54. The next question which needs to be decided is whether the Defendant No.4 proved that he is a bonafide purchaser of the said flat by paying value and without notice of the prior agreement. This issue is important because the Defendant No.4 is claiming protection under Section 19 sub-section (b) of the Specific Relief Act, 1963 which provides that the specific performance of a contract may be enforced against either party to the contract or any person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in

good faith and without notice of the original contract.

55. Shri Shah relying on the observations of the Hon'ble Supreme Court in the case of **Jagan Nath** submitted that the burden to prove that the Defendant No.4 was a bonafide purchaser for value without notice of the suit agreement squarely rested on the shoulder of such subsequent transferee. However, in the same judgment the Hon'ble Supreme Court has further observed that once the evidence is led by both the sides, the question of initial onus of proof pales into insignificance and the Court will have to decide the question in controversy in the light of the evidence on record.

56. Therefore, it is necessary to decide whether the Defendant No.4 falls in such category to claim protection from enforcement of specific performance of the suit agreement. The first hurdle which the Defendant No.4 will have to cross is to show whether he can raise such contention without there being a specific cross-objection made in that regard.

57. The Defendant No.4 has filed his own Appeal i.e. Appeal No.490/2010 against the same impugned judgment and order. In any case the Defendant No.4 was entitled to attack an

adverse finding in the impugned judgment and order without filing cross-objection. The position in law is made clear by the Hon'ble Supreme Court in the case of **Ravinder Kumar Sharma**. In paragraph-23, the Hon'ble Supreme Court has specifically held thus:

“23. We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the extent the lower court had dismissed the suit against the defendant-respondent. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory.”

. In the present case, therefore, Shri Purohit is right in submitting that an adverse finding that the Defendant No.4 is not a bonafide purchaser without notice can be attacked by the Defendant No.4 before us. This position is further clarified in the case of **S. Nazeer Ahmed** in paragraph-7 as follows :

“7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order 41 Rule 22 of the Code, could not challenge the finding of the trial court that

the suit was not barred by Order 2 Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negated to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned Counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvass the correctness of the finding on the bar of Order 2 Rule 2 rendered by the trial court.”

58. In this background, we can consider whether there is evidence to show that the Defendant No.4 was a bonafide purchaser and had paid value for the flat and was without notice of the suit agreement.

59. The learned Judge has held that the Defendant No.4 failed to take necessary precautions to find out registration of the

suit agreement. In paragraph-20 of the impugned judgment, the learned Judge observed that the suit agreement was lodged for registration on 14.3.1977 and it was registered on 15.12.1978. It was further observed that the Defendant No.4, in his evidence, had not specifically stated that search was caused to be taken in the office of the Registrar of Assurances before entering into an agreement for sale with the Defendant No.3. The Defendant No.4, in his cross-examination, had answered that he had checked up with the Clerk of Sub-Registrar's office whether any *lis pendens* was registered and the answer was in the negative and when he was asked as to whether he had taken any search of the land records to verify whether there were any registered documents executed relating to the said flat, his answer was that he had checked the receipt dated 17.3.1982 regarding registration of the agreement for sale in favour of the Defendant No.3 and he had found the receipt to be genuine. The learned Judge observed that while it was true that the notice of *lis pendens* was not registered but since the suit agreement was registered, the Defendant No.4 had constructive notice of the suit agreement and that it was not the case of the Defendant No.4 that he had caused regular search

to be taken in the office of the Sub-Registrar of Assurances. The learned Judge observed that the Defendant No.4 had not taken precautions which any prudent purchaser ought to have taken. And, therefore, it was held that he was not a bonafide purchaser. Shri Shah supported those observation and relied on the observations of the Hon'ble Supreme Court in the judgments in the cases of **Ram Niwas (Dead) through L.Rs. Vs. Bano and others**¹⁴ and **Suraj Lamp and Industries Private Limited through Director Vs. State of Haryana and another**¹⁵. He relied on Section 3 of the Transfer of Property Act, 1882 defining the term "a person is said to have notice". Shri Shah submitted that in **Ram Niwas's** case, the Hon'ble Supreme Court had observed that the notice could be (i) actual, (ii) constructive, or (iii) imputed. In the present case, according to Shri Shah the Defendant No.4 had constructive notice.

60. Shri Shah further relied on the observations of the Hon'ble Supreme Court in the case of **Suraj Lamp & Industries Private Limited** and in particular paragraphs-17 & 18 therein, which read thus:

"17. Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect

¹⁴ (2000) 6 SCC 685

¹⁵ (2009) 7 SCC 363

any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

18. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified.”

61. In this context it is necessary to see what is meant by “a person is said to have notice” as per the Transfer of Property Act, 1882, which provides thus :

3. Interpretation clause

In this Act, unless there is something repugnant in the subject or context,--

XXXXXX

XXXXXX

“a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I--Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that--

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian. Registration Act, 1908 (16 of 1908) and the rules made thereunder,
- (2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and
- (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.--Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.--A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

PROVIDED that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.”

62. Admittedly, when the Defendant No.4 entered into a transaction with the Defendant No.3, the Plaintiff was not in possession of the said flat. Therefore, she cannot be said to have

had constructive notice as per Explanation II.

63. As far as Explanation I is concerned, the proviso to that explanation is important. There are three different definite steps mentioned in that proviso. The first requirement is that the instrument has to be registered, the second requirement is that the registration is completed in the books kept under Section 51 of that Act, and the third requirement is that the particulars regarding the transaction to which the instrument relates have been correctly entered in the relevant book under Section 55 of the said Act.

64. In the present case, the Plaintiff has proved only the first requirement that the suit agreement was registered but the other two requirements are not proved. They needed to be proved separately. The same view is taken by a Single Judge Bench of the Allahabad High Court in the case of **Dinesh Chandra**. Paragraphs- 26, 27 and 28 of the said judgment read thus:

“26. It is pertinent to note that Explanation-I is attracted only when the conditions stipulated in First Proviso to the Explanation-I are complied with, which are:-
(1) the instrument has been registered and its registration has been completed in the manner prescribed by the Indian Registration Act, 1908 and the rules made thereunder;

(2) the instrument or memorandum has been duly entered or filed, as the case may be in books kept under Section 51 of that Act and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

27. In the present case, the first condition enumerated in the proviso i.e. registration of agreement to sell has been completed in the manner provided by the Registration Act and the Rules framed thereunder are complied with. Condition Nos. 2 and 3 enumerated in First Proviso are not fulfilled in the instant case as is evident from the perusal of the plaint since the Plaint reveals that the pleading in the plaint is silent in respect to the compliance of condition Nos. 2 and 3 enumerated in the First Proviso to Explanation-I. Fulfilment of the above three conditions is necessary to seek the benefit of Explanation-I to the expression "a person is said to have notice". In other words, to seek the benefit of the expression "a person is said to have a notice", the plaintiff has to establish that the above three conditions enumerated in the proviso to Explanation-I have been fully complied with.

28. There is no pleading in the plaint that the instrument or memorandum had been duly entered and filed in the books kept under Section 51 of the Registration Act, and particulars of the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of the Registration Act. Unless three conditions enumerated in the First

proviso to Explanation-I are complied with and established on record that after the due registration of the instrument, the entries have been made as contemplated under Sections 51 and 55 of the Registration Act, no benefit of the expression "a person is said to have notice" in the interpretation clause defined in Section 3 of the Act 1882, in the opinion of the Court, can be extended to a party that on registration of an instrument, a person is supposed to have notice about such fact. Thus, for the aforesaid reason, the submission of the counsel for the appellant regarding Explanation -I to the expression "a person is said to have notice" is devoid of merits and is rejected."

65. Similar view is taken by the Hon'ble Supreme Court in the case of **Dattatreya Shanker Mote**. The relevant portion from Paragraph-5 of the said judgment reads thus :

"5. The Explanation in Section 3 of the Act which provides for fixing a party with constructive notice in respect of registered transactions, contains a proviso to Explanation I that in order to amount to constructive notice, it is necessary that (1) the instrument has been registered and its registration completed in the manner required by the Registration Act and the Rules made thereunder, (2) the instrument has been duly entered or filed in books kept under Section 51 of the Registration Act, and (3) the particulars regarding the transaction to

which the instrument relates have been correctly entered in the indices kept under Section 55, of that Act. It further- observed that though in some cases by legal fiction, constructive notice may be imputed to a party, in the case before it, it cannot be imputed to the plaintiff (respondent 14),. since the third condition required for the purpose was not satisfied. We would, therefore, accept the finding of both the Courts that respondent No.,14 had no notice of the prior charge created by the decree.”

66. In the present case before us also the requirement Nos.2 & 3 are not proved to be fulfilled by the Plaintiff and hence it is not possible to hold that the Defendant No.4 had constructive notice. To that extent, the finding recorded by the learned Judge is required to be set aside.

67. The evidence shows that the Defendant No.4 has paid amount of Rs.1,30,000/-. There is no dispute about such payment. The Defendant No.4's name was entered into the records of the society subsequent to the entry in the name of the Defendant No.3. The evidence shows that right from the year 1986, he was continuously in possession of the said flat, at least till 2000. His wedding card and other correspondence shows the same address.

He had shown payment for the said flat in his Income Tax records. Thus, the Defendant No.4 has proved that he is a transferee for value who has paid his money in good faith and without notice of the earlier contract. It is of course undisputed that the Plaintiff had not registered the *lis pendens* notice.

68. The next question is whether the learned Judge has properly exercised his discretion. Shri Shah submitted that the learned Judge erred in holding all the points in favour of the Plaintiff, but, not granting decree of specific performance by exercising his discretion under Section 20 of the Specific Relief Act. To consider this submission, it is necessary to refer to the observations in the impugned judgment in that behalf. The learned Judge observed that there was voluminous documentary evidence to show that from May, 1986 the Defendant No.4 was in possession of the said flat which was purchased for valuable consideration of Rs.1,30,000/- and as against that the Plaintiff had offered balance consideration after two months from the date on which the notice of termination of the suit agreement was served on the Plaintiff. The Defendant No.4 was in possession of the said flat since 1986 onwards after payment of Rs.1,30,000/- and,

therefore, on these reasonings the learned Judge observed that the discretion under Section 20 will have to be exercised in favour of the Defendant No.4 by not granting decree of specific performance. Shri Shah submitted that the learned Judge erred in exercising the discretion in favour of the Defendant No.4 and not in favour of the Plaintiff. He submitted that the Defendant No.4 had not pleaded hardship at all and no issue was framed and, therefore, it was not permissible to exercise the discretion on that basis in favour of the Defendant No.4. In support of this contention, Shri Shah relied on the observations of the Hon'ble Supreme Court in the cases of **A. Maria Angelena and Prakash Chandra Vs. Narayan.**

69. As against that, Shri Purohit submitted that Section 20 sub-sections (1) & (2) operate in different fields. Whereas Section 20(2)(b) refers to hardship for which pleadings and issues may be necessary. However, sub-section (1) of Section 20 is wider and is not bound by the illustrations under sub-section (2). In support of its case, he referred to the observations of the Hon'ble Supreme Court in the case of **Sardar Singh Vs. Krishna Devi and another**¹⁶.

70. To test both these rival contentions, it is necessary to

16 (1994) 4 SCC 18

consider the provisions of Section 20 of the Specific Relief Act, 1963. Section 20 before amendment reads thus:

“20. Discretion as to decreeing specific performance.—(1)

The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the

meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

- (3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.
- (4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.”

71. The Hon’ble Supreme Court in the case of **Sardar Singh** makes distinction between sub-section (1) and sub-section (2) of the Section 20 of the Specific Relief Act. Paragraph-14 of that judgment reads thus :

- “14. The next question is whether the courts below were justified in decreeing the suit for specific performance. Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such

relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract.”

72. In this case, we find that the learned Judge has properly exercised his discretion in favour of the Defendant No.4 and, therefore, it would not be proper to substitute our discretion at this stage. We may note here that even in our opinion, it would not be proper to pass the decree thereby evicting the Defendant No.4 from the said flat which he is occupying since 1986.

73. A similar view was expressed by the Hon’ble Supreme Court in the case of **Azhar Sultana**. While deciding the Appeal on 17.2.2009, the Hon’ble Supreme Court observed that grant of decree for specific performance of contract is discretionary. The contesting Respondents were living in the property since 1981 in their own right. There was absolutely no reason as to why they should be forced to vacate the said property at that juncture.

In the present case also, as mentioned earlier, the Defendant No.4 is occupying said flat since May, 1986.

74. In the case of **Mysore State Road Transport Corporation**, the Hon'ble Supreme Court observed that it was only if the discretion not having been exercised by the lower Court in the spirit of the statute or fairly or honestly or according to the rules of reason and justice, that the order passed by the lower Court can be reversed by the superior Court. In the present case, we do not have any such reason to reverse the discretion exercised by the learned Judge in favour of the Defendant No.4.

75. As far as the damages to the Plaintiff are concerned, we see no reason to interfere with that part of the decree. Those damages are given based on the sound reasoning.

76. Hence, we answer the points for determination as follows :

- i. The Plaintiff has proved that she was always ready and willing to perform her part of the obligations under the agreement for sale dated 9.1.1977.

- ii. The Plaintiff has proved that the notice of termination dated 13.9.1981 was illegal and bad in law.
- iii. The Defendant No.4 is a transferee for value, who has paid his money in good faith and without notice of the original contract, and Defendant No.4 could raise an objection to a finding to the contrary without filing a formal memo of cross-objection.
- iv. The discretion exercised in favour of the Defendant No.4 while denying the relief for specific performance of the agreement for sale dated 9.1.1977 to the Plaintiff is proper.
- v. The decree needs no interference.

77. With the result, the decree passed by the learned Judge dated 14.1.2010 passed in Suit No.1642/1984, is confirmed. No order as to costs. The decree be drawn accordingly.

78. Appeal No.171/2010 is dismissed and Appeal No.490/2010 is disposed of in the aforesaid terms.

(SANDESH D. PATIL, J.)

(SARANG V. KOTWAL, J.)

79. At this stage, learned Senior Counsel appearing for the Appellant in Appeal No.171/2010 submits that the interim order dated 29.3.2010 be continued for a period of six weeks. Learned counsel for the Respondent No.4 opposes this prayer. However, considering that the interim relief was operating for a number of years, we are inclined to accept that request. Therefore, the interim order granted vide order dated 29.3.2010 is extended by a further period of six weeks from today.

(SANDESH D. PATIL, J.)

(SARANG V. KOTWAL, J.)

Deshmane (PS)

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