

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 188 OF 2010

Kashinath S/o Yadeo Hiwarde,
(Deceased) through legal
representatives:

- 1-A. Ramhari S/o Kashinath Hiwarde,
Age:35 Years, Occu:
- 1-B. Balu S/o Kashinath Hiwarde,
Age: 30 Years, Occu:
- 1-C. Aruni D/o Kashinath Hiwarde,
Age: 32 Years, Occu:
- 1-D. Padmabai W/o Kashinath Hiwarde,
Age: 35 Years, Occu:

All R/o : Satiche Kanadgaon,
Tal. Kannad, District Aurangabad.

**....Appellants.
(orig.plaintiffs)**

Versus

- 1) Osman Baig Sandu Baig @ Amir Baig,
Deceased his L.Rs.
- 1 (i) Jahir Baig Osman Baig,
Age 43 yrs, Occu. Business,
R/o. Baijipura, Galli No.1,
Aurangabad.
- 1(ii) Firoz Baig Osman Baig,
Age 41 yrs, Occu. Business,
R/o. Alamgir Colony, Aurangabad,
At Present r/o. Galli No.4,
Bair Colony, Aurangabad.
- 1(iii) Babbu Baig Osman Baig,
Age 37 yrs, Occu. Business,
R/o. Alamgir Colony, Aurangabad.
- 1(iv) Faujiya Begum d/o. Osman Baig,

(Faujiya Begum W/o Sk. Habib)
Age 39 yrs, Occu. Household,
R/o. Ulhas Nagar, Kalyan.

- 1(v) Farjana Begum Osman Baig,
(Farjana Begum Abdul Rashid)
Age 34 yrs, Occu. Household,
R/o. Alamgir Colony, Aurangabad.
- 1(vi) Shabana Begum Osman Baig,
Age 30 yrs, Occu. Household,
R/o. Alamgir, Colony, Aurangabad.
- 1(vii) Jarina Begum D/o Osman Baig,
Age 25 yrs, Occu: Household,
R/o. Alagir Colony, AURANGABAD.
District : Aurangabad.
- 1(viii) Farida Begum Osman Baig,
Age: 24 Years, Occu:Household,
R/o : Alamgir Colony, Aurangabad.
2. Salam Baig S/o Sandu Baig @ Amir Baig,
Age: 52 Years, Occu: Motor Driver and Agril.,
3. Jaheer Baig S/o Sandu Baig @ Amir Baig,
Age:48 Years, Occu: Motor Driver and Agril.,
4. Saberabi W/o Jamaluddin,
Age:82 Years, Occu: Household,
Appellant Nos.2 to 4 All
R/o: Khirdi, Taluka Khultabad,
District: Aurangabad.
5. Safibi W/o Syed Amir,
Age: 57 Years, Occu: Household,
R/o Savangi (Harsool),
Taluka and District Aurangabad.
6. Rayibai W/o Syed Amir,
Age:57 Years, Occu: Household,
R/o: Khirdi, Taluka Khultabad,
District Aurangabad.
7. Yaseenbi W/o Sandu Baig @ Amir Baig,
Deceased

Through her Legal Representatives
1-A to 6.

**....Respondents.
(Orig. Defendants)**

Mrs. Charuta S. Deshmukh, Advocate for appellants.

Mr. P.R. Katneshwarkar h/f. Mr. Y.V. Kakade, Advocate for
respondent Nos. 2 to 6.

CORAM : T.V. NALAWADE, J.

DATED : 10th December, 2015.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Appeal No. 116/1984 which was pending in District Court, Aurangabad. The appeal of present respondents, original defendants filed against judgment and decree of Special Civil Suit No. 51/1980 is allowed by the District Court and the decree given by the Trial Court of specific performance of contract is set aside. The original plaintiff has filed the present appeal. Both the sides are heard.

2) Two agricultural lands like land bearing Survey No. 18, admeasuring 12 Acre 1 Gunta and Survey No. 14, admeasuring 19 Acres 8 Gunta situated at village Maosala, Tahsil Khultabad, District Aurangabad were owned by Sandu Baig. Land Survey No. 14 is also known as Godhya Ambacha Inam. Sandu is dead and defendants are the successors of Sandu.

3) It is the case of plaintiff appellant - Kashinath that Sandu was in need of money and so, he expressed to plaintiff that he wanted to sell aforesaid two lands. It is the case of plaintiff that Sandu then agreed on 27.4.1977 to sell the aforesaid two lands for total consideration of RS. 42,000/-. It is the case of plaintiff that on the same date, the agreement was written and it was registered. It is contended that on 27th April, amount of Rs. 35,000/- was paid to Sandu as earnest money and the remaining amount of Rs. 7,000/- was to be paid at the time of execution and registration of the sale deed. The sale deed was to be executed after obtaining necessary permission from authority. The charges of the registration and obtaining permission were to be paid by the plaintiff, purchaser.

4) It is the case of plaintiff that brother of plaintiff namely Mahadu was in possession of both the lands since the years 1974-75, but Sandu was not ready to mention in the agreement that the possession was handed over to plaintiff unless the entire consideration was paid to him. It is contended that plaintiff was interested in having such recital in document and so, he paid the remaining amount of consideration of Rs. 7,000/- to Sandu on 28.4.1977 and on that date, Sandu executed

Bharna Pavti in favour of plaintiff. It is contended by the plaintiff that in Bharna Pavti, there was mention of receipt of money and there was mention of handing over of possession of two lands to the plaintiff. It is the case of plaintiff that said Bharna Pavti was produced by him in Regular Civil Suit No. 532/1979 which was filed by the present respondents, successors of Sandu.

5) It is the case of plaintiff that during the lifetime of Sandu, Sandu avoided to execute the sale deed under one or other pretext. It is contended by the plaintiff that after 28.4.1977, many times he had requested Sandu to execute the sale deed and he had informed that there was no necessity of any permission for execution of sale deed. It is the case of plaintiff that after the death of Sandu, he approached the successors of Sandu, defendants and he requested them to execute the sale deed, but they also avoided to execute the sale deed. It is the case of plaintiff that he was always ready and willing to perform his part of contract, but the defendants have avoided to execute the sale deed.

6) It is the case of plaintiff that Bharna Pavti dated 28.4.1977 produced in Regular Civil Suit No. 532/1979 is missing and so, he is entitled to lead secondary evidence in respect of

Bharna Pavti. It is the case of plaintiff that due to action of defendants like filing of suit bearing No. 532/1979, there is threat to his possession and so, he has filed the suit. The suit came to be filed on 25.4.1980. During implementation of consolidation scheme, these two survey numbers were merged to create Gat No. 30.

7) The defendants filed joint written statement. They denied that prior to 27.4.1977 brother of plaintiff was in possession of these lands. They denied that on 27.4.1977 Sandu agreed to sell the two lands for consideration of Rs. 42,000/- to the plaintiff. They denied that on 28.4.1977 Sandu had executed Bharna Pavti and he had received amount of Rs. 7,000/- more from plaintiff and he had also given possession to plaintiff. It is the case of defendants that Sandu was in possession of both the lands till his death. It is contended that defendant No. 1, son of Sandu, was in need of money as he wanted to purchase a truck for transport business and so, he requested plaintiff to give loan of Rs. 30,000/-. It is contended that as the plaintiff wanted some security in respect of this amount, one agreement was executed in favour of plaintiff on 27.4.1977. It is contended that some interest was given to plaintiff and so, the amount of Rs. 28,000/- was actually paid to defendants, but in the document, it was

shown that the amount of Rs. 35,000/- was paid by plaintiff to defendants. It is contention of defendants that possession was not given on 27.4.1977 or subsequent to that, at any time.

8) It is the case of defendants that Sandu had obtained occupancy right in respect of Survey No. 14 which was Inam land and the land was also known as Godhya Ambacha Inam. It is contended that in view of this circumstance, it was not possible to sell this land as there is prohibition under Inam Abolition Act to sell such land. It is contended that by joining hands with the revenue authority, plaintiff somehow got entered his name in revenue record in ownership column and also in possession column. It is contended that he used the circumstance that consolidation of lands was going on. It is contended that as there was no agreement of sale, there is no question of giving reliefs claimed. They contended that they are ready to return the amount taken as loan.

9) Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. The Trial Court had held that there was agreement of sale and even Bharna Pavti was executed on 28.4.1977 in favour of plaintiff. Thus, the Trial Court had held that entire amount of consideration was paid by

plaintiff to Sandu and his family members and the reliefs claimed were given. The First Appellate Court has set aside the decision of the Trial Court and it is held that it was a loan transaction. Equitable relief is given by the First Appellate Court to plaintiff and a direction is given to defendant to pay the amount of Rs. 42,000/-.

10) This Court (other Hon'ble Judge) admitted the appeal on 9.8.2011 on following substantial questions of law :-

"(1) Whether the findings of the first appeal Court on the questions; (i) the purport of the agreement, (ii) proof of bharna-pawati, and (iii) delivery of possession, are perverse ?

(2) Assuming the appellants succeed in proving the agreement, whether they make out a case for discretion for grant of specific performance ?"

11) The case of the plaintiff is based entirely on secondary evidence as he did not produce the original agreement dated 27.4.1977 and he was not having even a copy of so called Bharna Pavti dated 28.4.1977. Certified copy of registered agreement of sale is, however, produced on the record. Plaintiff examined himself and some witnesses to give

evidence on these two documents and some circumstantial evidence is also given. It appears that permission was given in trial Court to the plaintiff to lead secondary evidence in respect of both the documents. This Court, at this stage, is not expected to go into the propriety or legality of granting such permission. However, it needs to be kept in mind that the requirements which are there in the Evidence Act for proof of execution and also for proof of contents of documents and the transaction need to be fulfilled. The other requirement regarding validity of the document also need to be kept in mind. It is the case of plaintiff that in Bharna Pavti not only the receipt of amount was acknowledged, but the possession was also given.

12) The Trial Court had started with the presumption that in view of the existence of registered agreement of sale, it was not possible for it to consider the oral evidence of defendants and circumstances on the basis of which the defendants wanted to prove that it was a loan transaction. This point is addressed by the First Appellate Court by discussing the provision of section 92 of the Evidence Act and the necessary discussion in that regard is made by this Court at proper place.

13) It is already observed that plaintiff is relying on the

secondary evidence and for that also, he was expected to prove the things like execution of document and contents of the document. Relevant provisions in that regard are quoted hereinafter.

14) The provision of section 59 of the Evidence Act reads as under :-

"59. Proof of fact by oral evidence.-- All facts, except the contents of documents or electronic records, may be proved by oral evidence."

Thus, the ordinary rule is that for proving contents of document, the document itself is the best evidence. Section 61 of the Evidence Act relaxes this rule. Section 61 and other provisions show that when there are circumstances due to which it is not possible to produce the document and the grounds mentioned in the provision of Chapter V of the Evidence Act are available, the contents of the document can be proved by secondary evidence also. The provision of section 61 makes it clear that the contents of the document can be proved by primary or secondary evidence. In section 62 of Evidence Act, the meaning of 'primary evidence' and 'secondary evidence' is given and it is mentioned that the original document itself means primary evidence. In section 63 of the Evidence Act, the meaning of 'secondary

evidence' is given. Section 63 (5) of the Evidence Act shows that oral account of contents of document can be accepted as secondary evidence. In section 64 of the Evidence Act, it is again mentioned that the document must be proved by the primary evidence except in cases mentioned in section 65 of the Evidence Act. In the present matter, original documents are lost and so, as provided in section 65 (c), secondary evidence is permissible. The aforesaid provision show that the secondary evidence can be used for proof of existence, condition or contents of the document.

15) In section 63 of the Evidence Act, the meaning of 'secondary evidence' is given but section 63 (5) provides that oral accounts of contents of document can be given by a person who has himself 'seen' it. 'Seen' means 'read the contents'. In view of the provision of section 67 of the Evidence Act, it can be said that witness on execution of document is not a witness, who can say that he had 'seen' the document. So, when the original document is not available, the scribe, the person, who can say that he had written the document or he knew the contents of the document, the transaction, can give such evidence. Such need arises more when the contents of the document are disputed. In the present matter, some contents of agreement dated

27.4.1977 are disputed and so, this position of law needs to be kept in mind. In respect of Bharna Pavati, defence of forgery only needs to be considered.

16) Section 67 of the Evidence Act says that unless the execution of document is proved, the document cannot be admitted in evidence. There are many modes to prove the execution of document and one of them is to examine attesting witness. When the document is lost and even its copy is not available, in that case also, the evidence on execution of the document needs to be given in view of provision of section 67 of the Evidence Act. When there is a defence that the original document itself was forged, it becomes necessary for the party relying on the document to prove the execution and only after that the burden shifts on the party making allegation of forgery. Only after proof of execution the party making allegation of forgery needs to prove forgery.

17) Provisions of sections 101 and 102 of the Evidence Act show that when execution of document is proved, the burden shifts on the person, who is alleging that it was a forged document. These provisions show that such defendant has statutory right to send disputed handwriting or signature to

expert to prove the defence of forgery. However, the Court can consider the circumstance like relevancy of document and necessity of consideration of the document for just decision of the case. This right of defendant is also a part of basic principles of justice and fairness. {Reliance placed on the case reported as **AIR 1973 BOMBAY 40 (V 60 C 10) [M/s. Sanjay Cotton Co., Partnership Firm Akola Vs. M/s. Omprakash Shiopprakash and Anr.]**}. So, when there is no document available for sending it to the expert to get opinion for defence of forgery, the Court is expected to proceed with presumption that prejudice is certainly caused to the party, who has made allegation of forgery. In the result, when the original document is lost and it's genuineness itself is in question, the oral evidence given as secondary evidence on the proof of execution of that document and also the contents of the document becomes weak piece of evidence. However, it also needs to be kept in mind that when under the aforesaid provisions the proof of both the execution and contents of lost document can be given by secondary evidence, in a fit case, when there is convincing evidence, the Court can infer that the person must have signed the lost document.

18) In the cases like present one, one more probability

also needs to be kept in mind that the document lost was itself inadmissible in evidence. If the document was inadmissible in evidence, the Court is not expected to allow the party, who wants to place reliance on such document to lead secondary evidence. As already observed, in the present matter, the permission is already given and considering the scope of interference in the permission, this Court is not discussing that point more.

19) Before starting appreciation of evidence, the defence which is available to present defendants need to be discussed in brief. It is because the Trial Court had held that the aforesaid defence taken in the written statement is not available to the defendants in view of the provision of section 92 of the Evidence Act. The relevant portion, proviso (2) of section 92 is as under :-

"92. Exclusion of evidence of oral agreement.- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).-----

Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).-"

20) On the aforesaid point, the learned counsel for respondents/defendants placed reliance on the case reported as **AIR 1982 SUPREME COURT 20 [Smt. Gangabai Vs. Smt. Chhabubai]**. The relevant observations are as under :-

"(B) Evidence Act (1 of 1872), S.92(1)-Bar of, as to adducing of oral evidence - Applicability.

The bar imposed by sub-sec.(1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted

upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For the purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties. AIR 1936 PC 70, Foll."

21) In view of nature of defence taken by the defendants which is already quoted and the aforesaid position of law, this Court has no hesitation to hold that the defendants cannot be prevented from taking such defence. On this point, the learned counsel for appellant placed reliance on the case reported as **2010 (6) Mh.L.J. 653 BOMBAY HIGH COURT [Shriram s/o. Tukaram Avatade Vs. Ramrao Udaji Khadase]**. In this reported case, this Court held in view of the facts of that case that there was no evidence to override the legal effect of the suit agreement. This proposition is not disputed and on facts it was held that the defence taken was not proved.

22) For giving the decision on second substantial question of law, the provision of section 20 of the Specific Relief

Act need to be kept in mind. However, the question about using discretion under this section arises only if the Court comes to the conclusion that there was agreement of sale. The provision of section 20 of the Specific Relief At runs as under :-

"20. Discretion as to decreeing specific performance.- (1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance-

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

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

the plaintiff;

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

Explanation 1.- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

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

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the

instance of the other party."

23) Let us see the material available for proving the rival cases. The defendants have admitted that Sandu and they had signed on agreement of sale. Sandu had executed the document and defendants had signed the agreement dated 27.4.1977 as witnesses. The document produced on the record is certified copy of registered agreement of sale but it is not photostat copy. Witness Bhagwan Patil, who had signed on the original document is examined by the plaintiff to prove the execution. His name appears on the certified copy of agreement as witness to execution.

24) Exh. 60 the agreement contains following important points :-

- (i) That, before Sub-Registrar the cheque of Rs. 28,000/- bearing No. 648155 was given to Sandu by Kashinath.
- (ii) That, for repayment of loan of Sandu of Credit Cooperative Society of Khirdi, the cheque of Rs. 3,675/- dated 27.4.1977 and bearing No. 648156 was already given.
- (iii) That, the cash amount of Rs. 3,325/- was already

given to Sandu.

(iv) That, the two lands shown in the agreement were to be sold for total consideration of Rs. 42,000/- and out of that amount, the amount of Rs. 35,000/- was paid as earnest money.

(v) That, in the lands to be sold viz. Survey Nos. 14 and 18, there were two wells, there was construction of cattleshed, there were many mango trees, there were two tamarind trees and there was one coconut tree.

(vi) That, the remaining consideration of Rs. 7,000/- was to be paid after getting of the permission of authority to sell the land and it was to be paid at the time of registration of sale deed.

(vii) That, the purchaser was to bear the expenses for obtaining aforesaid permission.

(viii) That, the possession of the lands was to be given after getting permission of the authority for selling the lands and the agreement of sale was made without handing over the possession of the lands.

(ix) That, Sandu had decided to sell the lands as he was in need of money for family expenses and for repayment of loan. Out of the earnest amount, the amount of Rs. 3,675/- was given by cheque for

repayment of loan taken from Society.

(x) The document bears signatures of three sons of Sandu and thumb impressions of three daughters of Sandu as witnesses.

25) The evidence given by Kashinath on the agreement of sale is as per the aforesaid contents of the agreement. Evidence is given by his witness on execution. The witness has tried to say that on the same day i.e. on 27th April, the cheque of the Society was handed over to employee of the Society in the office of Sub-Registrar. The witness has further stated that the cash amount of Rs. 3,325/- mentioned as a part of consideration was given to Sandu in the office of Sub-Registrar on 27th. This evidence is not consistent with the evidence of plaintiff, the contents of Exh. 60 and his other witness, employee of the District Central Bank.

26) The circumstance that sons of Sandu had signed on the document can be used in both ways. Due to this circumstance, it can be said that the sons of Sandu knew about the real transaction and the intention behind the creation of document. So, the necessary weight needs to be given to the evidence of son of Sandu in that regard. Defendant No. 1 has

given evidence that the document was executed only as a security in respect of loan of Rs. 28,000/- given to Sandu by the plaintiff. Defendant No. 1 has deposed that other amount like cash amount of Rs. 3,325/- and the amount of Rs. 3,675/- by cheque was not given to Sandu and this part of the consideration was not paid. He has given evidence that the amount of Rs. 35,000/- was to be returned and it was the amount with interest on the amount of Rs. 28,000/-. He has given evidence that possession was not to be given and so, it was specifically mentioned that under that document possession was not given.

27) Witness Sabne examined by the plaintiff was not employee of credit cooperative Society of the village of defendants, but he was employee of District Central Bank. His evidence shows that his bank had not authorised him to recover the amount of loan of the Society. This witness was acquainted with plaintiff. This circumstances need to be kept in mind while appreciating the evidence of Sabne. Sabne has deposed that plaintiff Kashinath had given cheque of Rs. 3675/- to him and he credited that amount in the loan account of Sandu as the loan was taken by Sandu through Khirdi Society. He produced the record like copy of cheque No. 648156 dated 27.4.1974. This

cheque was given to Khirdi Vikast Society. The slip of deposit of the cheque is also produced and the title appearing on the slip is "interest" (ब्याज). The record shows that this amount was credited in the account of Khirdi Vikas Society on 28.4.1977. Though on the backside of the slip with which the cheque was produced in the bank, there is mention that the cheque was for Sandu, there is no record to show that this amount was really credited in the account of Sandu. Copy of account statement at Exh. 70 in respect of loan of Sandu is produced and it shows that from Khirdi Vikas Society, the loan of Rs. 250/- was taken and due to various renewals the total amount which was due from Sandu was Rs. 1815/-. This amount was due for the period from 1.7.1975 to 30.6.1976. The evidence of witness Sabne shows that he had brought the register and extract at Exh. 70 was prepared on 5.4.1984 and was produced in the Court. Thus, there was no entry in the loan account of Sandu in respect of aforesaid cheque of Rs. 3675/-. These circumstances show that there was something fishy. There are many other circumstances in the present matter creating probability that there was some mischievousness and there was manipulation and there was high handedness on the part of plaintiff.

28) Due to aforesaid inconsistencies in the record and

inconsistencies in the evidence of three witnesses, it is not possible to believe that the two amounts like Rs. 3675/- by cheque and Rs. 3325/- by cash were given to Sandu on 27.4.1977. If the cheque of amount of Rs. 28,000/- was given in presence of Sub-Registrar, it was possible to give the remaining amount also in presence of Sub-Registrar. That was not done and there are aforesaid circumstances. The scribe of the agreement of sale is not examined by plaintiff. As it was necessary to prove the contents, the transaction mentioned in the agreement dated 27.4.1977, the aforesaid circumstances cannot be ignored. Here only it needs to be mentioned that the First Appellate Court has come to the conclusion that the amount of Rs. 28,000/- was only paid. The First Appellate Court has given equitable relief of returning of amount of Rs. 42,000/- by holding that the defendants have admitted their liability in respect of the amount of Rs. 35,000/-.

29) The aforesaid circumstances are considered by the First Appellate Court, but they were not considered by the Trial Court and the reasons for the same are already mentioned. Burden was on the plaintiff to prove that the consideration as contended by him was really paid to the defendants. He could not establish the circumstances on the basis of which inference

could have been drawn that the remaining amount as mentioned in the document at Exh. 60 was also paid.

30) So far as the case of plaintiff Kashinath that on 28th April, the next day of the agreement, remaining amount of Rs. 7,000/- was paid by him is concerned, for proving such case, there is neither the original document nor even a copy of document available. Only the oral evidence is available as secondary evidence on this document. At the time of considering this oral evidence, it needs to be kept in mind throughout that the defendants have denied that amount of Rs. 7,000/- was paid to the defendants or Sandu on 28th April and such Bharna Pavti was executed by Sandu or defendants. The plaintiff wanted to prove that the so called Bharna Pavti was signed by Sandu and his three sons and three daughters had put thumb impressions on this document. All these sons of Sandu are available and one son has given evidence on oath that no such document was executed and no amount was given on 28th by plaintiff. In the previous suit filed by defendants for relief of injunction, the defendant No. 1 had filed affidavit to the effect that the document of Bharna Pavti produced in that case by Kashinath was forged document. In the present matter, the said affidavit was confronted to defendant No. 1 when he gave evidence in the

Court.

31) Kashinath has given evidence that on 28.4.1977 Bharna Pavti was executed as he gave amount of Rs. 7,000/- to Sandu. There is no specific case of Sandu whether such document was written on stamp paper or it was written on a stamp or ordinary paper and revenue ticket was affixed on the document. In the plaint, there is no pleading that this document was attested by witnesses. The submissions made show that in previous suit, no affidavits of witnesses including the witness examined in the present matter were filed by plaintiff. In that case also as the relief of temporary injunction was claimed, for making out prima facie case, both the sides were expected to file affidavits.

32) The evidence given by Bhagwan, the witness examined on execution of both the documents shows that he has tried to say that on 28.4.1977 he signed on Bharna Pavti as attesting witness. He has deposed that in his presence, the amount was paid to Sandu and signatures were made by Sandu and his issues on that document. He has deposed that there was mention of possession also in Bharna Pavti and since that date the possession of two lands is with plaintiff.

33) Bhagwan, the witness examined on both the documents is Police Patil of village and is also a relative of Kashinath. The evidence on the record and particularly admissions given by Kashinath show that he used his two relatives as witnesses and he used one of his colleague, a teacher, as a witness. It is peculiar that no witness even from a community of defendants was used on any document as per the case of plaintiff.

34) The evidence of Bagwan in cross examination shows that Bharna Pavti was probably written on a stamp paper. He does not know as to from where the stamp paper was purchased. Kashinath has deposed in cross examination that the amount of Rs. 7,000/- shown to be paid on 28th was given to him by his brother Mahadu. He does not know as to from where Mahadu had collected this money. It was necessary to give such explanation as the plaintiff has tried to say that he was not having such amount on 27th April. Mahadu is not examined in the present matter and so, there is no circumstantial check at all to the case of plaintiff and the aforesaid oral evidence on execution of Bharna Pavti on 28th April and on payment of Rs. 7,000/- and also on handing over of possession on 28th April.

35) When Kashinath wanted to give secondary evidence on Bharna Pavti, which was of the nature of oral evidence only, it was necessary for him not only to prove the execution of Bharna Pavti, but also the transaction of the said document. Both the witnesses have tried to say that one Bhagwan Kulkarni had allegedly scribed the two documents. Evidence of scribe is not given on both the documents.

36) To prove that there was the agreement of sale and plaintiff had paid entire amount of consideration, it was necessary for plaintiff to prove his case that the remaining consideration was paid on 28th April and the possession was given to plaintiff by Sandu on 28th April. Such proof was necessary not only to prove that it was agreement of sale, but to prove that the plaintiff was ready and willing to perform his part of the contract.

37) In the agreement of sale, there is specific mention that the permission of authority was necessary and only after that there was possibility of execution and registration of the sale deed. There is specific mention in the document at Exh. 60 that the remaining consideration of Rs. 7,000/- was to be paid at

the time of execution and registration of the sale deed. There is documentary evidence which is specifically mentioned hereinafter to show that Survey No. 14 was initially Inam land and the occupancy rights were given to Sandu under Inam Abolition Act. Thus, the permission was necessary for registration of sale deed atleast in respect of Survey No. 14. On the other hand, there was no hurdle in execution and registration of sale deed of other land. In view of these circumstances and specific contents of Exh. 60, it was necessary to prove that the remaining consideration was paid by Kashinath and the possession was given by Sandu to Kashinath. There is no record and there is no circumstance creating a probability that execution and registration of sale deed was possible in near future. In the cross examination, it is specifically brought on the record that application or affidavits required to be prepared for getting such permission were not prepared on 27th or 28th. Thus, the plaintiff failed to prove on pre-ponderance of probability that on 28.4.1977 he paid Rs. 7,000/- to Sandu and then Sandu executed Bharna Pavati and he handed over possession to plaintiff.

38) Consideration for sale was mentioned as Rs. 42,000/- in Exh. 60. If this document is considered as it is, it can be said

that most of the amount, the amount of Rs. 35,000/- was given by plaintiff. In spite of such circumstance, the possession of the lands was not given. This circumstance is against the case of plaintiff that it was agreement of sale. Thus, the burden was heavy on the part of plaintiff to prove that there was agreement of sale and he had paid the amount under the agreement of sale. If the plaintiff had proved that he had paid the consideration of Rs. 7,000/- on 28th, if he had proved that Bharna Pavati was executed on 28th and possession was given to plaintiff under Bharna Pavati, these circumstances would have certainly helped the plaintiff to prove that there was agreement of sale in his favour.

39) In 7/12 extract there is entry for year 1976-77 that of name of Mahadu, brother of plaintiff in possession column of both the lands. It is already observed that Mahadu is not examined by the plaintiff as his witness. No explanation is given by plaintiff when question was asked to him as to how Mahadu had come in possession. Defendant No. 1 has denied on oath that Mahadu was in possession. The revenue record shows that when the dispute started, steps were taken by the defendants and the name of Sandu was again entered in the revenue record. Surprisingly, the name of Mahadu was entered in crop cultivation

column for the year 1974-75 as owner.

40) There is the record and it is not disputed by plaintiff that during implementation of consolidation scheme which was started in the year 1977-78 the name of plaintiff was entered as owner in the revenue record and land Gat No. 30 was shown to be owned by plaintiff. There was only agreement of sale, but plaintiff managed to see that his name was entered in the revenue record as owner and the aforesaid Gat number was allotted to him. No right or interest had passed under agreement of sale and that can be seen from the provision of Section 54 of the Transfer of Property Act, 1882. These circumstances show that plaintiff was in a position to influence authorities. These acts of plaintiff were illegal and they show that he was ready to go to any extent.

41) The defendants filed suit for injunction first. In that suit also, the defendants had denied that they had agreed to sell the suit property and they had given the possession to plaintiff. They could not get temporary injunction. Then the present suit came to be filed. It appears that the suit filed for injunction was not prosecuted by the present defendants and it came to be dismissed for default. The circumstances of the present matter

show that the suit for specific performance was not filed even when plaintiff knew that Sandu and his issues were not ready to execute the sale deed and they had denied that there was the agreement of sale by filing a suit. After the period of more than 2 years nine months from the date of the agreement, plaintiff filed suit for specific performance of contract. The record and submissions show that no notice was given by plaintiff either to Sandu or to his sons and daughters for calling them to execute the sale deed. All these circumstances are against the case of plaintiff that there was agreement of sale and he was ready and willing to perform his part of contract.

42) The learned counsel for appellant submitted in the present proceeding that defendants failed to prove that they were in need of money for purchasing a truck. It was submitted that no such specific mention was made in agreement. In the agreement, Exh. 60, there is mention that for family necessity and for repayment of loan, the amount was taken. When the defendants want to prove that the real transaction was of loan, it was not necessary for them to prove specifically that they wanted to use that amount for purchasing truck. However, the record like driving licence of defendant No. 1 was produced and defendant No. 1 has given evidence that for many years, he has

been working as a truck driver. Inference with regard to the need of defendants of money can be drawn on the basis of entire evidence and contents of the documents.

43) The defendants have examined two witnesses like Ramchandra Patil and Bismilla Baig. It is already observed that nobody from the side of defendants was allowed to sign on Exh. 60. It is also not the case of plaintiff that on so called Bharna Pavati any relative of defendants or friend of defendants has signed as witness. These circumstances are sufficient to infer that the plaintiff was controlling the things as defendants were in need of money. Only those persons who were near relatives, who were close to plaintiff and who would have helped the plaintiff, were used as witnesses by plaintiff. In spite of all these circumstances, attempt is made by defendants to examine aforesaid two witnesses. This Court holds that not much weight can be given to the evidence of these two witnesses due to aforesaid circumstances.

44) The learned counsel for plaintiff, appellant submitted that Bismilla Baig is brother of deceased Sandu and in his evidence, he has given admission that there was the agreement that the land was to be returned back after one year. It was

submitted that on the basis of this admission, inference can be drawn that the possession was given. This Court holds that on the basis of such stray admission, when there are circumstances of aforesaid nature, it is not possible to infer that the possession was really given to plaintiff on 27th or 28th. The plaintiff has tried to contend and prove in the suit that the possession was given to him on 28.4.1977. He has failed to prove such contention.

45) The revenue record like 7/112 extract for the year 1975-76 shows that Sandu Baig was the owner of the property and he was also in possession. He was taking crops like sugarcane, gram, Jawar and wheat. The name of Mahadu was entered in crop cultivation column in 7/12 extracts of both the lands in the year 1976-77 and his name was shown as owner in the column due to sale transaction. In 7/12 extracts of Survey No. 14 one well, 10 mango trees, six lime trees, 5 Ber trees and 9 Babool trees were shown. In 7/12 extract it was shown that the loan of Rs. 5300/- was taken by Sandu for taking another well and for installing electric motor and it was taken from Land Development Bank. There was mutation No. 216 in that regard. Similar entry of loan was made in 7/12 extract of Survey No. 18 and in that land also many trees were present

46) In the agreement of sale, Exh. 60, there is mention that there were two wells in the lands of Sandu. The aforesaid record is sufficient to create the probability that by joining hands with the revenue authorities, entry of name of Mahadu was made first in crop cultivation column as owner and then the name of plaintiff was entered in the revenue record by using the circumstance that consolidation of lands was going on. There is no record whatsoever produced to show that any inquiry was made for making such entries in favour of Mahadu or plaintiff. The record further shows that there was no entry showing that loan was given by Khirdi Society on these lands to Sandu. Thus, there was no necessity for plaintiff to take care and see that the loan if at all taken from Khirdi Society was paid first.

47) In First Appeal, 7/12 extract for the year 1977-78 (zerox copy) is produced by plaintiff. Certified copy is not produced and so, it is not possible to say as to whether the entries in crop cultivation column were pencil entries or confirmed entries. This record shows that name of Kashinath was entered in the crop cultivation column and even in ownership column in the year 1977-78. However, the name from ownership column was removed subsequently. The 7/12 extract at Exh. 97

for the year 1989-90 shows that due to order made by authority under the provisions of Prevention of Fragmentation and Consolidation of Holdings Act, the name of Padmabai, widow of Kashinath was entered in the crop cultivation column of Gat No. 30.

48) It is not disputed that a proceeding under section 145 of Criminal Procedure Code was started and possession was first taken over by the Government in that proceeding. It appears that due to some order made by Sessions Court, possession was handed over to Kashinath in the said proceeding. Such order made by the Criminal Court is not binding on the Civil Court. It is clear that due to circumstances like there was an agreement of sale which was registered and there was the decision given by the Civil Court at that time (on 8.6.1984), there was reason for Criminal Court to make such order in favour of plaintiff. The name of Kashinath was entered in crop cultivation column from 1977-78 to 1982-83, but the name of Court Receiver came to be entered in the year 1983-84 and the name of Kashinath was again entered in the year 1987-88. Copy of decision given by the Sessions Court is not produced, but the aforesaid circumstances are sufficient to infer that there was decision of Civil Court in favour of plaintiff and so, such orders

were made by the Criminal Court and entries were made again by revenue authorities in favour of plaintiff. It is the Civil Court which is required to decide the dispute of present nature and it is the Civil Court which is required to decide as to who was in possession of the suit property on the relevant date, on the date of so called agreement. This Court has already observed that the plaintiff influenced the authorities and got entered his name even as owner in the revenue record. There was no record like sale deed, but he was able to get entry of his name as owner. When the agreement was shown to be made on 27.4.1977, the name of his brother Mahadu was entered in crop cultivation column as owner for previous year, 1976-77. These circumstances show that plaintiff was bent upon anyhow to grab the suit properties. He did not feel it necessary to call upon the defendants to execute the sale deed or even to apply to authority for getting permission. There is the record like Exhs. 74, 77, 78, 79 and 80 showing that Survey No. 14 was Inam land, it was abolished under the Inam Abolition Act and occupancy rights were given to Sandu. All these circumstances can be considered to ascertain the real transaction between the parties. This Court has no hesitation to hold that plaintiff failed to prove his case on preponderance of probability. On the other hand, the material is sufficient to infer that it was loan transaction. Thus, on facts it is

not possible to interfere in the decision given by the District Court which is lost fact finding Court. The Trial Court had committed error only due to its belief that there was the bar of provision of section 92 of the Evidence Act for considering the defence taken by the defendants. Due to this belief, the Trial Court had not considered the aforesaid material which is in favour of the loan transaction.

49) Even if the plaintiff had proved that there was agreement of sale, this Court or the Courts below in ordinary course would have refused to grant relief of specific performance of contract. At that time, the provision of section 20 of the Specific Relief Act could have been used. The record shows that the total area of two lands was more than 22 Acres. There were 2 wells in the lands and there is record to show that atleast on one well electric motor was installed. In Survey No. 14 even cash crops like sugarcane were taken in some portion by Sandu in the year 1975-76. For taking one well, the loan of Rs. 5,300/- was taken by Sandu from Land Development Bank prior to the date of transactions. There were many trees and there was structure of cattleshed in the land. It can be said that the value of the two wells, cattleshed and electric motor was certainly more than Rs. 15,000/- at the relevant time. The defendant No. 1 has given

substantive evidence that value of the land per Acre at the relevant time, in the year 1977 was between seven to eight thousand rupees. Thus, the total value was more than Rs. 1.5 lakh. These were the only lands with Sandu at the relevant time and his occupation was agriculture. In view of these circumstances, the Court could have refused to use the discretion in favour of plaintiff as per the power given to it in section 20 (a) (b) and (c) of the Specific Relief Act. This Court holds that plaintiff is not entitled to relief of specific performance as he failed to prove that there was agreement of sale.

50) The learned counsel for plaintiff placed reliance on some reported cases. In the case reported as **2005 (4) Bom.C.R. 399 (AURANGABAD BENCH) [Abdul Mutalik Rajjak Musalman & Ors. Vs. Khubai Majidkha Musalman and Ors.]**, this Court has observed that the construction of a document cannot be termed as a question of law. This Court is avoiding to say anything about this as the construction of document involves question of law though the Court is required to ascertain as to whether it is substantial question of law or not. In the case reported as **(1999) 7 Supreme Court Cases 703 [Manzoor Ahmed Magray Vs. Ghulam Hassan Aram and Ors.]**, the Supreme Court held that the prohibition under Special

Act like J & K Prohibition on Conversion of Land and Alienation of Orchards Act, 1975 do not bar the maintainability of the suit for specific performance and the permission under the Special Enactment can be obtained even after getting the decree. This proposition cannot be disputed. Similar observations are made in other cases reported as **(2007) 10 Supreme Court Cases 595 [Vishwa Nath Sharma Vs. Shyam Shanker Goela and Anr.] and 2003 (4) Mh.L.J. 134 [Asudamal s/o. Laxmandas Sindhi Vs. Kisanrao s/o. Wamanrao Dharmale and ors.]**.

51) In the case reported as **(2000) 6 Supreme Court Cases 420 [Motilal Jain Vs. Ramdasi Devi (Smt) and Anr.]**, in view of the facts of that case, the Apex Court held that the major portion of consideration, 2/3 portion was paid at the time of execution of agreement and so, the willingness to pay the remaining amount was apparent. In every case, it is the duty of the Court to ascertain as to whether the party claiming such specific relief was ready and willing to perform his part of the contract. In the case reported as **2005 (2) Mh.L.J. 8 [Nilkanth Dhondiba Chavan, since deceased by L.Rs and others Vs. Umabai w/o. Anant Desai and Ors.]** this Court made some observations with regard to readiness and willingness as provided in section 16 (c) of the Specific Relief Act and held in

that matter that it was not necessary to deposit the money in Court and the requirement of making payment would arise if the Court directs to deposit and the plaintiff fails to tender it. It was the suit for specific performance of contract of reconveyance and there was alternate prayer for redemption of mortgage. In view of the nature of the matter, such observations were made. In the case reported as **AIR 1970 SUPREME COURT 546 (1) [Nathulal Vs. Pholchand]**, the Apex Court has observed that for showing readiness and willingness the purchaser need not produce money or vouch concluded scheme for financing the transaction. It is already observed that the nature of proof of readiness and willingness to perform the part of contract depends on facts and circumstances of each and every case.

52) In the result, the appeal stands dismissed. The learned counsel for appellants requests for granting further protection of two months. The learned counsel for other side strongly opposed to this request. Further protection of six weeks is granted.

[T.V. NALAWADE, J.]

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