
Malini V. Parab @ Prabhu and Another Vs Prafullakumar R. Deshpande

F.A. No. 79 of 1997

Court: Bombay High Court (Goa Bench)

Date of Decision: June 6, 2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 1 Rule 10(2), 47#Limitation Act, 1963 " Article 54#Specific Relief Act, 1963 " Section 16, 22, 22(1), 22(2)#Transfer of Property Act, 1882 " Section 55

Citation: (2008) 5 ALLMR 223 : (2008) 6 BomCR 293 : (2008) 5 MhLj 633

Hon'ble Judges: N.A. Britto, J

Bench: Single Bench

Advocate: P.S. Rao, for the Appellant; C.A. Coutinho, for the Respondent

Final Decision: Dismissed

Judgement

N.A. Britto, J.

The plaintiffs' suit for specific performance of agreement dated 13-1-1990 has been decreed by the learned Civil Judge,

Sr. Division at Quepem by Judgment/Decree dated 24-2-1997. Hence this appeal by the defendants.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said civil suit. Some admitted facts are required to be

stated to dispose of this appeal.

3. The defendants are owners of a property admeasuring 584 sq. metres surveyed under No. 128 of Curchorem Village in which they constructed

a house. The said plot was purchased by the defendant No. 1 earlier by Deed of Sale dated 22-2-1982. By virtue of agreement dated 13-1-

1990, rectified by another agreement dated 22-2-1990, the defendant No. 1 (since expired and now represented by his legal representatives)

entered into an agreement of sale with the plaintiffs. It is necessary to refer to some of the clauses of the said agreement. By virtue of Clauses (1)

and (2), the suit plot along with the house was agreed to be sold to the plaintiffs for a sum of Rs. 2,00,000/-, out of which Rs. 10,000/- were paid

by a cheque, as earnest money. Clause (3) stipulated that the defendants would hand over the documents, and in fact the sale deed dated 22-2-

1982 was handed over to the plaintiffs. By virtue of Clause (4), the sale deed between the plaintiffs and the defendants was to be executed within

3 to 4 months from the date of production of the occupancy certificate and tax receipt by the defendants from the Municipal Council. By virtue of

Clause (6) it was agreed that the defendants would not enter into any type of agreement with any other person in respect of the said plot and the

said house till the sale deed was executed between the plaintiffs and the defendants. Clause (7) also specifically stipulated that the compensation in

money would not be an adequate relief and either of the parties would be entitled to ask for the specific performance of the said agreement.

4. By letter dated 30-1-1991, the defendants sent the occupancy certificate and house tax receipt as stipulated, and called upon the plaintiffs to

take immediate steps to execute the sale deed. Thereafter there was silence between both the parties i.e. as far as written word is concerned,

though each claims that they approached the other for the purpose of execution of the sale deed. The defendants, thereafter, by letter dated 21-3-

1994-Exhibit PW.1/C called upon the plaintiffs to execute the sale deed within a period of 8 days and the plaintiffs by letter dated 31-3-1994-

Exhibit PW.1/D told the defendants that they were willing to execute the same and called upon the defendants to fix the time and place. This letter

was returned ""unclaimed"", but, it has got to be presumed that it was received by the defendants as it was a registered letter sent at correct address

of the defendants and a bare denial from the defendants, that it was not received by them, would not be sufficient to rebut the presumption, that

was available to the plaintiffs under the relevant provisions of law.

5. Thereafter, the defendants are stated to have entered into another agreement with one Leena Matilda Fernandes, wife of Joaquim Fernandes on

13th June, 1994, and, after the plaintiffs came to know about the same, the plaintiffs filed the suit for specific performance on or about 25th July,

1994.

6. The case of the plaintiffs is that they are ready and willing to execute the sale deed as per the agreement. The case of the defendants is that time

was the essence of contract since the defendants were indebted to the Bank of India. It is also the case of the defendants that since the plaintiffs

were not coming forward to execute the sale deed and failed to advance Rs. 50,000/- which was agreed to be advanced at the time of execution

of the agreement and as the defendants were in serious financial difficulties, they could not wait for the plaintiffs to execute the sale deed at their

sweet pleasure and as they got an offer to purchase from the said Joaquim Fernandes for Rs. 3 lacs they entered into an agreement with them on

13-6-1994 and after receiving an advance of Rs. 2 lacs they were put in possession of the suit house/property.

7. The learned trial Court framed 4 issues. The plaintiffs and the defendants examined one witness each in support of their respective cases and the

learned trial Court, after considering the evidence produced, came to the conclusion that the first two issues were proved by the plaintiffs and the

next two issues were disproved by the defendants. In other words, the learned trial Court held that the plaintiffs were entitled to the specific

performance of the said agreement and directed the defendants to execute the sale deed on payment of Rs. 1,90,000/-. The learned trial Court

also held that in the absence of any corroborative evidence, the defendants had failed to prove that the suit plot was agreed to be sold to the said

Leena Matilda Fernandes, wife of Joaquim Fernandes, out of which Rs. 2 lacs were paid and the balance of Rs. 1 lac was yet to be paid.

8. The plaintiffs (i.e. PW.1) stated in his evidence before the Court that after the agreement, the plaintiffs requested the defendants to show certain

documents and the defendants all the time asked the defendants to wait for some time. PW.1 has admitted the receipt of letter dated 30-1-1990

with which the occupancy certificate and the house tax receipt were sent and has admitted that the plaintiffs did not write to the defendants that

they were willing to execute the sale deed, but they had approached the defendants in person on many occasions for the purpose of execution of

the sale deed and that he (i.e. PW. 1) had on many occasions met the defendants and similarly, the defendants had also come to meet them. He

also stated that plaintiff No. 1 went to the defendants' house on two occasions along with him. On the other hand, the defendant (i.e. DW.1)

stated that the plaintiffs in spite of receiving the notice, did not come forward to execute the sale deed and that he personally contacted the plaintiffs

who went on promising to sign the sale deed, but they never came forward and on one occasion, one Laximan Naik was also accompanying him

when he went to meet the plaintiffs and finally, the defendants sent the legal notice dated 21-3-1994 asking the plaintiffs to come forward to

execute the sale deed within 8 days and in case of default, the amount of Rs. 10,000/- would stand forfeited and the agreement would stand

terminated.

9. Admittedly, the defendants did not examine the said Laximan Naik in support of their case though it is expected of the parties to produce the

best evidence available. The version given on behalf of the plaintiffs and the defendants by their respective witnesses, when tested on the anvil of

probabilities shows that it is the version of the plaintiffs which is more plausible and probable. There is no dispute that at the time of execution of

the agreement a sum of Rs. 10,000/- was paid by the plaintiffs to the defendants and not only that the defendants had handed over the sale deed of

the suit plot to the plaintiffs. The defendants' version that 1 lac was required to be paid at the time of the signing of the agreement and 2 lacs were

to be paid at the time of the signing of the sale deed does not at all appear to be correct in the light of clauses 1 and 3 of the agreement which show

otherwise. It is true that after the plaintiffs received the occupancy certificate and the house tax receipt by letter dated 30-1-1991, sent by the

defendants, the plaintiffs did not write to the defendants fixing a time for the execution of the sale deed, but the fact remains that the defendants also

did not call upon the plaintiffs in writing to execute the sale deed. The evidence led on behalf of both the parties has to be seen in the light of the

fact that in Special Civil Suit No. 26/89/A which was filed by the State Bank of India against the defendant i.e. appellant No. 2 herein, there was

an ex-parte injunction granted vide order dated 1-7-1989 and confirmed by order dated 16-4-1990, whereby the defendant was restrained from

transferring the suit property. The said suit was subsequently decreed on 27-12-1994 and, if that is so, and if at all the said property could not be

transferred in favour of the plaintiffs, it was in view of the restraint placed by the Court against the defendants from transferring the suit property

and the suit house in favour of the plaintiffs. There is no explanation from the defendants as to why they waited to send the letter dated 21-3-1994

for over 3 years, which could have been sent much earlier i.e. after the expiry of 3 to 4 months from 30-1-1991. If at all there was delay in

execution of the sale deed, the fault appears to have been on the part of the defendants and not on the part of the plaintiffs. The defendants"

contention that the sale deed remained without being executed because of the fault of the plaintiffs cannot be accepted. The letter dated 21-3-1994

was sent by the defendants only as an excuse to wriggle out from the said agreement of sale. The plaintiffs had in fact promptly replied to the said

letter by their letter dated 31-3-1994 which the defendants are presumed to have received and in any event it could not be said that the fault in not

executing the sale deed has to be shouldered by the plaintiffs.

10. The first submission made by the learned Counsel on behalf of the defendants is that the plaintiffs failed to plead and prove that they were

ready and willing to perform their part of the obligation under the contract which was a condition precedent to grant the relief of specific

performance and in the absence of the same, the plaintiffs would not have been entitled to the specific performance of the contract. On behalf of

the defendants, it is further submitted that by letter dated 30-1-1990, the occupancy certificate and the house tax were sent to the plaintiffs and the

plaintiffs were required to execute the deed of sale within 3 to 4 months from the receipt of the said documents and since there was no

communication from the plaintiffs until 31-3-1994, the plaintiffs would not have been entitled for the specific performance of the agreement. It is

further submitted that the time was the essence of the contract and, in any event, by virtue of letter dated 21-3-1994, the time was made essence

of the contract and the plaintiffs having failed to complete the transaction within the stipulated time, the plaintiffs would not be entitled to the specific

performance of the contract. In support of the submissions, the learned Counsel on behalf of the defendants has placed reliance on several

decisions and particularly on the case of Pushparani S. Sundaram and Others Vs. Pauline Manomani James (Deceased) and Others, , wherein the

Apex Court has stated that the plaintiffs must aver and prove that either he has actually performed or that he was always ready and willing to

perform his essential obligations under the contract and merely filing suit for specific performance and taking the plea that he was ready and willing

by themselves are not sufficient to satisfy the requirements of Section 16(c) of the Specific Relief Act, 1963. The Apex Court in the aforesaid

decision has also stated that readiness and willingness to perform the essential terms of contract could be inferred from totality of circumstances or

conduct of plaintiff. That was case where there were two circumstances sought to be proved, one was that immediately after the exemption was

given by the Ceiling Authorities on 31-3-1982, the suit was filed in April, 1982 and the other was the tendering of Rs. 5000/- to the defendant

after execution of the agreement of sale, and, the Apex Court, after considering the said two circumstances came to the conclusion that the said

two circumstances even if taken together, is too weak a filament to stand even to build an image of readiness and willingness. The Apex Court also

observed in that case, that not only the plaintiff had not stepped into the witness box, but had not even sent any communication or notice to the

defendant about his willingness to perform his part of the contract.

11. The next contention of the defendants is that the time was the essence of the contract and in any event that it was made so by virtue of letter

dated 21-3-1994.

12. The Apex Court in Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Another, has stated that:

The fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When

a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. The intention to treat

time as the essence of the contract may be evidenced by circumstances which should be sufficiently strong to displace the normal presumption that

in a contract of sale of land stipulation as to time is not the essence of the contract.

In coming to the conclusion, the Apex Court relied upon its earlier decision in the case of Gomathinayagam Pillai and Others Vs. Pallaniswami

Nadar, on which reliance has been placed on behalf of the defendants. In the case of Gomanthinayagam Pillai (supra), the Apex Court has further

stated that if time is not of essence originally, it can be made of essence even subsequently by serving notice on the other party. In the case of Smt.

Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., , the Constitution Bench of the Apex Court after taking into consideration

several of its previous decisions has come to the conclusion that:

In the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the

contract, the Court may infer that it is to be performed within a reasonable time if the conditions are:

1. from the express terms of the contract;
2. from the nature of the property; and
3. from the surrounding circumstances., for example : the object of making the contract.

In Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others, , the Apex Court observed that:

It is incumbent upon the plaintiff both to aver and prove that he had all along been ready and willing to perform the essential terms of contract

which were required to be performed by him.

In Syed Dastagir v. T.R. Gopalkrishna Setty 1999(4) ALL MR 286, the Apex Court referring to Section 16(c) of the Specific Relief Act, 1963

observed that:

In construing a plea in any pleading. Courts must keep in mind that a plea is not an expression of art and science but an expression through words

to place fact and law on one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still could be gathered what he

wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by

counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a

whole. This does not distract one from performing his obligations as required under a statute. But to test, whether he has performed his obligations

one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form.

Same plea may be stated by different persons through different words then how could it be constricted to be only in any particular nomenclature or

word. Unless statute specifically require for a plea to be in any particular form, it can be in any form. No specific phraseology or language is

required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he

has performed or has always been and is willing to perform his part of the contract. So the compliance of ""readiness and willingness"" has to be in

spirit and substance and not in letter and form. So to insist for mechanical production of the exact words of an statute is to insist for the form rather

than essence. So absence of form cannot dissolve an essence if already pleaded.

13. The plaintiffs did plead in para 12 of the plaint that they were ready and willing to execute the sale deed as per agreement and they were willing

to pay the balance of Rs. 1.9 lacs at the time of execution. Firstly, it must be stated that the very manner in which clause No. 4 was worded namely

that the sale deed would be executed within 3 to 4 months from the date of the production of the occupancy certificate and the tax receipt shows

that the parties did not intend that time would be the essence of the contract. Moreover, if the defendants had understood that time was the

essence of the contract, one fails to understand as to why the defendants waited for more than 3 years to send the said letter dated 21-3-1994 and

in case time was the essence of the contract the defendants would have themselves sent the said letter after the expiry of the stipulated time of 3 to

4 months after letter dated 30-1-1991. The defendants have not explained as to how they could have executed the said deed in favour of the

plaintiffs after the earlier ex parte order was confirmed on 16-4-1990 in CMA No. 90/89 in CS No. 26/89. The letter dated 21-3-1994 was

promptly replied to by the plaintiffs and even assuming that time was essence of the contract, the sale deed remained without being executed

because of the said Civil Suit filed against the defendants and the plaintiffs cannot be blamed for not executing the said deed within a reasonable

time. The defendants cannot be allowed to take advantage of their own default. All that Section 16(c) requires is that the plaintiff should aver in the

plaint and establish as a fact by evidence aliunde that he has always been willing to perform his part of the contract. What is to be seen is the pith

and substance of the plea and not the form it is taken. Considering the facts of the case, the plaintiffs have pleaded and proved the requirements of

Section 16(c) of the Specific Relief Act. If at all the Apex Court in Smt. Chand Rani (dead) by LR's (supra) held that time was the essence of the

contract it was because the word ""only"" was used twice over to (a) qualify the amount of Rs. 98,000/- and to (b) qualify the period of 10 days. If

time was made the essence of contract by letter dated 21-3-2004 in this case, the plaintiffs have immediately reacted to the same calling upon the

defendants to fix the time and place for execution of the sale deed. Plaintiffs therefore cannot be blamed for breaching the contract.

14. It is also contended on behalf of the defendants that the plaintiffs approached the Court with unclean hands in that the plaintiffs did not disclose

in their plaint about the receipt of the defendants' letter dated 30-1-1991. It is true that the plaintiffs did not plead about the said letter dated 30-1-

1991. However, the fact remains that in the cross-examination, the plaintiffs' witness immediately admitted the receipt of the said letter and only

because the plaintiffs did not plead the said fact, in my view it would not be the sufficient reason to disentitle the plaintiffs from obtaining equitable

relief.

15. The defendants' contention that the suit is barred by limitation also needs to be rejected. Firstly, the defendants did not raise the plea of

limitation in their written statement. The defendants' contention that the last date for execution of the sale deed would have ended on 30-5-1991

cannot be accepted as already observed. Admittedly, both the parties did not treat that time was the essence of the contract between them and as

already stated, this is reflected in the contents of the defendants' letter dated 21-3-1994, which letter the defendants' could have sent much earlier

i.e. soon after 30-1-1991 in case that was the last date by which the sale deed was to be executed. In Pukhraj D. Jain and Others Vs. G.

Gopalakrishna, on which reliance has been placed on behalf of the defendants, the Apex Court has stated that:

Article 54 of the Limitation Act provides for a limitation of three years for instituting a suit for specific performance of a contract. This period of

three years has to be reckoned from the date fixed for the performance, or if no such date is fixed, when the plaintiff has noticed that performance

is refused.

In the case of Mst. Sugani v. Rameshwar Das and Anr. 2006(6) ALL MR (SC) 28, the Apex Court has again reiterated that in terms of Article 54

the starting point of limitation is three years from the date when a date is fixed and since in that case no date was fixed the execution of the

agreement was denied. In the case at hand, the plaintiffs had clearly averred that the cause of action for filing of the suit arose on 6-4-1994 when

the defendants refused to comply the notice for execution of the sale deed in favour of the plaintiffs. The defendants had not specifically denied the

said averments of para 15 of the plaint, but merely stated that they had not received notice dated 31-3-1994 on 6-4-1994 which, as already

observed, is presumed to have been received by the defendants and therefore the suit which was filed on 25-7-1994 could not be said to have

been time barred.

16. On behalf of the defendants, it is also contended that the learned trial Court could not have granted relief of possession to the plaintiffs against

the third party in possession of the suit property when there was no prayer for possession made on behalf of the plaintiffs and such a relief is

against the mandate of Section 22 of the Specific Relief Act, 1963 and in this context reliance has been placed on 2001 VII AD 513 (SC) , wherein

the Apex Court has held that:

In a suit for specific performance of contract for sale of immovable property containing stipulation that on execution of the sale deed the possession

of the immovable property will be handed over to the purchaser, it is implied that delivery of possession of the immovable property is a part of the

decree of specific performance of contract. But in this connection it is necessary to refer to Section 22 of the Specific Relief Act, 1963 which runs:

22. Power to grant relief for possession, partition refund of earnest money, etc.:

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, and person suing for the specific performance of a

contract for the transfer of immovable property may, in an appropriate case, ask for:

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him in case his claim for

specific performance is refused.

(2) No relief under Clause (a) or Clause (b) of Sub-section (1) shall be granted by the Court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the

plaint on such terms as may be just for including a claim for such relief.

17. The Apex Court in the above decision further stated that:

It may be seen that Sub-section (1) is an enabling provision. A plaintiff in a suit of specific performance may ask for further reliefs mentioned in

Clauses (a) and (b) thereof. Clause (a) contains reliefs of possession and partition and separate possession of the property, in addition to specific

performance. The mandate of Sub-section (2) of Section 22 is that no relief under Clauses (a) and (b) of Sub-section (1) shall be granted by the

Court unless it has been specifically claimed. Thus it follows that no Court can grant the relief of possession of land or other immovable property,

subject-matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is

specifically prayed for.

18. Earlier, in the case of Babu Lal Vs. Hazari Lal Kishori Lal and Others, , the Apex Court referred to the expression "appropriate case" in Sub-

section (1) of Section 22 of the Specific Relief Act, 1963 and stated that the said expression was very significant. The plaintiff may ask for the

relief of possession or partition or separate possession "in an appropriate case".

A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual

possession of the property. As against him, a decree for possession must be specifically claimed for such a person is not bound by the contract

sought to be enforced. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale

simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree-holder. Referring to the expression "at

any stage of the proceedings" in the proviso below Sub-section (2) of Section 22 of the Specific Relief Act, 1963, the Apex Court referred to

Shorter Oxford Dictionary, wherein the said expression has been defined and after referring to several decided cases came to the conclusion that

the Legislature has given ample power to the Court to allow amendment of the plaint at any stage, including the execution proceedings. That was

the case where a suit for a specific performance was filed by respondents No. 1 to 5 and the trial Court had dismissed the same, but the learned

Additional District Judge had decreed the suit. The High Court had confirmed the judgment and the decree of the learned Additional District Judge

with slight modifications in that the High Court had directed the petitioner as well as the respondents No. 6 to 9 to execute the sale deed in favour

of respondents No. 1 to 5. The decree holders had then applied for execution of the decree and the petitioner had filed objections u/s 47, CPC

and ultimately the High Court had held that the decree holders would be entitled to possession also, and, it was contended before the Apex Court

that it was not possible for the High Court to grant the relief of possession at the execution stage and in any case the Court should have allowed

first an amendment to the plaint and then an opportunity should have been afforded to the petitioner to file an objection. It may be stated here that

respondents No. 6 to 9 had executed a sale deed in favour of the petitioner in that case in spite of an agreement with respondents No. 1 to 5. The

Apex Court therefore observed that:

Once they accept the legal position that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives

any right or title to the decree-holder and the right and title passes to him only on the execution of the deed of sale either by the judgment-debtor

himself or by the Court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the petitioner merely

because a decree has been passed for the specific performance of the contract. The limitation would start against the decree-holders only after

they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment-

debtor by lapse of time. Section 22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law Courts always

abhor.

The only amendment to be made in the plaint was to add a relief for possession if necessitated because of the provisions of Section 22 which is

only an enabling provision.

Ultimately, the Apex Court stated that procedure was meant to advance the cause of justice and not to retard it. The difficulty of the decree-holder

starts in getting possession in pursuance of the decree obtained by him. The judgment-debtor tries to thwart the execution by all possible

objections. The Apex Court found no fault in the order passed by the High Court and proceeded to dismiss the Special Leave to Appeal filed by

the petitioner.

19. In *Prataprai Trambaklal Mehta Vs. Jayant Nemchand Shah and Other etc.*, this Court has observed that:

It is now well settled that it is not necessary in a suit for specific performance, either to separately claim possession or for the Court to pass a

decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to

complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by Section 55 of the Transfer of Property

Act.

The Court further observed that:

It is clear that most important part of such a decree is the portion where the Court directs that the contract to be specifically performed and the

details which follow do not in any way limit the jurisdiction of the executing Court to take particular steps which are mentioned in the decree, but all

other steps which ought to be taken for giving full effect to the decree for specific performance are not only within the competence of the Court,

but the Court is bound to assist the party to that effect.

In *Lotu Bandu Sonavane v. Pundalik Nimba Koli* 1985 Mh.LJ. 359 this Court observed that the plaintiff had not made a claim to be placed in

possession of property agreed to be sold and the judgment-debtor was in possession and this Court held that the plaintiff was entitled to

possession in execution proceedings even though there was no specific decree made for possession.

20. What follows particularly from *Babu Lal and Adcon Electronics Pvt. Ltd.* (supra) is that/the relief of possession being inherent in the relief of

specific performance of the contract of sale it is not always necessary for the plaintiff to specifically claim possession but in cases where possession

is parted with subsequent to such contract or agreement for sale, it is necessary that the plaintiff seeks the relief of possession also but this can be

done at any stage of the suit including execution proceedings, and this on the assumption that a decree in a suit for specific performance is

considered to be some what in the nature of preliminary decree. Being so, the plaintiffs' suit could not have been dismissed only because till date

the plaintiffs had not sought the relief of possession as well, in addition to the reliefs of specific performance.

21. The plaintiffs were fully aware that the defendants had parted with the possession of the suit property/house in favour of the said Smt. Leena

Matilda Fernandes, wife of Joaquim Fernandes and yet did not implead the said Leena as a defendant in the suit. So also the defendants did not

take a plea of her nonjoinder. The said Smt. Leena also did not come forward with a prayer that she should be joined as a party to the suit. It

appears that she remained happy only by attending the Court and watching the proceedings of the suit. The reason for all this is obvious and which

can be seen from the decision of the Apex Court, cited hereinbelow.

22. As far as the rights of Smt. Leena Matilda Fernandes, wife of Joaquim Fernandes are concerned, she would be entitled to resist the Decree in

execution proceedings by virtue of an application filed in terms of Order 47, CPC or by way of Civil Suit and the controversy on this aspect is no

longer res integra. The Apex Court in *Kasturi Vs. Iyyamperumal and Others*, , stated that:

In a suit for specific performance of contract the only necessary parties are those who are parties to a contract or parties who claim under them

and that a person who claims independent title and possession adversely to title of vendor is not a necessary party, since an effective decree can be

passed in his absence and no relief can be claimed against such party.

23. Referring to the provisions of Order 1, Rule 10(2) and the expression "all the questions involved in the suit" appearing therein, the Apex Court

stated that the expression does not include the controversies which may arise between the plaintiffs or the defendants inter se or questions between

the parties to the suit and a third party. The Apex Court further observed that:

The parties claiming independent title and possession adverse to title of vendor, and not on basis of the contract, are not proper parties, for if such

parties are impleaded scope of the suit for specific performance shall be enlarged to a suit for title and possession, which is impermissible. A third

party or a stranger to the contract cannot be added in a suit for specific performance merely in order to find out who is in possession of the

contracted property or to avoid multiplicity of suits.

24. In other words" the said Smt. Leena Matilda Fernandes and or her husband Joaquim Fernandes would at the most be at liberty to obstruct the

execution of the Decree in order to protect their possession, taking recourse to the relevant provisions of CPC if they are available to them or to

file an independent suit for declaration of title and possession against the plaintiffs or the defendants.

25. In view of the above, I find there is no merit in this appeal and consequently the same is hereby dismissed. Whether the decree passed by the

trial Court and confirmed herein, is executable or not, in the light of the judgment and decree passed in Special Civil Suit No. 26/89/A dated 27-

12-1995, is a matter which can be considered by the executing Court if such a plea is taken up on behalf of the defendants.