IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF APRIL, 2026

PRESENT

THE HON'BLE MR. JUSTICE JAYANT BANERJI

AND

THE HON'BLE MR. JUSTICE K. V. ARAVIND

REGULAR FIRST APPEAL NO. 1661 OF 2012 (SP)

BETWEEN:

SRI.GOPALAPPA,
AGED ABOUT 61 YEARS,
S/O MUTHAPPA,
RESIDING AT NO.765/A,
15TH MAIN, 7TH CROSS,
BTM LAYOUT, MICO LAYOUT,
BANGALORE-560 076.

...APPELLANT

(BY SRI B.R.VISHWANATH., ADVOCATE)

AND:

1. MR.DWARAKANTH,
   AGED ABOUT 49 YEARS,
   SON OF B.VISVESWARAIAH,

2. MRS.GAYATHRI DWARAKANATH,
   AGED ABOUT 45 YEARS,
   WIFE OF DWARAKANATH,

   BOTH ARE RESIDING AT
   NO.17/1, 4TH MODEL HOUSE STREET,
   BASAVANAGUDI,
   BANGALORE-560 004.

3. MR.V.K.MOHAMMED ISMAIL,
   AGED ABOUT 51 YEARS,
   SON OF LATE HABIBULLAH AND K.CHOTIBI,
   RESIDING AT NO.45, ALABADAR HOUSE,
   2ND CROSS, KHBCS LAYOUT,
   BANGALORE-560 078.

4. MR.ARUN CHAWLA,
   AGED ABOUT 27 YEARS,

SON OF MOHAN CHAWLA,
RESIDING AT NO.79/124,
6TH MAIN, 36TH CROSS,
5TH BLOCK, JAYANAGAR,
BANGALORE-560 041.

…RESPONDENTS

(BY SRI.S.GANGADHAR AITHAL., ADVOCATE FOR C/R4;
R1 AND R2 SERVED UNREPRESENTED;
V/O DTD 07.10.2024 NOTICE TO R3 HELD SUFFICIENT)

THIS REGULAR FIRST APPEAL IS FILED U/SEC.96 R/W ORDER XLI RULE 1 OF CPC AGAINST THE JUDGMENT AND DECREE DATED 04.08.2012 PASSED IN O.S.NO.9153/2004 ON THE FILE OF THE V ADDITIONAL CITY CIVIL JUDGE, BANGALORE, PARTLY DECREEING THE SUIT FOR SPECIFIC PERFORMANCE ETC.

THIS REGULAR FIRST APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT COMING ON FOR 'PRONOUNCEMENT OF JUDGMENT' THIS DAY, **JAYANT BANERJI J**., MADE THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE JAYANT BANERJI
AND
HON'BLE MR. JUSTICE K. V. ARAVIND

CAV JUDGMENT

(PER: HON'BLE MR. JUSTICE JAYANT BANERJI)

This is the plaintiff's appeal seeking modification of the judgment and decree dated 04.08.2012 passed by the 5th Additional City Civil and Sessions Judge, Bangalore, in OS No. 9153/2004 and to decree the suit filed by the plaintiff as prayed for. The plaintiff filed a suit for specific performance in respect of the suit schedule property, which was partly decreed with costs. It was decreed that the 1st defendant, who is the respondent no. 1 herein shall refund the earnest money of Rs.5,00,000/- (Rupees Five Lakhs) to the plaintiff with costs

and interest at the rate of 18% per annum from the date of suit till the date of realisation of the decreetal amount. The suit against the defendant nos. 2 to 4 was dismissed.

2. For the sake of convenience, the parties are being referred to as per their ranking before the trial Court.

Pleadings:

3. The suit was filed by the plaintiff on 10.12.2004 with the following prayers:-

"*PRAYER*

"WHEREFORE, the plaintiff prays for a Judgment and Decree against the Defendants for Specific Performance:

a) directing the Defendants to execute the sale deed in favour of the plaintiff in pursuance of the Agreement/Memorandum of Understanding dated 07.01.2004.

b) if the defendants fail to execute the sale deed in favour of the plaintiff. This Hon'ble Court be pleased to execute the same in favour of the Plaintiff.

c) Restraining the Defendants their workmen, agents or anybody claiming through them from interfering with the peaceful possession and enjoyment of the

suit schedule property by decree of permanent injunction.

IN ALTERNATIVE

d) If the specific performance cannot be granted by this Hon'ble Court to direct the Defendant to pay Rs.5,00,000/- with interest at the rate of 24% p.a. from the date of agreement till the date of payment and also damages of Rupees Fifty Lakhs to the plaintiff."

e) for such other and further reliefs as this Hon'ble Court deems fit to grant under the circumstances of the case with costs in the interest of justice and equity"

4. The plaint case in brief is that the 1st defendant entered into a Memorandum of Understanding[1] with the plaintiff on 07.01.2004 in respect of suit schedule property, by which the plaintiff was nominated to be the purchaser of the suit schedule property, in which MOU, a representation was made by the 1st defendant that he has an understanding with the 3rd defendant for the purchase of the suit schedule property. The price agreed for the nomination and assignment inclusive of the sale consideration to be paid to the owner, that is, the 3rd defendant in respect of the suit schedule property was agreed as Rs.78,00,000/- (Rupees Seventy Eight Lakhs). As per the terms of MOU, the plaintiff is entitled to make payment of sale

[1] MOU

consideration to the 3rd defendant directly and get the sale deed executed in his favour or in favour of his nominee. An advance of a sum of Rs.5,00,000/- (Rupees Five Lakhs) was paid by the plaintiff by means of a cheque to the 1st defendant, which was duly acknowledged. The sale was to be completed within 3 months from the date of the MOU or within 1 month from the date of the owner furnishing the original documents relating to the scheduled property after getting the discharge of loan from Sree Charan Co-operative Bank Ltd., of which Bank the 1st defendant was the Chairman and Managing Director. The 1st defendant represented that he would make arrangements for discharge of the said loan and get the sale deed executed by the 3rd defendant. The 3rd defendant also agreed for the said arrangement. On 10.08.2004 the 1st defendant sent a letter to the plaintiff stating that the deal may get delayed and requested to take back the advance. The plaintiff caused a legal notice to be issued stating that he is ready to perform his part of the contract and is ready and willing to get the seal deed executed in his favour; that the 1st defendant is not entitled to unilaterally cancel the MOU. A reply notice was given on behalf of 1st defendant by his counsel on 02.09.2004. The 1st defendant with an ulterior motive to cause loss to the plaintiff, surreptitiously has got the two sale deeds

registered in his name own and in the name of the 2nd defendant, who is the wife of the 1st defendant. It is stated that the defendants suppressed the actual market value of the suit schedule property by getting the same registered for Rs.37,50,000/-(Rupees Thirty Seven Lakhs Fifty Thousand) against Rs.78,00,000/- (Rupees Seventy Eight Lakhs), which is the actual value as per the MOU, and the said act of the defendants confirmed that they have an intention to deprive and cheat the plaintiff. The defendants were evading and postponing the execution of the sale deed and were negotiating with third parties to sell the property by suppressing the transaction with the plaintiff. Since the defendants refused to execute the sale deed in favour of the plaintiff as per the terms of the said agreement, the suit was filed.

5. A written statement dated 30.08.2010 was filed by the defendant nos. 1 and 2. It is stated that the 1st defendant agreed only to be the facilitator for the sale of the suit schedule property, of which the 3rd defendant was the owner, on terms and conditions as per MOU. The time for completion of the terms and conditions of the MOU is stated as three months or one month from the date of furnishing/obtaining the original documents and discharge of mortgage loan on the suit schedule

property by the 3rd defendant. Since the matter was getting delayed for completion of the sale transaction within 3 months, the 1st defendant by a letter dated 10.08.2004, requested the plaintiff to receive back Rs.5,00,000/- (Rupees Five Lakh) and cancel the MOU. However, the plaintiff demanded execution of sale deed in respect of the suit schedule property.

5.2 Due to unforeseen and unavoidable circumstances, the owners of the said property were not able to discharge their obligations in time. It is stated that the MOU was entered into for a limited purpose and it could not be treated as an agreement of sale. The averment in the plaint that the suit schedule property was worth Rs.78,00,000/- (Rupees Seventy Eight Lakhs) during the year 2004 is stated to be 'not correct'. It is stated that only after cancellation of the MOU and requesting the plaintiff to receive back his money, the 1st and 2nd defendants have purchased the suit schedule property after raising loans by paying the prevailing market rate; that after purchase of the suit schedule property, as the defendant nos. 1 and 2 were not in a position to look after their interest, they jointly agreed to sell the suit schedule property for a sum of Rs.50,00,000/- (Rupees Fifty Lakhs) and executed a registered

General Power of Attorney[2] dated 24.02.2005 in favour of Sri. Mohan Chavala. Through their registered GPA holder, the 1st and 2nd defendants sold the suit schedule property in favour of Sri. Arjun Chavala for a total sum of Rs.50,00,000/- (Rupees Fifty Lakhs) to discharge their debts and other family commitments under a registered sale deed dated 24.08.2005 and delivered physical possession of the suit schedule property to the said purchaser. It is stated that even as on date, the defendants are ready and willing to pay back the amount of Rs.5,00,000/- (Rupees Five Lakhs) to the plaintiff or to deposit the said amount before the Court. It is stated that the MOU is not an agreement of sale and not legally enforceable.

6. The 3rd defendant filed a written statement stating that he had nothing to do with the alleged transaction between the plaintiff and the defendant nos. 1 and 2. The plaint averments are false and concocted. It is stated that, in pursuance of an agreement to sell entered between the defendant nos. 1 and 2, the defendant no. 3 and other owners, executed a regular sale deed in favour of the defendant nos. 1 and 2. After payment of the sale consideration, possession has been given to them.

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[2] GPA

7. Yet another written statement was filed by the defendant no. 4. It is stated that the defendant no.4 is not a necessary party. The defendant no. 4 purchased the suit schedule property under a registered sale deed dated 24.08.2005 executed by Sri. Mohan Chavala, the registered GPA holder of defendant nos. 1 and 2. There is no privity of contract between the defendant no. 4 and the plaintiff. The defendant no.4 is a *bona fide* purchaser for value without notice of any agreement/MOU.

Issues:

8. On the basis of the submissions, the following issues were framed:-

> *"i) Does the plaintiff prove that the defendants 1 & 2 assigned their interest in the schedule property in his favour by executing a Memorandum of Understanding on 07/01/2004?*
>
> *ii) Does the plaintiff prove that he paid an amount of Rs.5,00,000/- by way of advance to the first defendant pursuant to MoU dated 07/01/2004?*
>
> *iii) Does the plaintiff prove that he is always ready and willing to perform his part of the contract?*
>
> *iv) Does the 3rd defendant prove that the MoU dtd.7/1/2004 between the plaintiffs and defendants 1 and 2, is not binding on him?*

v) Does the 3rd defendant prove that in view of the schedule property having been sold by him to defendants 1 and 2, he is not under an obligation to execute the sale deed in favour of plaintiff and thus he is not a necessary party to the suit?

vi) Whether the plaintiff is entitled for relief of specific performance or the alternative relief as sought for?

vii) What decree or order?

9. Since the plaintiff had stated nothing in the plaint about his possession over the suit schedule property, no issue was framed by the trial Court as regards the relief of injunction.

***The judgment of the trial court*:**

10. The plaintiff, Sri. Gopalappa, examined himself as PW1. On behalf of the defendant, the 1st defendant examined himself as DW1 and the defendant no.4 was examined as DW2. On behalf of the plaintiff, Exs.P1 to P18 were marked. On behalf of the defendants, Exs.D1 to D16 were marked.

11. The findings on the issues as recorded by the trial Court are as follows:-

1 & 2 : Affirmative
3 : Negative
4 & 5 : Affirmative
6: Partly in the affirmative

7 : As per final order

12. After going through the terms of the MOU and the submissions advanced on behalf of the parties as well as the evidence, the trial Court noted that the contents of the MOU, the conditions therein, the sale price fixed, receipt of earnest money, etc. are those of an agreement of sale. Therefore the Trial Court's opinion was that the document is a sale agreement and not an MOU as contended by defendant nos.1 and 2. The trial Court also referred to the admissions made by the 1st defendant in his cross-examination, on the basis of which, it was gathered that the intention of the parties was only to enter into a sale agreement in respect of the suit schedule property. Accordingly, Issue Nos.1 and 2 were answered in the affirmative.

13. As regards Issue No.3, it was held that the plaintiff had not acted as per the MOU and did not issue any notice to the defendants within 3 months showing his readiness and willingness with all money ready with him. It was noted that after lapse of 7 months, the defendant himself wrote a letter dated 10.08.2004 requesting the plaintiff to cancel the MOU dated 07.01.2004. It was observed that in all the transactions, neither the 1st defendant nor the 2nd defendant was shown as

the owners of the suit property. The alleged agreement between the 1st defendant and the 3rd defendant was not collected by the plaintiff when he entered into the MOU (Ex.P1). It was held that non-production of agreement between the 1st defendant and the 3rd defendant was fatal to the case of the plaintiff.

14. It was held that the plaintiff was not ready and willing to perform his part of the contract. On the date of transaction (MOU), the 1st defendant and 2nd defendant were not the owners of the property. As per the evidence available, the 1st defendant and the 2nd defendant purchased the suit property on 18.11.2004 and thereafter sold the same during pendency of the suit. The suit was filed by the plaintiff on 10.12.2004. It was held that the documents-Exs.P1 to P10 did not disclose the plaintiff's readiness and willingness well within three months as per the recitals in the agreement (MOU). It was noted that after purchasing the property, the 4th defendant started constructions and the building was completed as per Exs.D13 and D14; that in the cross-examination the PW1 had admitted that under Ex.P1 (MOU), time was the essence of contract; that he also admitted that the 1st defendant had written a letter to him as per Ex.P2 which is a letter dated

10.08.2004 issued by the 1st defendant requesting the plaintiff to receive back his earnest money and to cancel the MOU.

15. It is pertinent to mention here that a memo dated 20.07.2012 was filed by the plaintiff in which it was stated that sale consideration being offered by the plaintiff as per the terms of the MOU is Rs.78,00,000/- (Rupees Seventy Eight Lakhs), and the plaintiff has been always ready and willing to pay the balance sale consideration to the defendants. He also stated that he is ready and willing to pay the cost of improvement made on the property by the 4th defendant as may be estimated by a competent Engineer.

16. With regard to this memo, the trial Court held that it was not sustainable in law. It was observed that the memo was filed to fill up the lacuna in the evidence and the admissions made by the plaintiff. Objections were filed to this memo by the 4th defendant. Accordingly, the memo was rejected by the trial Court holding that the offer made by the plaintiff could not be accepted at that stage, when the plaintiff is entitled for alternative relief of refund of earnest money with substantial interest. Therefore, the trial Court answered Issue No.3, in the negative.

17. With regard to Issue Nos. 4 and 5, it was held that the third defendant was not a party to the MOU (Ex.P1). He was also not the attesting or consenting witness to the MOU. Even the defendant no. 2 was not a party to the MOU. No consent of the 3rd defendant was taken by the plaintiff before entering into the MOU with the defendant no.1. The 3rd defendant honestly sold the property in favour of the defendant nos.1 and 2. The 3rd defendant was found to be not a necessary party to the suit. The suit against him deserved to be dismissed. It was also observed that the plaintiff had not taken any summons to examine the 3rd defendant. Accordingly, the Issue Nos. 4 and 5 were answered in the affirmative in favour of the 3rd defendant.

18. As regards Issue No.6, it was held that when the plaintiff had not proved his readiness and willingness, the question of granting decree of specific performance did not arise. As admitted by the plaintiff himself in the cross-examination, the 4th defendant had constructed a four storied building investing huge amount and some portion was already leased to tenants for commercial purpose. It was held that even in the entire evidence of DW2, the learned counsel for the plaintiff had not elicited anything trustworthy to show that the

4th defendant purchased the suit property with all knowledge of the MOU and the litigation pending before the Court in respect of the suit schedule property. It was observed that the defendant nos.1 and 2 purchased the suit schedule property under two registered sale deeds dated 18.11.2004. The suit was filed on 10.12.2004. The defendant nos.1 and 2, in turn, sold the property in favour of the 4th defendant by registered sale deed dated 24.08.2005. However, the 4th defendant was impleaded in the suit after lapse of five years from the date of sale.

19. The evidence of the 4th defendant was found to be unimpeachable that he was a *bona fide* purchaser. It was observed that, if the Court granted a decree of specific performance, greater hardship will be caused to the 4th defendant and it would amount to multiplicity of proceedings. Therefore, the Court granted the decree for refund of the earnest money with interest and cost of the suit. The alternative prayer made by the plaintiff for damages of Rs.50,00,000/- (Rupees Fifty Lakhs) was declined for the reason that there is no clause in the MOU for grant of liquidated damages on the breach of agreement by either side. The plaintiff also had not paid any Court fee to consider such relief. It was held that the plaintiff is entitled for refund of earnest

money with interest. Accordingly, Issue No.6 was answered by the trial Court partly in the affirmative. Accordingly, the suit was partly decreed as aforesaid.

Points for determination:

20. The points for determination would be:-

i) Whether the plaintiff is entitled to a decree of specific performance of the MOU?

ii) Whether time was the essence of the contract?

iii) Whether the plaintiff is ready and willing to perform his point of the contract?

iv) Whether the plaintiff is entitled for damages?

Evidence:

21. Ex.P1 is the MOU dated 07.01.2004 between the defendant no. 1, who is referred therein as the '1st Party', and the plaintiff, who is referred therein as the '2nd Party'.

22. In the examination-in-chief, the PW1 iterated the contents of the plaint. Additional evidence by way of affidavit was also furnished by him. It is stated therein that the defendant no.1 by playing fraud against the plaintiff to deprive him of his valuable right over the suit schedule property, colluded with defendants and got the sale deed in the name of the defendant nos.1 and 2. The defendant no.2 is none other

than the wife of the defendant no.1. It was stated that initially the defendant nos. 1 and 2 did not appear. The defendant no.2 was placed *ex-parte* and the defendant no.1 was avoiding service of summons, whereafter paper publication was issued to the defendant no. 1. Thereafter also he did not appear before the trial Court. The trial Court then issued an attachment warrant of the property of defendant no.1, which was duly executed. However, when the defendant no.1 did not appear, finally the Court issued bailable warrant, which was duly executed and thereafter the defendant no.1 was forced to appear. It is stated that the sale deed executed by defendant nos. 1 and defendant no.2, in favour of defendant no.4, is hit by Section 52 of the Transfer of Property Act, 1882[3] and that sale deed is not binding on the plaintiff.

23. Exs.P1 to P9 are marked in the further examination-in-chief held on 28.11.2005. The PW1 was cross-examined on 08.02.2012 on behalf of Defendant No.4. On 28.02.2012, PW1 was cross-examined by advocate for Defendant No. 1 and Defendant No. 2. In the cross-examination on 08.02.2012, PW.1 stated that Sri. Arun Chavala purchased the suit schedule property after filing of the case and

[3] TP Act

he is the owner of the same. The allegation that PW1 filed a suit in collusion with the defendant nos.1 and 2 was denied. There was no agreement or MOU between the 2nd defendant and the PW.1. The agreement in respect of the suit schedule property was with the plaintiff. He stated that there was no other agreement with him. He admitted that the 3rd defendant was neither a party nor a witness, nor a consenting witness to Ex.P1(MOU). He denied knowledge of whether the 4th defendant had prior knowledge with regard to Ex.P1 or any other agreement, or that whether the 4th defendant is a *bona fide* purchaser for valuable consideration. He denied that he was ready to receive back the amount from the defendant nos.1 and 2. It was stated that the suit schedule property was being visited by him every day and the building was under construction. The construction was nearly complete. He did not have any estimation as to how much money had been spent.

24. Thereafter in the cross-examination of PW1 done on behalf of the defendant nos.1 and 2 on 28.02.2012, it is stated that the scheduled property mentioned in Ex.P1 belongs to Mohammed; he had not entered into any sale agreement with Mohammed; Ex.P1 is an unregistered document entered into between him and the 1st defendant; neither the 2nd defendant

nor the owner of the scheduled property was a party or witnesses to Ex.P1. Under Ex.P1, time was the essence of the contract; the first defendant had written a letter to PW1 as per Ex.P2. That after receipt of Ex.P2, PW1 issued legal notice as per Ex.P3. It was true that the 1st defendant replied the notice as per Ex.P4. It was false to suggest that the 1st defendant sent a cheque for Rs.6,01,691/- along with registered letter dated 24.02.2005; PW1 received only registered letter, but had not received the cheque; it was false to suggest that the 1st defendant had no intention to cheat and acted bonafidely by sending letter to him as Ex.P2; it was false to say that there was no cause of action to file the suit.

25. The DW1 (defendant No.1) filed his affidavit by way of examination-in-chief dated 19.03.2012, wherein he reiterated the contents of his written statement. He stated that the time for completion of the terms and conditions of the said MOU was 3 months or 1 month from the date of furnishing/obtaining the original documents and discharge of mortgage loan on the suit schedule property by the 3rd defendant. It was stated that there was no *mens rea* or criminal breach of trust involved by him. The MOU was entered into for limited purposes and it could not be treated as an

agreement of sale. It was stated that after purchase of the suit schedule property, they were not in a position to look after their interest in the suit schedule property and pay the debts they had incurred. Hence, they (defendant Nos. 1 and 2) jointly agreed to sell the suit schedule property for a sum of Rs.50,00,000/- (Rupees Fifty Lakhs) and executed a GPA dated 24.02.2005 in favour of Sri. Mohan Chavala. The GPA holder in turn sold the suit to the 4th defendant-Sri Arun Chavala for total sum of Rs.50,00,000/- (Rupees Fifty Lakhs) to discharge their debts and other family commitments by a registered sale deed dated 24.08.2005 and delivered physical possession of the suit schedule property to the purchaser.

26. In the cross-examination of DW.1 held on 06.06.2012, he stated, *inter alia*, that he was also President of Sree Charan Co-operative Bank. The total transaction of the bank/turnover was up to 300 Crores; he was the Chairman of the said bank since last 14 years; he had become Chairman of the said bank when he had entered into the MOU as per Ex.P1. He did not know the suit schedule property was pledged to the said bank on the date of Ex.P1; he did not know to which bank the suit schedule property was pledged on the date of Ex.P1; he did not know in which bank the property was to be

discharged free from encumbrance. He admitted paragraph No.4 of the MOU. He also admitted that there was a sale agreement between him and the 3rd defendant namely V.K. Mohammed Ismail. He did not remember on what consideration the 3rd defendant agreed to execute the sale deed in his favour under the agreement. He admitted that under such agreement, the 3rd defendant agreed to execute the sale deed either to him or his nominees; it is on the basis of agreement that he had entered into an agreement as per Ex.P1 (MOU). He admitted that the 2nd defendant was his wife. He and the 2nd defendant purchased the suit schedule property for total consideration of Rs.37,54,000/- (Rupees Thirty Seven Lakhs Fifty Four Thousand) under Exs.P5 and P6. He admitted that he had agreed to sell the suit schedule property for a total consideration of Rs.78,00,000/- (Rupees Seventy Eight Lakhs) to the plaintiff under Ex.P1. He denied the suggestion that the plaintiff got issued legal notice dated 18.08.2004 stating that he is ready to pay the consideration of Rs.78,00,000/- (Rupees Seventy Eight Lakhs) and to get the sale deed in his favour. He admitted that his advocate issued reply notice as per Ex.P4, after receipt of Ex.P3. He admitted that the address mentioned in the notice and the cause title belonged to him. The reply notice dated 01.03.2005 as per Ex.P8 issued by the plaintiff

was admitted. He also admitted that he appeared before the Court only in the year 2008 on a warrant issued by a Court. He stated that he was not in a position to produce the agreement entered into between him and the 3rd defendant, because such agreement was not available. He admitted that Charan Souhardha Bank had got legal advisers; that their bank got simple mortgage from the 3rd defendant by receiving some title deed. He did not remember whether the title deeds had been taken by the bank or not, but he had not borrowed any loan from the Charan Souhardha Co-operative Bank and purchased the property; he did not remember where he had borrowed the loan at that time. He stated that they had sold the property to the 4th dependent for a total consideration of Rs.50,00,000/- (Rupees Fifty Lakhs). He did not remember whether he had brought to the notice of the 4th defendant regarding the contents of Ex.P1. He denied the suggestion that in order to deprive the right of the plaintiff and to cheat the plaintiff, he and the 4th defendant together created all those documents and also subsequent transaction documents. He further stated that he did not remember whether he had agreed to get the sale deed executed or not as per Ex.P1 (MOU). He admitted that as per clause 7 of Ex.P1, he had agreed to execute the sale deed in favour of the plaintiff. He denied the suggestion that in order

to frustrate the right of the plaintiff, they had executed the sale deed in favour of the 4th defendant.

27. In further cross-examination done by the counsel for the defendant no.4, the DW1 stated that before selling the property, he had not intimated the matter of Ex.P1 to Arjun Chavala. He stated that he did not remember himself and the plaintiff had colluded.

28. DW.2 is the defendant no.4 herein. In his examination-in-chief he got marked Exs.D1 to D.14 on 21.03.2012. In his cross-examination on 15.06.2012 he stated that before purchase of the property, he and his father negotiated the transaction. Before the purchase of the property there was no contact or connection between DW.2 and DW.1. On the advise of the 1st defendant, he opened a bank account in Charan Co-operative Bank. He enquired from the neighbouring persons regarding the property and thereafter negotiated. He denied the suggestion that his father and the 1st defendant were close prior to the transactions. At the time of sale agreement, his father had paid a sum of Rs.50,00,000/- (Rupees Fifty Lakhs) and thereafter he had not paid any amount to the 1st defendant. He had taken permission to demolish the existing building in the year 2008. Permission was

obtained from BBMP to put up a new construction in the year 2008 itself. They had started construction of the building in the year 2008. He denied the suggestion that after filing of the application in Court seeking directions not to put up any construction, he had constructed the building. He then stated that they had taken permission only in the year 2011 and started construction. He denied the suggestion that his father and the 1st defendant were close friends and even though they had knowledge of the sale agreement between the plaintiff and the 1st defendant, they had intentionally purchased the property. He also denied the suggestion that he and his father had got knowledge of the Court proceedings. It was admitted that when they started construction, the plaintiff lodged a complaint against them. He stated that in the year 2011 itself the building was completed. They had not taken completion report from the BBMP/BMP. It was denied that when the plaintiff lodged a complaint, they were only digging the earth and putting up pillars. He stated that they had not given any notice to the 1st defendant after coming to know the Court proceedings. He denied the suggestion that he, his father and the first defendant had all colluded together. He admitted that, no civil or criminal action was initiated by them against the 1st defendant. He denied the suggestion that they and the 1st

defendant were partners in the construction of the building, hence they had not taken action. The suggestion was denied that the sale deed was collusive and was nominal.

29. Now to discuss the contents of the MOU which is an unregistered document. Under the proviso to Section 49 of the Registration Act, 1908, an unregistered document affecting immovable property and required by the Registration Act or the Transfer of Property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act. The schedule to the MOU is the suit schedule property.

29.1. By means of the MOU, the 1st defendant represented to the plaintiff that, one Sri. Mohammed Ismail (Defendant No.3 herein) had an understanding with him to sell the scheduled property to the 1st defendant or his nominee, which arrangement is subsisting and valid. The 1st defendant offered to nominate the plaintiff to be the purchaser in regard to the MOU schedule property and obtain a deed of sale executed by the said owner in favour of the plaintiff. Accordingly, pursuant to the recitals and in consideration of the price agreed to be paid by the plaintiff under the MOU, the 1st defendant nominated the plaintiff to be the purchaser of the

MOU schedule property, subject to the terms mentioned therein. The consideration payable to the 1st defendant by the plaintiff under the MOU for nomination and assignment was Rs.78,00,000/- (Rupees Seventy Eight Lakhs) which was to include the amount paid to the owner Sri. Mohammed Ismail by the 1st defendant as advance and also sale consideration agreed to be paid by the 1st defendant to the owner-Mohammed Ismail. It was left open for the first defendant to pay the amount of sale consideration directly to the owners or to the 1st defendant and deduct the same from the payment to be made to the 1st defendant. An advance of Rs.5,00,000/- (Rupees Five Lakhs) was acknowledged to be paid by the plaintiff to the 1st defendant with the balance of the price being agreed to be paid by the plaintiff at the time of registration of the deed of sale.

29.2. Clause 4 of the MOU provided the time for completion. The sale in favour of the plaintiff was to be completed within 3 months from the date of the MOU or within 1 month from the date of the owner's furnishing and obtaining other permission documents relating to the MOU schedule property, getting discharge of loan from Sree Charan Souhardha Co-operative Bank Ltd., and absolute sale deed

from the BDA, **whichever date is later.** The 1st defendant assured under the MOU that the title of the owner to the MOU schedule property is good, marketable and subsisting, and the scheduled property would be conveyed to the 2nd party free from all encumbrances, attachments or acquisition proceedings or charges of any kind. It was agreed that the 1st defendant would obtain the conveyance of the MOU schedule property by the owners either in favour of the plaintiff and/or his nominee(s), as required by the plaintiff. As regards the consequences of breach of agreement, it was provided that the aggrieved party shall be entitled to specific performance of the MOU and also recover all losses and expenses incurred by them/him, as a consequence of such breach from the party committing breach. Any breach by the owners shall be considered a breach by 1st party and the plaintiff will be entitled to proceed against both for its remedy.

ANALYSIS:

30. On reading the MOU, we are convinced that the MOU is actually a sale agreement and we are in full agreement with the same finding being returned by the trial Court. This finding also draws strength from the examination-in-chief of the PW1, as well as the testimony of DW1. In the cross-

examination of DW1, he admits that he had agreed to sell the suit property for a total consideration of Rs.78,00,000/- (Rupees Seventy Eight Lakhs) to the plaintiff under Ex.P1 (MOU). So, evidently the parties are *ad idem* that the MOU is in fact an agreement to sell. Though at several places in the written statement filed by the defendant no.1 and in his examination-in-chief he has stated that the MOU was entered into for 'facilitating' the sale transaction of the property in dispute from the 3rd defendant, however, when he was specifically queried, he stated that he did not know the meaning of the word facilitating. Simultaneously, he answered that he did not remember whether he had agreed to get the sale deed executed or not as per Ex.P1. He also admitted that as per Clause-7 of Ex.P1 (MOU), he had agreed to execute the sale deed in favour of the plaintiff. Clause-7 of the MOU provides that the 1st defendant would obtain the conveyance of the MOU schedule property by the owners either in favour of the plaintiff and/or his nominee(s), as required by the plaintiff.

31. The trial Court has laboured on the testimony of the PW1 during his cross-examination done on behalf of the defendants no. 1 and 2, which was that under Ex.P1, time was the essence of the contract. This was taken by the trial Court as

an admission by the plaintiff that he had to act as per the MOU within 3 months. As is noted hereinabove, the MOU clearly provides that the sale would be completed in favour of the plaintiff within 3 months from the date of the MOU or within 1 month from the date the owners furnishing the requisite documents and getting discharge of loan from the co-operative bank, ***whichever date is later*****.** There are no consequences or other restrictive provisions in the MOU that may result in or indicate termination of the agreement in case the sale is not completed. Therefore, in the light of the judgment of the Supreme Court in ***Chand Rani Vs. Kamal Rani***[4], in the present case, time is not the essence of this contract. The trial Court, therefore, has misdirected itself in holding that the plaintiff had to act as per the MOU within 3 months, basing its finding on the 'admission' of the P.W1 without adverting to the terms of the MOU.

32. Now to consider the agreement that is referred to in the MOU which was between the defendant no.1 and the owner, who is the defendant no.3. A perusal of the MOU itself leaves no room for doubt that the first defendant had categorically represented to the plaintiff regarding the

[4] (1993) 1 SCC 519

existence of the agreement with both the defendant no.3 (owner) and the defendant no.1 being bound by the same. In the cross-examination of DW1, he has admitted that there is a sale agreement between him and the 3rd defendant namely Mohammed Ismail. He however, did not remember on what consideration the 3rd defendant agreed to execute the sale deed in his favour under the agreement. He also admitted that under such agreement the 3rd defendant agreed to execute the sale deed either to him or to his nominees. He categorically stated that it was on the basis of the agreement that he had entered into an agreement as per Ex.P1. It would also be pertinent to refer to the written statement filed by the 3rd defendant, in paragraph-5 of which he stated that in pursuance of the agreement of sale entered into between him and the defendant nos. 1 and 2, the 3rd defendant and other owners had executed a regular sale deed in favour of the defendant nos. 1 and 2. Therefore, the existence of the agreement to sell between the 1st defendant and the 3rd defendant is proved. Hence, it is evident that the terms of the MOU entered into between the 1st defendant and the plaintiff, were in terms of an agreement between the owner and the 1st defendant. In view of these facts, the trial Court was not right in saying that, firstly, the plaintiff should have procured the agreement, and, secondly, to

record a finding that non-production of the agreement was fatal to the case of the plaintiff.

33. It is pertinent to mention here that even though in his written statement, the defendant no.3 admitted the agreement to sell between himself and the defendant nos. 1 and 2, however, in the two sale deeds, both dated 18.11.2004, executed by the defendant no. 3 in favour of the defendant no.1 and defendant no.2 (Exs.P5 and P6 respectively), there is no mention of the agreement to sell. It is noted that in the sale deed executed by defendant no. 3 in favour of defendant no. 1, one of the witnesses is Gayathri, who is the defendant no. 2, and, in the sale deed executed by the defendant no. 3 in favour of the defendant no. 2, one of the witnesses is Sri. B.V. Dwarkanath, the defendant no.1.

34. As far as the question of readiness and willingness of the plaintiff to perform his part of contract within the stipulated time is concerned, the background of the matter may be discussed. The MOU is of 07.01.2004. On 10.08.2004, defendant no.1 wrote to the plaintiff stating that owing to certain personal reasons, the deal may be delayed and that the plaintiff is requested to take back his advance amount of Rs.5,00,000/- within seven days from the date of receipt of

that letter and get the MOU cancelled. This letter is Ex.P2. A perusal of the pleadings and the evidence reflects that this was the first date on which the plaintiff got a hint of the intention of defendant no. 1 to resile from his promise. There is no proof of the date of dispatch of Ex.P2 or its receipt by the plaintiff. However, promptly, on 18.08.2004, a legal notice was issued by RPAD to the defendant no.1 through the advocate of the plaintiff. In the legal notice reference was made to the MOU and it was stated that in view of the understanding, the plaintiff had already mobilized funds by giving up interest in certain other properties, which were getting him more benefits. It was stated in the notice that the plaintiff was in such an irretrievable position and as such he is not in a position to accept the unilateral and illegal cancellation of the MOU. It was stated that MOU be complied with and the sale deed be executed by the owner in favour of the plaintiff. It was stated that the plaintiff had always been ready and willing to perform his part of the contract. It was stated that the plaintiff is ready with the balance sale consideration and the defendant no.1 was asked and to inform the date and time for getting the sale deed executed in his favour.

35. About 15 days thereafter, that is on 02.09.2004, a reply legal notice was sent on behalf of the defendant no.1, which is marked as Ex.P4. In this reply legal notice, it is stated that the period of completing the MOU was 3 months from 07.01.2004 or within 1 month from the date of the owners of the above said property furnishing the original documents after getting due discharge of existing liability on the said property and getting other relevant title deeds from the BDA or whichever event occurs earlier. It is stated in the reply notice that due to unforeseen and unavoidable circumstances, the owners of the property were not able to discharge their obligations in spite of the best efforts of the defendant no.1. Therefore, the defendant no.1 was requesting the plaintiff to take back the amount of Rs.5,00,000/- paid as deposit amount, but the same was not being heeded by the plaintiff.

36. Thereafter, the two sale deeds dated 18.11.2004 (Exs.P5 & P6) were executed by the owner (defendant no.3) in favour of the defendant nos.1 and 2 respectively. The suit was then filed by the plaintiff in OS No. 9153/2004 on 10.12.2004.

37. It is clear that the trial Court has clearly not perused the entire evidence and the chronology of developments while recording its finding that the plaintiff has

not shown his readiness and willingness to perform the contract within the stipulated time. It goes on to state that the documents Exhibits P1 to P10 do not disclose the plaintiffs readiness and willingness to perform his part of the contract well within 3 months as per the recitals in the agreement. Such a finding cannot be sustained. It is pertinent to mention here that, as is evident from the reply legal notice dated 02.09.2004 sent by the advocate of the defendant no.1, the defendant no.1 had falsely instructed his own counsel that the MOU's period of completion is 3 months from 07.01.2004 or within 1 month or the contingencies specified in the MOU taking place, whichever event occurs earlier, whereas, it is evident from bare perusal of the MOU that it mentions whichever event occurs later.

38. As a matter of fact, the legal note dated 18.08.2004 sent on behalf of the plaintiff reflects the promptitude of the reply, the shock reflected in the legal notice of the plaintiff as well as his categorical statement regarding his readiness and willingness to perform his part of the contract. He had already mobilised funds. That legal notice of 18.08.2004 (Ex.P3) itself calls upon the defendant no.1 to inform the time and date for getting the sale deed executed in favour of the plaintiff, as he is ready with the balance sale

consideration. Importantly, in his reply legal notice of 02.09.2004 (Ex.P4), there is no averment or indication that the plaintiff is not ready and willing, nor it stated that the plaintiff has no financial capacity. Therefore, we find that the plaintiff was ready and willing to perform his part of the contract.

39. In view of this finding, the answer of the trial Court on Issue No.3 is set aside.

40. It is pertinent to mention here that after filing of the suit 10.12.2004, on 24.02.2005 a letter (Ex.P7) was purportedly sent by the defendant no.1 to the plaintiff with reference to the legal notice dated 18.08.2004 and the reply notice of the defendant no.1 dated 02.09.2004 in which it was stated that enclosed therein was a cheque dated 24.02.2005 drawn on Sree Charan Souhardha Co-operative Bank Limited, main Branch, Bangalore for an amount of Rs.6,01,691/-, being the amount of advance of Rs.5,00,000/- and interest at the rate of 18% per cent from 07.01.2004, asking the plaintiff to receive and acknowledge the same. It was also mentioned that the matter be treated as closed amicably.

41. It appears that on 01.03.2005, a reply to Ex.P7 was sought to be sent on behalf of the plaintiff through his advocate

(Ex.P8) seeking to inform defendant no.1 regarding filing of the suit for specific performance of the MOU in respect of the suit schedule property, specifying the next date of hearing along with a copy of the plaint. It was also stated that though the defendant no.1 is residing in the address shown in the cause title, he has evaded service of notice issued by the Court to circumvent the said proceedings, with a *mala fide* intention. It is stated in the notice that the letter (dated 24.02.2005) was sent without enclosing the cheque, which showed its ulterior motive. It again called upon the defendant no.1 to execute the sale deed with regard to the suit property, as the plaintiff was always ready and willing to perform his part of contract. However, this letter, though was sent by registered post (Ex.P9) to the defendant no.1, the same was returned as 'not claimed'.

42. Now coming to the point whether the plaintiff is entitled to a decree of specific performance of the MOU or whether the plaintiff is entitled for damages.

43. It is true that the 3rd defendant is not a signatory to the MOU. However, the agreement to sell which is indicated in the MOU entered into by him with the defendant nos. 1 & 2 is not denied. That agreement not being produced, no liability

under that agreement can be ascertained of the defendant no.3. The agreement to sell with the defendant no.3 is admitted both by the DW.1 in his cross-examination and the defendant no.3 in his written statement. The sale deeds dated 18.11.2004 (Exs.P5 & P6) executed in favour of defendant no.1 and 2 respectively by the defendant no.3 do not disclose the agreement to sell. Therefore, the finding of the trial Court on Issue Nos. 4 and 5 that the 3rd defendant honestly sold the property in favour defendant nos. 1 & 2 by receiving substantial consideration, does not appear to be correct.

44. The 1st notice (Ex.P2) dated 10.08.2004, which was sent to the plaintiff by the defendant no.1, which can be connected to the sale deeds (Exs.P5 & P6), states that owing to certain personal reasons, the deal may get delayed and the plaintiff was asked to take back the advance amount and to get the MOU cancelled. Even the reply notice dated 02.09.2004 (Ex.P4) sent on behalf of defendant no.1 specifically refers to the MOU being completed within 3 months or within 1 month of the contingencies mentioned therein whichever event occurs 'earlier'. This indicates that there is an intention to mislead and deceive on part of the defendant no.1.

45. In paragraph-5 of the plaint, it is mentioned, *inter alia*, that sale would be made within one month from the date of owner furnishing original documents relating to the scheduled property after getting discharge of loan from Sree Charan Co-operative Bank Limited[5], of which the 1st defendant is the Chairman and Managing Director. It is stated therein that the 1st defendant represented that he will make arrangements for discharge of the said loan and get the sale deed executed from the 3rd defendant and the 3rd defendant also had agreed for the said arrangement. This paragraph has not been denied by defendant no.1 in his written statement. Moreover, the PW1 has proved these facts in his examination-in-chief. No question was put on behalf of the defendant no.1 to the plaintiff in this regard. Moreover, in his cross-examination, the defendant no.1 as DW1, has admitted that he is also president of Sree Charan Co-operative Bank; that he is the Chairman of the bank since the last 14 years, which has a total transaction/turnover of up to 300 Crores; that he had become the Chairman of the bank when he had entered the MOU (Ex.P1). However, DW.1 feigns in his cross-examination that, he does not know the suit schedule property was pledged to the bank on the date of the

[5] The full name of the Co-operative bank is mentioned in the MOU as Sree Charan Souhardha Co-operative Bank Limited.

MOU (Ex.P1). He also states that he does not know to which bank the suit property was pledged on the date of Ex.P1. He also does not know in which bank the property is to be discharged free from encumbrance. In the same vein, he admits in his cross-examination that Paragraph-4 of the MOU mentions getting original documents after discharge of loan from Sree Charan Souhardha Co-operative Bank Limited. He also admits of a sale agreement between him and the defendant.

46. There is, thus, clinching evidence of the nexus between the defendant no.1 and the defendant no.3. The original documents of the suit schedule property of which the owner is admittedly the Defendant no.3 was charged/pledged to Sree Charan Souhardha Co-operative Bank, of which the defendant no.1 was the Chairman and Managing Director, which reflects a pact of the defendant no.1 with the defendant no.3. The statement in the cross-examination that the DW1 did not know that the suit schedule property was pledged to the said bank on the date of Ex.P1 is unbelievable.

47. A perusal of the certificate of encumbrance in Form-15 (Ex. D9) that has been proved by the 4th defendant reflects on the 1st page that in Column-5, the name of Sree

Charan Souhardha Co-operative Bank Limited is mentioned and in column-6 thereof the name of the 3rd defendant is mentioned. On page 2 of Ex.D9, there are two entries in Column-5, the name of the 3rd defendant is mentioned and in Column-6, the names of the defendant nos. 1 and 2 are mentioned. Defendant no.4 has proved Ex.D1, which is an agreement to sell entered into by the defendant nos. 1 and 2, referred to as the sellers therein, and the defendant no. 4 Arjun Chavala, who is referred therein as the purchaser. This agreement is made on 24.02.2005, which is registered (Ex.D1). A perusal of Ex.D1 reflects that there is no reference made by 'sellers' to any dispute on litigation pending between the defendant nos.1 and 2 and the plaintiff. As a matter of fact, on Page-5 of Ex.D1, it is mentioned that the scheduled property is not subject matter of any litigation or proceeding and the same is not attached or sought to be sold in whole or in portion in any Court, or other civil or revenue, or other proceedings and not subject to any attachment by the proceedings etc. The Ex.D1 also reflects that a power of attorney was executed by the defendant nos.1 and 2 in favour of Sri. Mohan Chavala, the father of the defendant no.4. It is noted that Ex.D1 acknowledges payment by the purchaser to the seller an advance amount totaling Rs.50,00,000/- (Rupees Fifty Lakhs),

which amount was stated to be the total sale consideration of the sale deed with regard to the scheduled property, which is the suit schedule property.

48. Ex.D2 is a GPA executed by the defendants nos. 1 and 2 in favour of the father of the defendant no.4, Sri. Mohan Chavala in respect of the suit schedule property. Ex.D3 is the sale deed dated 24.08.2005 executed by the defendant nos.1 and 2 in favour of the defendant no.4. In this document too in Page-5, it is stated that the scheduled property is not subject matter of any litigation or proceeding etc. The scheduled property of the said deed is the suit schedule property.

49. The defendant no.4 appeared as witness DW2. In the examination-in-chief, by way of affidavit, he has stated, *inter alia,* that the plaintiff was an utter stranger to him; that he is a stranger to the alleged agreement (MOU) and he is neither a necessary party nor a proper party. It is stated that after purchase of the suit schedule property, he had demolished the existing structure and put up a commercial complex investing a huge amount.

50. DW.2 was cross-examined on 15.06.2012. He stated that he had taken permission only in the year 2011 and

started construction. The suggestion that his father and the 1st defendant were close friends and the suit schedule property was intentionally purchased even though they had knowledge of the sale agreement between the plaintiff and the 1st defendant was denied. It is stated that in the year 2011 itself the building was completed. He admitted that when they had started construction, the plaintiff lodged a complaint against them. He denied that when the plaintiff lodged complaint, they were only digging the earth and putting up pillars. He had not given any notice to the 1st defendant after coming to know the court proceedings. Collusion between him, his father and the 1st defendant was denied. It was admitted that they had not initiated any civil or criminal action against the 1st defendant. He denied the suggestion that they and the 1st defendant were partners in the construction of the building. Hence, they had not taken action. The suggestion that the sale deed is a collusive document and nominal, was also denied.

51. The complaint lodged against defendant no.4 and defendant no.1 by the plaintiff before the Station House Officer, Jayanagar Police Station on 23.02.2011 is marked as Ex.P10. It is stated in that complaint that the property was attached and arrest warrant against the defendant no.1 was duly executed

and that the attachment of the property had not been recalled by the Court, which is still in force. Collusion between the defendant no.1 and the defendant no.4 was alleged that they were trying to put up a construction over the property. A non-cognizable report was registered by the police that was marked as Ex.P11. Photographs purporting to be of the site are enclosed as Exs.P12, P13, P15, P16, P17. Ex.P18 is a Compact Disc which is damaged. The sanction plan is on record as Ex.D10. The sanction is for stilt + ground floor + two upper floors and the period of sanction is from 02.11.2010 upto 01.11.2012.

52. Therefore, given the admissions made by the defendant no.4, in light of the documents/material on record, it is evident that the complaint was filed, and it was in the full knowledge of defendant no.4. The complaint was made on 23.02.2011 with no action by the defendant no.4 against the plaintiff. The written statement of the defendant no.4 bears the date 27.06.2011.

53. The amount agreed to be paid by the plaintiff to the defendant no.1 or the owner was Rs.78,00,000/-. The defendant no.3 executed the sale deeds (Exs.P5 and P6) in favour of the defendant nos. 1 and 2, for a sum of

Rs.18,27,000/- (Rupees Eighteen Lakhs Twenty Seven Thousand) and Rs.18,75,000/- (Rupees Eighteen Lakhs Seventy Five Thousand) respectively. Despite getting those sale deeds executed, no intimation was sent to the plaintiff by the defendant no.1 or defendant no.2 of having acquired the properties and they surreptitiously proceeded to execute the agreement of sale dated 24.02.2005 (Ex.D1) in favour of the defendant no.4.

54. It is pertinent to mention here that the suit in OS No. 9153/2004 was filed on 10.12.2004 and defendant no.1 was served 'as absent' and defendant no. 2 was served in the house 'as refused'. On 31.03.2005, the Court noted service on defendant no.2 'as sufficient', and allowed the application under Order V Rule 20 CPC for service on the defendant no.1 by affixation on the house numbers and boundaries. On 27.05.2005, the defendant no.2 was placed *ex-parte*. On 19.07.2005, the Court recorded that the defendant no.1 served by affixture, but he was absent. It is only thereafter that the sale deed dated 24.08.2005 (Ex.D3) was executed by defendant nos. 1 and defendant no.2 in favour of defendant no. 4.

55. It is clear from the aforesaid that the defendant nos. 1 and 2 were reported as duly served with the Court summons prior to execution of the sale deed dated 24.08.2005 (Ex.D3). Even earlier, they concealed the fact of the MOU and the legal notices sent by the plaintiff to the defendant Nos.1 & 2. The agreement to sell (Ex.D1) which was executed on 24.02.2005 itself reflects that the entire sale consideration of a suit of Rs.50,00,000/- (Rupees Fifty Lakhs) was paid by means of cheques. Thus, this Court cannot but hold that the defendant nos. 1 & 2 resorted to fraud and subterfuge against the plaintiff for depriving him of the benefit and right under the MOU aforesaid. Once the sale deeds dated 18.11.2004 (Exs.P5 and P6) were executed in favour of the defendants, all contingencies contemplated in Clause-4 of the MOU were fulfilled and therefore the defendant nos. 1 and 2 were bound to honour their commitment under the MOU.

56. As far as the defendant no.4 is concerned, it is his own admission made in his cross-examination as DW2, that the construction over the suit schedule property was commenced and completed by him in the year 2011 itself. Moreover, despite getting knowledge on the complaint being filed against him, no attempt was made by him to confront the defendant

nos. 1 and 2 or to stop the constructions which were stated by the plaintiff to be at the initial stages as per the suggestion put to the DW.2 during his cross-examination. Under such circumstances, the suggestion put by the counsel for the plaintiff during the cross-examination of the defendant no.4 assumes importance that the defendant no. 4, his father and the 1st defendant had colluded and that they and the 1st defendant are partners to the construction of the building. Hence they had not taken any action. The sale deed (Ex.D3) dated 24.08.2005, as noted above, was executed on receipt of an amount of Rs.50,00,000/- pursuant to the agreement to sell (Ex.D2). The defendant no.1 has been acting all along in his capacity as the Chairman and Managing Director of a Co-operative Bank which is dealing with public money and public trust. Under the facts and circumstances, we hold that the sale deed (Ex.D3) of 24.08.2005 is an outcome of fraud played by the defendant Nos.1 and 2 against the plaintiff. Further, the defendant No.4 on getting information of the complaint filed before police, which complaint also mentioned about the pending litigation, chose to proceed with the constructions and complete it. This indicates his intention to frustrate any legitimate claim of the plaintiff.

57. Evidently, the status of defendant no.4 is that of transferee *pendente lite.* The Supreme Court in the case of ***Thomson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd.***[6]***,*** while looking into an order passed by the Division Bench of the High Court affirming an order of the learned Single Judge and rejecting the petition filed by the appellant therein under Order 1 Rule 10 CPC for impleading the defendants in a suit for specific performance of contract filed by the respondent no.1, the plaintiff therein, considered the question as to whether if the appellant therein who was the transferee *pendente lite* having notice and knowledge about the pendency of the suit for specific performance and the order of injunction could be impleaded as a party under Order 1 Rule 10 CPC on the basis of sale deeds executed in their favour by the defendants.

58. While considering that question, the Supreme Court in ***Thomson Press (India) Ltd.,*** discussed some of the relevant laws. It was observed as follows:-

> "**26.** It would also be worth discussing some of the relevant laws in order to appreciate the case on hand. Section 52 of the Transfer of Property Act speaks about the doctrine of lis pendens. Section 52 reads as under:

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[6] (2013) 5 SCC 397,

> "**52.** ***Transfer of property pending suit relating thereto***.—During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.
>
> *Explanation*.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

It is well settled that the doctrine of lis pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this section does not indeed annul the conveyance or the transfer

otherwise, but to render it subservient to the rights of the parties to a litigation.

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29. The aforesaid Section 52 of the Transfer of Property Act again came up for consideration before this Court in *Rajender Singh* v. *Santa Singh* [(1973) 2 SCC 705 : AIR 1973 SC 2537] and Their Lordships with approval of the principles laid down in *Jayaram Mudaliar* v. *Ayyaswami* [(1972) 2 SCC 200 : (1973) 1 SCR 139] reiterated: (*Rajender Singh case* [(1973) 2 SCC 705 : AIR 1973 SC 2537] , SCC p. 711, para 15)

> "*15.* The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigation from the ambit of the court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of lis pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the court so as to prevent the object of a pending action from being defeated."
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> ……..……..
> ……..……..

33. At this juncture, we would also like to refer to Section 19 of the Specific Relief Act which reads as under:

> "**19.** ***Relief against parties and persons claiming under them by subsequent title***.— Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—
>
> (*a*) either party thereto;
>
> (*b*) any other 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;
>
> (*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;
>
> (*d*) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
>
> (e) when the promoters of a company have, before its incorporation entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:
>
> Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

From the bare reading of the aforesaid provision, it is manifest that a contract for specific performance may be

> enforced against the parties to the contract and the persons mentioned in the said section. Clause (*b*) of Section 19 makes it very clear that a suit for specific performance cannot be enforced against a person who is a transferee from the vendor for valuable consideration and without notice of the original contract which is sought to be enforced in the suit."

59. Learned Counsel for the appellants referred to the following judgments of the Supreme Court:

(i) ***Guruswamy Nadar v P.Lakshmi Ammal***[7]

(ii) ***Shyam Singh v. Daryao Singh & Ors***[8]

(iii) ***Parswanath Saha v. Bandhana Modak (Das) & Anr***[9]

60. In the judgment of ***Shyam Singh*** only legal question involved was whether the terms of agreement of repurchase dated 04.02.1971 contained any implied prohibition on the original contracting parties (particularly defendant Nos.2 to 4 therein) from transferring or assigning their rights in favour of a third party. This case is based on its own facts and is not helpful to the case of the appellant herein in the present case.

61. In case of ***Guruswamy Nadar***, after considering the judgments of the Allahabad High Court, the Privy Council of the Supreme Court, it was observed that it is apparent that the

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[7] (2008) 5 SCC 796
[8] AIR 2004 SC 348
[9] 2024 INSC 1022

appellant who was the subsequent purchaser of the same property had purchased in good faith, but the principle of *lis pendens* will certainly be applicable to the present case notwithstanding the fact that under Section 19(b) of the Specific Relief Act, his rights could be protected.

62. The judgment of the Supreme Court in ***Parswanath Saha,*** the issue was with regard to hardship of the defendant after they had parted with the suit property. After considering the provisions of Section 20 of the Specific Relief Act, and considering a catena of decisions of the High Court and the Supreme Court, it was held that the issue of hardship would come into play only after it is established by cogent evidence that the person who executed the agreement of sale was unable to foresee the hardship at the time of entering into contract. This judgment, however, is of no benefit to the appellant in the facts and circumstances of the instance case.

63. However, as noted aforesaid in the judgment of ***Thomson Press (India) Ltd.,*** which is a subsequent decision of the Supreme Court, it was held that the suit for specific performance cannot be enforced against the person who is transferee from the vendor for valuable consideration without

notice of the original contract which is sought to be enforced in the suit.

64. In the light of the aforesaid enunciation of law by the Supreme Court in ***Thomson Press (India) Ltd.,*** it is noted that, though defendant No.4 chose to proceed with the construction of the building on the suit schedule property, despite having knowledge of the police complaint as well as having knowledge of the litigation between defendant Nos.1 and 2 and the plaintiff, no liability for specific performance under Section 19 of the Specific Relief Act can be imposed on him in view of the fact that it has not been clinchingly demonstrated that at the time of execution of the sale deed by defendant Nos.1 and 2 in favour of defendant No.4 on 24.08.2005 (Ex.D3) defendant No.4 was anyone but a transferee for value who has paid his money in good faith and without notice of the original contract.

65. The case of defendant No.4 would be covered by the exception carved out in clause (b) of Section 19 of the Specific Relief Act since he is apparently a *bona fide* purchaser.

66. However, ordering specific performance of the contract may lead to multiplicity of proceedings and may delay

the right of the plaintiff to the benefit conferred by the MOU indefinitely. Under the circumstances, ordering specific performance may not an appropriate relief. Therefore, we have to consider the aspect of grant of damages to the plaintiff which has been claimed by him as an alternate prayer.

67. In that prayer made by the plaintiff, apart from seeking a direction to the defendants to pay Rs.5,00,000/- with interest at the rate of 24% per annum from the date of agreement till the date of payment, damages of Rs.50,00,000/- has also been claimed.

68. The trial Court has already in the impugned judgment, decreed payment of Rs.5,00,000/- with interest at the rate of 18% per annum, which has not been challenged by the defendants.

69. Accordingly, we direct as follows:

ORDER

i) The appeal is partly allowed and the impugned judgment and decree dated 04.08.2012 is set aside in part.

ii) Defendant No.1 shall pay Rs.5,00,000/- with interest at the rate of 18% per annum from

the date of filing of the suit till the date of payment.

iii) The plaintiff is entitled to damages of Rs.50,00,000/- that is claimed by him in the suit which amount shall be paid by defendant Nos.1 and 2, jointly and severally, within three months.

iv) The plaintiff shall be entitled to costs.

v) The suit against defendant Nos.3 and 4 is dismissed.

Sd/-
(JAYANT BANERJI)
JUDGE

Sd/-
(K.V.ARAVIND)
JUDGE

KGR/KSR