

CASE NO.:
Appeal (civil) 574 of 1988

PETITIONER:
NIRMALA ANAND APPELLANT

Vs.

RESPONDENT:
ADVENT CORPORATION PVT. LTD. & ORS. RESPONDENTS

DATE OF JUDGMENT: 10/05/2002

BENCH:
Doraiswamy Raju

JUDGMENT:

RAJU, J.

The above appeal has been filed against the judgment and decree dated 15.7.1987 of a Division Bench of the Bombay High Court in Appeal No.204 of 1981, whereunder the judgment and decree dated 23.3.1981 passed by a learned Single Judge in Suit No.744 of 1969 came to be confirmed. The fourth plaintiff in the Suit, who was the first appellant in the appeal before the High Court, is the appellant in this appeal. The Suit came to be filed jointly by more than one agreement-holders praying for a declaration that the scheme and the flat purchase agreement entered into between parties are valid and subsisting and the plaintiffs are entitled to specific performance of the same; that defendants 1 to 7 are promoters within the meaning of the Maharashtra Ownership Flats Act, 1963 and thereby they are trustees or occupy a fiduciary position qua the plaintiffs; that the defendants 1 to 8 and all other purchasers of flats are participants in the scheme; that defendants 1 to 8 and, in particular, defendants 1 and/or 2, may be ordered and decreed to forthwith specifically perform their respective obligations under the said agreements for sale by resuming or allowing to be resumed the construction of the building, by completing the same, by handing over possession thereof to the respective flat purchasers and by conveying or agreeing to convey the land in suit and the two buildings to an entity representing all the purchasers of flats in both the buildings; that defendants 1 to 8 be ordered to give the plaintiffs vacant possession of the incomplete flats agreed to be sold to them and in the alternative and without prejudice to the other prayers and in the event of the Court not decreeing specific performance, direct the payment of damages for breach of the scheme and the agreements, repayment of the purchase price paid by each of them and a charge on the properties specified to secure the same, etc..

The sum and substance of the claim of the plaintiffs was that the Municipal Corporation of Greater Bombay is the owner of a large plot of land situated at Foreshore Road, admeasuring about 4444 4/9 square yards and bearing new Survey No.9/8426, which came to be leased out on 21.12.1899 in favour of the predecessors of defendants 4 to 7 for a period of 50 years, which, in due course of time, came to be renewed on 21.12.1949 for a further duration of 49 years, subject to payment of the ground rent and complying with other conditions more fully stipulated therein; that subsequently on 23.10.1959 defendants 4 to 7 entered into an agreement with the original defendant No.1, a Company registered under the Companies Act, and carrying on business of constructing building and selling flats to members of the public on ownership basis, to develop the land by construction of two buildings and that under the said agreement the

first defendant company, of which defendant No. 2 was a Promoter and Director, sought permission from the Corporation to develop the property by construction of buildings and the said permission was also granted on 28.3.1961 on condition that the ground rent payable would be Rs.30,185/- per annum. It is further stated that the defendant No.1 completed the construction of one building named as "Advent" in October, 1962, which came to be occupied by about 30 members forming themselves into a Co-operative Housing Society known as "Foreshore Co-operative Housing Society Limited" shown as 8th defendant. It is also stated that in February 1962, the first defendant made an advertisement in the Newspaper in respect of the proposed construction of the second building to be named as "Divya Prabha", inviting applications for residential flats to be constructed in accordance with the advertisement, pursuant to which the plaintiffs, eight in number, and defendants 9 to 25 were said to have approached the first defendant and entered into various agreements for purchase of such plots to be constructed. So far as the appellant (plaintiff No.4) is concerned, the agreement so entered into was said to have been on 8.9.1966 for purchase of flat bearing No.71 on the seventh floor of the building with the area of the flat approximately at 1250 sq. ft. The price agreed to be paid by the appellant was said to be Rs.60,000/- and the first defendant also seems to have secured the commencement certificate from the Corporation in the month of July, 1966, since the terms of agreement entered into envisaged the completion of the building and possession thereof to be handed over by June 30, 1969. While so, the Municipal Corporation seems to have called upon the lessees from time to time to pay the arrears of lease rent as well as the taxes payable in respect of the building already constructed, but neither the lessees nor the Society seems to have paid the same, resulting in accumulation of such arrears by the end of May, 1969 to Rs.1,75,004, resulting, in turn, in the Service of a Notice dated 27.6.1969 upon the lessees terminating the lease in accordance with the provisions contained in Section 527 of the Bombay Municipal Corporation Act on account of the default committed by the lessees in the payment of lease rent and the violation of other terms of the lease. Notional possession of the entire plot was also said to have been secured by the Corporation on 4.8.1969 and as a matter of fact, it appears that from June, 1969 onwards, the construction activities in respect of building "Divya Prabha" ceased and the building permission granted by the Corporation also not having been renewed thereafter. The appellant was said to have paid altogether a sum of Rs.35,000/- till June, 1969. It may be incidentally noticed, among other things, that one of the grounds of dispute raised by the Municipal Corporation is with reference to the construction of 9th floor in contravention of the approved plan. Several proceedings seem to have resulted, also between more than one or other parties concerned, in the Bombay City Civil Court as a result of which also the completion of the building could not be made as originally planned. The present Suit culminating in the above appeal came to be instituted on 30.7.1969 by eight prospective purchasers, impleading the Advent Corporation (P) Ltd. and its Director as defendants 1 and 2, the Municipal Corporation being joined as defendant No.3, and the lessees of the plot being defendants 4 to 7 with Foreshore Co-operative Housing Society as defendant No.8 and defendants 9 to 25, the prospective purchasers, other than the plaintiffs, of flats in the building "Divya Prabha".

The defendants 1 and 2 resisted the Suit claiming that the building could not be completed for circumstances beyond their control; that the occupants of building "Advent" started using the premises for commercial purpose in violation of the lease agreement, resulting in the termination of the lease by the Corporation and that in the absence of renewal/revival of the lease agreement and renewal of the building permission, it was impossible for completing the construction or the performance of the contract with the plaintiffs. After Issues were framed, the suit was taken up for trial and plaintiff No.4, the appellant herein, and plaintiff No.7 were said to have entered into the witness box to depose in support of their claims. The defendants did not seem to have let in any oral evidence, but on both sides, various documents, which were not in dispute, seem to have been marked. After conclusion of recording of the evidence, the third defendant-Corporation was said to have been deleted from the array of the defendants on the application of the plaintiff's Advocate. The Suit was said to have been not pressed as against defendant No.8 also and before the arguments commenced, all the plaintiffs, except plaintiffs 4 and 7 and

defendants 9 to 25, had settled the dispute with defendant No.1, resulting in the prosecution of the suit claim only by plaintiffs 4 and 7.

On an appreciation of the materials on record, the learned Trial Judge came to the conclusion that plaintiff No.7 had also committed breach of the agreement and, therefore, was not entitled to specific performance of the agreement or for damages in lieu thereof, but only to get return of the purchase price with interest and for a charge upon flat agreed to be sold to him. So far as the appellant is concerned, the learned Trial Judge held that she was always ready and willing to perform her part of the contract and it was the first defendant who committed breach in not carrying out the terms of the agreement. In spite of recording such a finding, the learned Single Judge, while considering the question as to whether the appellant was entitled to a decree for specific performance, was of the view that granting of specific performance being a discretionary remedy in equity, the Court may take into account, in exercise of such discretion, even factors other than the plaintiff's conduct and taking into account the several and serious imponderabilities as they were, in his opinion, and that further huge sums may be required to complete the proposed building, which cannot properly be assessed, arrived at the conclusion that the case on hand cannot be said to be one, wherein the grant of compensation in lieu of specific performance cannot be said to give the plaintiff an adequate relief. Consequently, while denying the relief of specific performance, the first defendant was ordered to pay to the appellant damages as assessed by the Commissioner for taking accounts with interest at 6% p.a. from the date of the decree till the date of payment/realization, in addition to ordering the repayment of Rs.35,000/- with interest thereon at 9% p.a. from 4.10.1967 till the date of decree and for the subsequent period, at 6% p.a. till the date of payment/realization. A charge has also been created in favour of the appellant on Flat bearing No.71 on the seventh floor in the incomplete building, for payment of the said sum, with further liberty to execute the charge only on and after 1.11.1981.

Aggrieved, the appellant herein as well as the seventh plaintiff, whose claim for specific performance was also similarly rejected by granting different reliefs, filed an appeal in Appeal No.204 of 1981. Defendants 1,2,4,6 and 7 alone were impleaded as respondents and even respondents 3 to 5 (defendants 4,6 & 7) were not got served with notice, resulting in the appeal against them being dismissed for non-prosecution. The appeal was pursued only against respondents 1 and 2 (defendants 1 & 2). The cross-objections said to have been filed by respondents 1 and 2, came to be also dismissed for non-prosecution on account of failure on their part in removing the objections of the Registry. The learned Appellate Judges concurred with the nature of disposal given and the judgment and decree passed by the learned Single Judge while rejecting the appeal, resulting in the above appeal before this Court.

While granting special leave on 10.2.1988, this Court restrained the respondents from transferring, alienating or parting with possession of Flat No.71 on the seventh floor of the building known as "Divya Prabha". When the respondent brought to the notice of this Court that the building in question with all the other rights and interest in the leasehold land has been subsequently sold, the respondent was directed to place on record the document showing the sale/assignment. Notice was also directed to be issued to the Bombay Municipal Corporation. Subsequently, the Deed of Assignment dated 14.10.1994 was filed in this Court and the applications filed for impleading the State of Maharashtra as also the subsequent purchaser of the building and other rights and interest M/s Gaurav Overseas (P) Ltd. under said Deed of Assignment, were allowed on 25.10.1999 and notice was directed to be served on the newly added parties, who were also granted time subsequently for filing the Counter. On 13.3.2001, the Counsel appearing for the State of Maharashtra stated that the Government had already taken a decision for renewal of lease, but in individual cases lease has not yet been renewed. In the light of promulgation of an Ordinance No.32 of 2001, it appears that the respondent had applied for renewal of the lease to the Municipal Corporation of Greater Mumbai.

Shri Arunabh Choudhary, learned counsel for the appellant, contended

that, having regard to the principles enshrined in Sections 10 and 20 of the Specific Relief Act, 1963 and the law declared by this Court, the relief of specific performance ought to have been granted as prayed for. According to the learned counsel, there are no unsurmountable impediments in according such relief, particularly when the appellant while giving evidence has stated in categorical terms that she was prepared to take the flat agreed to be sold on "as is where is condition" on such terms as may be fixed without seeking any reduction or modification in the consideration for the sale and without making any claim against the 1st or 2nd defendants for the amount she might have to spend to complete the flat or for damages in that behalf and that the learned Judges in the High Court, at any rate, ought to have held that the Award of money compensation is no sufficient substitute or the only course to be adopted in this case. Reliance has been placed on the decisions reported in *Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial & Ors.* [1964 (2) SCR 495]; *Sardar Singh Vs. Krishna Devi (Smt.) & Anr.* [(1994)4 SCC 18]; *Ajit Prashad Jain Vs. N.K. Widhani & Ors.* [AIR 1990 Delhi 42]; *Gobind Ram Vs. Gian Chand* [(2000)7 SCC 548]; *K. Narendra Vs. Riviera Apartments (P) Ltd.* [(1999)5 SCC 77]; *M.L. Devender Singh & Ors. Vs. Syed Khaja* [1974(1) SCR 312 = (1973)2 SCC 515] and *Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibhai Haribhai Patel & Ors.* [(2001)5 SCC 101]. Before us, it has also been not only reiterated that the appellant stands by such statements made earlier, but further contended that the subsequent developments brought on record in the form of the Deed of Assignment made by respondents 1 and 2 in favour of the seventh respondent would belie the stand on behalf of the respondents that the agreement is not capable of being specifically performed due to any impediments in so doing, despite the preparedness and willingness, to get such relief at her risk and responsibility. In the written submission, it is stated that if the appellant is to be compensated by monetary compensation/damages a sum of Rs.1,81,63,534/- would possibly allow some kind of adequate relief to the appellant.

Per contra, Mr. P.P. Tripathi, learned Senior Counsel appearing for respondents 1 and 2, while adopting the reasoning in the judgments of the learned Single Judge and the Division Bench, forcefully contended that in the light of the concurrent refusal to grant specific performance and the discretion exercised in the matter to award only monetary compensation, in addition to the return of the portion of the sale consideration paid by the appellant, this Court may not be pleased to interfere with such exercise of discretion in this appeal. Strong reliance has been placed in support thereof on the decisions reported in *Rajendrakumar Bhandari Vs. Poosammal & Ors.* [AIR 1975 Madras 379]; *K. Narendra Vs. Riviera Apartments (P) Ltd.* [(1999)5 SCC 77]; *Matadin Agarwal, etc. Vs. Syed Abdul Razack & Ors.* [AIR 1997 Andhra Pradesh 103] and *Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibhai Haribhai Patel & Ors.* [(2001)5 SCC 101]. A technical objection has also been taken that the dropping of Golwallas, the original lessees, who were impleaded initially in the Suit and appeals, will have to necessarily result in the denial of the relief of specific performance. Strong reliance has also been placed on Section 14, particularly Clauses (b) & (d) of Sub-section (1) of Section 14 of the Specific Relief Act, 1963, to justify the denial of the relief of specific performance and inapplicability of Section 10 and Explanation (i) to the said provision of the said Act. The very many possible impediments considered to be great imponderables by the High Court have not only been reiterated but the subsequent filing of O.S. No.2939 of 1999 by Foreshore Co-operative Housing Society Ltd., the Society which owns the adjacent building "Advent" in the same premises, seeking a declaration that the said Society is the owner of the land on which the building "Divya Prabha" stands, with a further declaration that the said incomplete building is dangerous and hazardous one and the interim order obtained in the said Suit, noticed by the Division Bench in its judgment has been strongly relied upon to dissuade us from acceding to the request on behalf of the appellant. It was also contended that the broad approach adopted in some of the cases to decree or grant the relief of specific performance, subject to obtaining of the necessary and required permission in exceptional cases, cannot be applied in the present case on hand, which, according to the learned counsel on the facts of this case, amounts to seeking to sue or grant relief on what has really become a 'speculative contract' and that too, after such a long lapse of time of nearly 33

years. An argument in the alternative indicated in general terms is found elaborated in the written submissions made on behalf of the respondent 1 & 2, that taking into consideration the lapse of time and fact that the full consideration had not been paid by the appellant, a compensatory payment of Rs.50 lakhs by the respondents 1 and 2 which, according to them, represents the value of the flat today, may be awarded and if at all, any specific performance is to be decreed, it has to be subject to the further proper adjustment of equities between parties and satisfaction of the various monetary obligations imposed upon the appellant under the Agreement dated 8.9.1966 entered into between the parties as found elaborated in the Additional Affidavit dated 8.1.2002 filed in this Court. Reference has also been made to the earlier offer while exploring the possibility of settlement between parties, of a sum of Rs.60 lakhs, which the appellant seems to have declined to accept. The learned counsel repeatedly submitted that on the facts and circumstances of the case, there is no justification to direct the specific performance of the agreement, particularly when the facts already noticed by the High Court itself, renders it impossible to deliver possession even under the Maharashtra Apartments Act, 1963 unless and until Completion Certificate is obtained from the competent authority. Shri C. Mukund, learned counsel appearing for the seventh respondent, virtually adopted the submissions of the learned Senior Counsel for respondents 1 and 2, in addition to inviting our attention to the provisions contained in Sections 31 and 32 of the Indian Contract Act to justify the stand that the contract in question cannot be directed to be specifically performed the same, according to him being a mere contingent contract.

The learned counsel appearing on either side elaborately took us through the details of the findings of the learned Single Judge as well as the Division Bench, some of the materials on record as also the Deed of Assignment dated 14.10.1994 brought on record on the directions of this Court, in addition to inviting our attention to the principles laid down in the various decisions, noticed supra. I have carefully considered the same and my conclusions shall be recorded as and when necessary hereinafter, while dealing with the merits and demerits of the same.

The plea that the suit for specific performance must necessarily fail on account of the giving up of Golwallas, who were original defendants in the Suit and respondents 3 to 5, has no merit and needs mention to be rejected, only. The agreement sought to be enforced is indisputably with defendants 1 and 2, respondents 1 and 2 herein. Even in the Suit Agreement dated 8.9.1966, specific reference is made to the transfer of the rights, which subsisted in Golwallas, the Advent Corporation Pvt. Ltd. and Praveen D. Desai, to the party of the first part in the agreement, the specific performance of which is sought to be enforced. Recitals were also specifically made in this agreement about the satisfaction of the title of the party of the first part and the undertaking to accept the title being derived from the said party to the building and the rights in the land transferred to the Co-operative Society consisting the body of the purchasers of the flats in the building in question. Likewise, it could be seen from the Deed of Assignment dated 14.10.1994 (filed in this Court) that the same, which was executed in respect of the entire building "Divya Prabha", excluding Flat No.71 agreed to be sold to the appellant, also refers to the fact that by an Agreement dated 20.6.1967 the said Golwallas surrendered their rights, title and interest in the land and building in favour of Advent Corporation Pvt. Ltd. In the teeth of such admitted facts available on record, it does not lie in the mouth of the respondents to raise such a plea. This objection, therefore, is rejected.

In Rojasara Ramjibhai Dahyabhai vs. Jani Narottamdas Lallubhai (Dead) By LRs. & Anr. [1986(2) SCR 447], this Court held that from the mere fact that the agreement contemplated the execution of the sale-deed after the requisite permission was obtained from the Collector for use of the land as a village site and not as agricultural land, it cannot be considered to be contingent contract, there being in every contract to sell an implied covenant on the part of the vendor to do all things necessary to give effect to the agreement, including the obtaining of the permission for the transfer of the property. Relying upon certain earlier decisions of this Court in Mrs. Chandnee Widyavati Maddein vs. Dr. C.L.Katial [1964 (2) SCR 495] and Ramesh Chandra Chandiok & Another

vs. Chuni Lal Sabharwal (dead) by LRs. & Others [1971 (2) SCR 573], it has been observed that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority within a specified period and if the sanction is forthcoming to convey to the purchaser within a certain time. Such principles apart, this Court in that case also took notice of the subsequent fact about making of an application and obtaining the required permission. The case reported in *Rajendra Kumar Bhandari vs. Poosammal & Others* [AIR 1975 Mad. 379] is one wherein a Division Bench of the Madras High Court refused to grant the relief of specific performance of an agreement entered into by the plaintiff with a person who was not the owner of the property but a mere tenant entitled to the protection of the city tenants protection with a privilege or personal right which is only heritable but not transferable or saleable, when it was found that even such right also he lost before it could fruition into a transferable or assignable right and that too even before the plaintiff came to court seeking for relief.

In *Sardar Singh vs. Krishna Devi (Smt) and Another* [1994 (4) SCC 18] it was held that since Section 20 (1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, the Court is not bound to grant such relief merely because it is lawful to do so observing at the same time that the exercise of such discretion must not be arbitrary but sound and reasonable guided by judicial principles and capable of correction by Appellate Court. The circumstances specified in Section 20 were considered to be illustrative and not exhaustive and that the Court should take into consideration circumstances in each case, the conduct of the parties and the respective interest under the contract. In *K. Narendra vs. Riviera Apartments (P) Ltd.* [1999 (5) SCC 77], this Court dealt with the case of an agreement followed by a supplementary agreement to sell a plot and the structure thereon and where the agreement also envisaged the obtaining of permission for the conveyance from the Land & Development Officer as well as approval for the construction plan. Factually, the construction plan submitted was said to have been rejected on more than one reason, and the building plan was also rejected more than once. In respect of a portion of land hit by Urban Ceiling Law, only a conditional exemption alone seems to have been granted. Under such circumstances when the suit came to be filed seeking for annulment of the sale agreement on the ground of impossible of performance and the other party filed a suit for specific performance, this Court dealt with such claims in the light of Section 20 of the Specific Relief Act and observed as follows:

"29. Section 20 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; 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. Performance of the contract involving some hardship on the defendant, which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in *Lourdu Mari David v. Lous Chinnaya Arogiaswamy* by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on

sound principles of law capable of correction by an appellate court."

Ultimately it was held that since at one point of time the contract was rendered incapable of performance and stood frustrated with reference to Section 56 of the Contract Act, the repeal of the Urban Ceiling Act after nearly 16 years is no ground to enforce the agreement and grant a decree for specific performance.

In Her Highness Maharani Shantidevi P. Gaikwad vs. Savjibhai Haribhai Patel & Others [2001 (5) SCC 101], this Court had an occasion to deal with the scope of Section 20 of the Specific Relief Act, 1963, and the impact of Section 14 (1) (c) and (d) in the matter exercising such discretion, in a given case. Apart from the finding recorded that the contract by its very nature was terminable and stood terminated as envisaged under Section 14 (1) (c) and was also further not enforceable in view of the stipulation contained in Section 14 (1) (d), this Court on the principles which should normally guide the exercise of discretion under Section 20 by the Courts, observed as below:

"59. The grant of decree for specific performance is a matter of discretion under Section 20 of the Specific Relief Act, 1963. The court is not bound to grant such relief merely because it is lawful to do so but the discretion is not required to be exercised arbitrarily. It is to be exercised on sound and settled judicial principles. One of the grounds on which the court may decline to decree specific performance is where it would be inequitable to enforce specific performance. The present is clearly such a case. It would be wholly inequitable to enforce specific performance for (i) residential houses for weaker sections of the society cannot be constructed in view of the existing master plan and, thus, no benefit can be given to the said section of the society; (ii) in any case, it is extremely difficult, if not impossible, to continuously supervise and monitor the construction and thereafter allotment of such houses; (iii) the decree is likely to result in uncalled-for bonanza to the plaintiff; (iv) patent illegality of order dated 20.6.1998; (v) absence of law or any authority to determine excess vacant land after construction of 4356 dwelling units; and (vi) agreement does not contemplate the transfer of nearly 600 acres of land in favour of the plaintiff for construction of 4356 units for which land required is about 65 acres. The object of the Act was to prevent concentration of urban land in the hands of a few and also to prevent speculation and profiteering therein. The object of Section 21 is to benefit weaker sections of the society and not the owners. If none of these objects can be achieved, which is the factual position, it would be inequitable to still maintain decree for specific performance."

In Gobind Ram vs. Gian Chand [2000 (7) SCC 548], this Court though held, taking note of Section 10 Expl.(i) and Section 20 of the Specific Relief Act, 1963, that mere escalation of prices of real estate properties per se is no ground to deny the relief of specific performance but at the same time emphasized that the Court has to consider whether it will be fair, just and equitable to grant a decree therefor, guided by principles of justice, equity and good conscience and not automatically grant the relief for the asking of it. In the process of balancing equities and in order to ensure justice to both parties, this Court directed deposit of further sum for the benefit of the vendor, in addition to the consideration stipulated in the agreement, even though the trial court itself decreed specific performance, in terms of the agreement and the balance of consideration in full has been deposited by the purchaser immediately after passing of the decree.

In M.L. Devender Singh & Others vs. Syed Khaja [1973 (2) SCC 515], this Court, while analyzing the provisions contained in Sections 10, 14, 22 and 23 of the Specific Relief Act, 1963, as well as the corresponding provisions viz. Sections 12, 20, 21 & 22 of the Specific Relief Act, 1877, held that Section 23 of the 1963 Act contains comprehensive statement of the principles to be kept into consideration in construing a contract with a term specifying a sum of money to be paid for breach of the contract when such a breach occurs. It was further held that the jurisdiction and discretion of the Court to decree specific performance cannot be considered to be curtailed in any manner or taken away by parties merely fixing a sum, even as liquidated damages, payable by the party breaking the contract.

On a careful consideration of the decisions brought to our notice, it can safely be recorded that it is too late in the day to deny a claim for specific performance of an agreement to sell an immovable property in existence or to be brought into existence according to the specification agreed to merely because the Vendor had to make applications or move the concerned and competent authorities to obtain permission/sanction or consent of such authorities to make the sale agreed to be made an effective and full-fledged one. The principles laid down in the above decisions clearly indicate that unless the competent authorities have been moved and the application for consent/permission/sanction have been rejected once and for all and such rejection made finally became irresolutely binding and rendered impossible the performance of the contract resulting in frustration as envisaged under Section 56 of the Contract Act, the relief cannot be refused for the mere pointing out of some obstacles. Since the agreement to sell, in this case, relates to an immovable property, which indisputably is of special value having regard to its location and special importance of the area, it cannot be readily assumed or taken for granted that the respondents opposing the claim of the appellant have discharged their burden to displace the initial statutory presumption engrafted in the Explanation (i) to Section 10 of the Specific Relief Act. Even the so-called imponderables noticed both by the learned Single Judge and by the Division Bench of the High Court, if could not stand in the way of or did not impede the assignment of the rights in the building and the interests in the land in favour of the seventh respondent under the Deed of Assignment dated 14.10.1994, it is beyond comprehension as to what could legitimately be pleaded against for a similar or identical relief being granted in the suit by compelling transfer of such and similar rights to and in favour of the appellant in respect of flat No. 71 on the 7th floor, agreed to be sold which she is prepared to receive and take upon herself at her risk and responsibility even in the complete shape as it stands unless it is that respondents 1 and 2 are trying to avoid their obligations and liabilities to suit their own convenience, wishes and welfare taking advantage of the steep appreciation in the value of the real estate in the locality in question. The competent Courts of Justice, which exercise not only statutory powers, but jurisdiction in equity, should not be a mere onlooker of an attempt by one of the party to unreasonably, unjustifiably and unethically try to evade specific performance in order to make profit at the expense of the other party to the contract, who, as concurrently found by the learned Single Judge as well as the Division Bench of the High Court, was always ready and willing to perform the remaining part of her contract.

Not only the respondents 1 and 2, who have agreed to sell, but also the seventh respondent and others, particularly the State Government as well as the Municipal Corporation, were heard. During the course of listing of the appeal for hearing on several earlier occasions, it appears that representations have been made that there is every possibility of the Government as well as the Municipality respectively, renewing the lease and revalidating the building plans in question. Apparently, having regard to such positive hopes and constructive moves as also the possibility of such renewal of lease and revalidation of the plans, already transfer of the entire building and the rights in the same as it stands as well as the interests and rights in the land, except flat No.71 agreed to be sold to the appellant, has been made to the seventh respondent, subject to the terms and conditions as are stipulated in the Deed of Assignment dated 14.10.1994. The claim of the appellant could not, therefore, be unceremoniously rejected merely because in this case it is the Court, which has to order the specific performance.

What the parties themselves could do or perform, if they wish or so desire, may be compelled to be performed by the mandate of the competent Court also and Court cannot be held to be disabled or disentitled in law to direct the parties to perform their obligations, express and implied by adhering to the solemn undertaking under the contract between the parties. While granting such a decree for specific performance, it can always be made conditional and dependent upon the renewal of the lease and revalidation of the building plans. In my view, there is no justification whatsoever in law or on facts on record to deny the relief to the appellant when it could possibly and legitimately be directed and rendered executable, subject to the competent authorities so according or making the required orders in this regard, denying the right of execution of the decree at the same time, if the competent and concerned authorities refused or declined to grant renewal of the lease and/or revalidate the building plan rendering it wholly impossible or performance of the contract by respondents 1 and 2. So much, on the position of law as to the powers of the competent court to grant even a conditional decree by way of specific performance. But, at the same time, this Court has also repeatedly reiterated the position of law that courts are not bound to grant specific performance merely because it is lawful to do unmindful of equities to be balanced and despite serious inequities that may necessarily result by granting the same. These aspects have been highlighted even in the judgments noticed supra.

In *Sardar Singh vs. Krishna Devi (Smt.) & another (supra)*, this Court held that Section 20 (1) declaring the jurisdiction of courts to decree specific performance being discretionary, the court is not bound to grant such relief merely because it is lawful to do so and that the discretion of the court is to be exercised guided by sound and reasonable judicial principles, not arbitrarily. It was also cautioned that the court has to also take into account the circumstance of each case keeping in view the fact that the circumstances specified in Section 20 are illustrative and not exhaustive and that the plaintiff cannot succeed in obtaining an order of specific performance unless he is able to show sufficiently and clearly the existence of a contract that is valid and enforceable at law at the time when the order is sought.

In *K.Narendra Vs. Riviera Apartments (P) Ltd. (supra)*, this Court reiterated that severe hardship may be a ground for refusing specific performance, even though it results from circumstances, which arise after the conclusion of this contract, which affect the person of the defendant and for which the plaintiff is no way responsible. Adverting to inflationary increase in the value of properties and the relevance of the same in denying or granting the relief at paragraph 35 of the report, it was observed as hereunder:

"Added to all this is the factum of astronomical rise in the value of the land which none of the parties would have fore-contemplated at the time of entering into the agreement. We are not in the least holding that the consideration agreed upon between the parties was inadequate on the date of the agreement. We are only noticing the subsequent event.. Upon an evaluation of the totality of circumstances, we are of the opinion .. The contract though valid at the time when it was entered, is engrossed in such circumstances that the performance thereof cannot be secured with precision. The present one is a case where the discretionary jurisdiction to decree the specific performance ought not to be exercised in favour of the respondents."

In *K. S. Vidyanadam & Others vs. Vairavan [1997 (3) SCC 1]*, B.P. Jeevan Reddy, J., speaking for this Court, observed at Para 11 as hereunder:

"Shri Sivasubramaniam cited the decision of the Madras High Court in *S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar* holding that mere rise in prices is no ground for denying the specific

performance. With great respect, we are unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We cannot be oblivious to the reality - and the reality is constant and continuous rise in the values of urban properties fuelled by large-scale migration of people from rural areas to urban centres and by inflation"

In a recent pronouncement reported in *V. Pechimuthu vs. Gowrammal* [2001 (7) SCC 617], this Court observed that where the court is considering whether or not to grant a decree for specific performance for the first time the rise in the price of the land agreed to be conveyed may be a relevant factor in denying the relief of specific performance. Reference has also been made above to a decision of this Court in *Gobind Ram vs. Gian Chand* (supra) wherein, in order to mitigate the hardship resulting to the vendor due to lapse of time and escalation of prices of urban property, further compensatory amount was ordered to be paid, even though in that case the trial court granted a decree for specific performance for consideration recited in the document and the balance of consideration was also deposited by the purchaser in full, thereon.

The subsequent developments and events noticed above and brought on record, even de hors the legal principles considered above belies, at least for the present, the claim of total impossibility of performance of the agreement entered with the appellant by the respondents 1 and 2. At the same time, the entire fault for the delay or default cannot be squarely attributed solely to 1st and 2nd respondents since the volition and positive role of others as well as some public authorities were found required to have the agreed things to be done, really fulfilled and carried out. Certain lapses in carrying out the developmental activities in accordance with the arrangements made and agreements entered into with other parties and court proceedings also had their inevitable impact. Consequently, while insisting upon the enforcement of her rights under the suit agreement, the plaintiff/appellant also should be prepared to share a portion of the expenses, monetary commitments and obligations to be satisfied in securing the renewal of the lease and the revalidation of the building plan proportionate to and commensurate with her share qua the flat No.71 agreed to be sold. During the course of examination and particularly her cross-examination, the appellant expressed her willingness to contribute her share viz. 1/36th of the arrears, and later mentioned it to be 1/34th share. The appellant also seems to have stated that she was prepared and willing to take possession of the incomplete flat without claiming any reduction in purchase price and also further stated that she, by accepting the incomplete flat, would not hold defendants 1 and 2 (respondents 1 and 2) liable for anything incomplete in the building. Attractive though it may appear, ordinarily, she cannot be allowed to have for her alone, the entire benefit of manifold mega increase of the value of real estate property in the locality. Apparently, aware of the nebulous state of affairs, she also has stated that she cannot say who would complete the rest of the building, if specific performance was granted, as the building stands and that it would take several lakhs to complete it. She also firmly stated that she will co-operate if the possession of incomplete flat is given, to complete the same. As against the total consideration of Rs.60,000/- agreed to under the suit agreement, a sum of Rs.35,000/- has only been paid, as upto June, 1969 and even thereafter there was no occasion to pay any part of the balance of consideration. Consequently, it would be not only unreasonable but too inequitable for courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question, preserved all along by respondent Nos. 1 and 2 by keeping alive the issues pending with the Authorities of the Government and the Municipal body. Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into the totality of

circumstances of each case. The parties, while availing of the opportunities given by this court to settle the matter, appear to have, so far as respondents No. 1 and 2 were concerned, prepared to pay upto sixty lakhs as against the demand of the appellant to the tune of one and half crores, and subsequently, reduced upto 120 lakhs. Seeking to place reliance upon the details of consideration found mentioned in the assignment deed dated 14.10.94, it has been stated in the written submissions on behalf of the appellant that even a sum to the tune of Rs.1,81,63,534/-, if paid, will be of some recompense only. Keeping in view, all these aspects, in my view, interests of justice would be better served, dictates of reason could be satisfied, and equities could, to some extent, be balanced only if as a condition for decreeing specific performance or allowing the plaintiff to avail of such relief, the appellant is directed to pay at least a sum of rupees forty lakhs to the respondents No. 1 and 2, in addition to the amount already paid. The appellant shall be entitled to have a decree for specific performance, only subject to satisfaction/compliance with the said condition of further payment, as a compensatory measure for the respondents No. 1 and 2.

The 7th respondent, in this appeal, the assignee/purchaser under the deed of assignment dated 14.10.94, got the incomplete building except flat No.71 on the 7th floor of the building "Divya Prabha" and the rights and interests in relation to the land on which this building and the completed building 'Advent' and other constructions stand. This respondent had to necessarily take steps to obtain the renewal of the lease in respect of the land and revalidation of the building plan, as a whole, of which the flat agreed to be sold to the appellant is only a part. For all purposes the benefits secured cannot be to the exclusion of the appellant, since flat No.71 alone cannot be segregated or separated from the totality of the scheme. Hence, it is but necessary for the appellant to engage the services of the 7th respondent and inevitable for the said respondent also to take up the cause of the flat No.71 also agreed to be sold to the appellant, on such terms as they may mutually stipulate by consensus forgetting about the rancour of the litigation or its side effects. If there is any difficulty in arriving at a consensus, the parties shall be at liberty to approach the Commissioner for taking Accounts who shall determine and fix the same, which determination shall be binding upon parties.

The appellant should not be left without any remedy, if she is not prepared to abide by and satisfy the condition as to the payment of a sum of rupees forty lakhs, before getting the decree for specific performance, executed in her favour. If the appellant fails to comply with the same, she shall not be entitled to the relief of specific performance and her rights and entitlement shall be only to get damages, as per the decree of the learned Single Judge in the suit, which was affirmed by the Division Bench of the High Court, in terms of the sum to be fixed by the Commissioner for taking accounts, as per the decree of the High Court, and nothing more than that relief.

For all the reasons stated above, the appeal is allowed and the judgment and decree dated 23.3.81 passed in suit No.744 of 1969 on the original side of the High Court of Bombay, as affirmed by the Division Bench by its judgment dated 15.7.1987 in Appeal No.204 of 1981, shall stand, modified and altered and there shall be a decree in suit No.744 of 1969 on the file of the original side of the High Court, Bombay in the following terms:

(i) There shall be conditional decree for specific performance of the agreement dated 8.9.66 entered into between the 4th plaintiff and defendants No. 1 and 2 and defendants No.1 and 2 shall execute a sale deed as envisaged in the agreement for sale of flat No.71 on 7th floor of the building known as "Divya Prabha" situated at No.12 A, Foreshore Road, Bombay, in "as is where is condition";

(ii) That the appellant/4th plaintiff shall pay the defendants/respondents 1 and 2, a sum of Rs.40,00,000/- (Rupees Forty lakhs) in addition to the sum already paid by them. The appellant shall be

entitled to have the sale deed executed in her favour only on prior compliance and satisfaction of this condition;

(iii) The rights and interest in the land shall be as agreed to between parties and as per scheme and arrangement contained in the agreement dated 8.9.1966;

(iv) The defendants 1 and 2 and/or the 7th respondent in this appeal, viz., Gaurav Overseas Private Ltd., 92, Maker Chambers, Nariman Point, Bombay-400020, as and when they secure the necessary renewal of the lease and revalidation of the building plan, the same shall be for the benefit of the 4th plaintiff/appellant also, subject to the condition that she shall contribute her share of the monetary commitments and expenses incurred therefor, on being intimated by any of them in writing within four weeks from the date of such receipt of the intimation. In case of dispute about the quantum, the same shall be got determined and settled before the Commissioner for taking accounts, on being moved by either of them. The sum so determined shall be a charge on the property comprised in flat No.71, till it is paid and shall be entitled to be recovered, accordingly.

(v) The appellant and the 7th respondent shall be at liberty to mutually agree for completion of the incomplete building at such prevailing market rates as would be applicable for the work and manner of its completion and the mode of payment. If there can be no such mutual agreement among the appellant and the 7th respondent in this regard, as and when the sale deed is executed by the 1st and 2nd defendant, as per this decree, the appellant shall be at liberty to make her own arrangement to have her flat completed through approved and licensed Architects;

(vi) The sale/conveyance pursuant to the decree in the suit shall be subject to all such rights and liabilities and obligations of respective parties (the appellant, the respondents 1, 2 & 7) under the suit agreement, as are available to each of them against the others, had the sale has been effected even without the intervention of this court, by mutual agreement of parties;

(vii) The appellant failing to comply with the terms of the conditional decree passed as above, shall stand denied and lost her right and entitlement to get specific performance of the agreement dated 8.9.66 in her favour and consequently, the appeal shall stand dismissed with the appellant's rights secured as per the judgments and decrees dated 23.3.81 and 15.7.87 firmly affirmed and settled, and the rights to have them executed in the manner known to law, alone surviving to the appellant.

(viii) Each party shall bear their respective costs in this Court.

J.
[Doraiswamy Raju]

May 10, 2002.

JUDIS