IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.73 OF 2009
WITH
CIVIL APPLICATION NO.13 OF 2015
WITH
CIVIL APPLICATION NO.243 OF 2009

1. Shakuntala Bhikchand Donde
2. Prakash Bhikchand Donde
3. Gautam Bhikchand Donde
4. Suvarna Bhikchand Donde
5. Smita Bhikchand Donde
   All residing at N-6/C-9, Near Old
   Shopping Centre, Near Donde Vidyalaya,
   Old CIDCO, Nashik … Appellants

Vs.

1. Sumanbai Yashwant Patil
   Resident of Pradhan Park, M. G. Road, Nashik

2. Shantabai Haribhau Donde (decd.)
   through heirs
   2-A. Ratnabai baburao Kale
   residing at House No.3076,
   Motha rajwada, District – Nashik

   2-B. Sarla Chandrakant Gade
   residing at House No.4398,
   Panchavati, Nashik

   2-C Sundrabai Haribhau Donde
   residing at Milind Nagar,
   Tidke Colony, District – Nashik

3. Ramchandra Haribhau Donde

4. Deepchand Haribhau Donde
   Both No.3 and 4 residing at Milind Nagar,
   Tidke Colony, District – Nashik … Respondents

Mr. Sandeep K. Shinde a/w. Mr. Sudam Kale & Ms Tanaya Goswami i/b. Sagar Kasar for Appellants.
Mr. P. K. Dhakephalkar, Senior Advocate i/b. Mr. Milind M. Sathaye for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : 23RD & 24TH APRIL, 2015

ORDER :

Heard Mr. Shinde, learned Counsel for appellants and Mr. Dhakephalkar, learned Senior Counsel for respondent No.1 at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original defendants No.2 to 6 have challenged the judgment and decree dated 20.08.2008 passed by the learned District Judge-3, Nashik in Civil Appeal No.402 of 2001. By that order, the learned District Judge allowed the Appeal preferred by respondent No.1, hereinafter referred to as the plaintiff, and quashed and set aside the judgment and decree dated 27.07.2001 passed by the learned II Joint Civil Judge, Senior Division, Nashik in Special Civil Suit No.303 of 1989 refusing the relief for specific performance. The learned District Judge decreed the Suit and directed defendants No.1A, 1B, 1C and defendants No.2 to 6 to execute the sale deed in favour of the plaintiff on her depositing the balance amount of Rs.7,937/- in respect of the property, more particularly described in the plaint. It was further clarified that if the defendants No.1A, 1B, 1C and 2 to 6 fail to execute the sale deed on depositing part consideration namely Rs.7,937/-, the plaintiff shall get the sale deed executed through the process of the Court. The cross-objections filed by original defendants No.1-C, 7 and 8 were dismissed. The parties shall hereinafter be referred to as per their status before the trial Court. The facts and circumstances, giving rise to filing of the present Second Appeal, briefly stated, are as under:

3. Plaintiff instituted Suit for specific performance of contract on the premise that on 27.10.1982 (exhibit-48), Bhikchand Haribhau Donde (son of defendant No.1, brother of defendants No.1A and 1B, stepson of defendant No.1C, husband of defendant No.2, father of defendants No.3, 4 and 5 and stepbrother of defendants No.7 and 8) agreed to sell land admeasuring 4250 sq.mtrs. out of 1 Hectare 49 Ares of Survey No.332/3 situate at Village Pathardi, Taluka and District Nashik (for short 'suit property') [being retainable land under the Urban Land (Ceiling & Regulation) Act, 1976 (for short 'ULC Act')] to the plaintiff for a total consideration of Rs.1,17,937/-. On the date of execution of the agreement of sale, Bhikchand accepted earnest money of Rs.51,000/-. Plaintiff and deceased Bhikchand agreed to bear the expense of sale deed in moiety. The possession was agreed to be delivered on 15.11.1982.

4. Plaintiff contended that after execution of the agreement of sale, she had paid Rs.59,000/- towards the consideration of the sale deed, from time to time. Thus, in all, out of total consideration of Rs.1,17,937/-, she had paid Rs.1,10,000/-. Rs.7,937/- was the balance consideration. She contended that she was and is ready and willing to get the sale deed executed in her favour. Bhikchand was an M.L.A. He could not get time to obtain requisite permissions under the ULC Act as also the clearance certificate from the Income Tax Authorities. From time to time, the period of execution of the sale deed was extended. On 02.08.1988, Bhikchand died. Because of his sudden death, plaintiff did not think it appropriate to initiate proceedings and waited upto April 1989. In April 1989, plaintiff requested defendants No.1 to 6 to perform their part of contract by executing the sale deed. The plaintiff thereafter gave notice on 27.06.1989 and called upon defendants to perform their part of contract. Defendant No.1 replied that notice on 18.07.1989

admitting the execution of agreement of sale. She, however, denied her liability to execute the sale deed. The plaintiff, therefore, instituted the Suit on 18.08.1989 for performance of agreement of sale dated 27.10.1982, and in the alternate, prayed for refund of earnest money.

5. Defendant No.1-Shantabai, who died during the pendency of the Suit, resisted the Suit by filing written statement exhibit-19 inter alia contending that she is not liable to execute the sale deed. She contended that she did not receive any earnest money as alleged by the plaintiff. She also contended that since the co-operative housing society was not formed, plaintiff cannot ask for specific performance of contract as the suit land was to be purchased for the society. She denied that deceased Bhikchand neglected to execute the sale deed. According to her, deceased Bhikchand was ready to execute the sale deed and even obtained clearance certificate from the Income Tax Authorities. Deceased Bhikchand had appointed plaintiff's husband Yeshwant as his Power of Attorney for obtaining requisite permission under the ULC Act. Neither the plaintiff nor Yeshwant took any steps in that direction. Plaintiff is, therefore, not entitled to get the contract specifically performed. Defendants No.2 to 6, being legal representatives of Bhikchand, are not bound by the agreement. The Suit is also bad for non-joinder of Haribhau, father of the deceased Bhikchand on the ground that Haribhau was a signatory on the agreement of sale and he also had share in the suit land.

6. During the pendency of the Suit, defendant No.1 Shantabai expired and her legal representatives (defendants No.1A to 1C) were brought on record. Defendants No.1A and 1B filed their written statement at exhibit-85 raising identical pleas as raised by defendant No.1. It was further contended that in the ULC proceedings, Bhikchand,

his sons Deepchand and Ramchandra (defendants No.7 and 8) and father Haribhau, each, were given 2000 sq.mt. retainable land. Deceased Bhikchand was, therefore, not competent to enter into agreement of sale in respect of the suit land.

7. Defendant No.1C resisted the Suit by filing written statement at exhibit-91 inter alia contending that the land bearing Survey No.332/3 was purchased by Haribhau in the name of the deceased Bhikchand from the income of the joint family. The suit property is a joint family property. There was no partition between Haribhau and Bhikchand. She also reiterated that in the ULC proceedings, 2000 sq.mtrs retainable land each was given to Haribhau and his 3 sons namely, Ramchandra, Deepchand and Bhikchand.

8. Defendants No.2 to 6 resisted the Suit by filing separate written statement at exhibit-83 inter alia contending that they are the only heirs of the deceased Bhikchand and owners of the suit land. Defendant No.1 or her heirs have no right in the suit land. They denied execution of the agreement of sale by Bhikchand in favour of the plaintiff as also his accepting earnest amount of Rs.51,000/- and subsequently, receiving Rs.59,000/- from the plaintiff. They further denied that plaintiff was and is ready and willing to perform her part of contract. It was further contended that even if there is any agreement between the plaintiff and Bhikchand, it cannot be enforced against the legal representatives of Bhikchand. Defendants No.2 to 6 also contended that the plaintiff did not take any steps for getting the sale deed executed during the lifetime of Bhikchand. The plaintiff is, therefore, not ready and willing to perform her part of contract. Lastly, it was prayed that the Suit is barred by limitation and as such, is liable to be dismissed.

9. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues at exhibit-30. Additional issues were also subsequently framed in view of the addition of the parties and their written statement. After considering the evidence on record, the learned trial Judge partly decreed the Suit with costs against defendants No.2 to 6. The claim of specific performance of contract was refused. Defendants No.2 to 6 were directed to refund Rs.79,000/- with future interest @ 12% p.a. from the date of the Suit till realization, to the plaintiff. The Suit against the legal representatives of defendant No.1 and defendants No.7 and 8 was dismissed. The learned trial Judge held that the suit property is not a joint family property.

10. Aggrieved by that decision, plaintiff preferred Appeal before the District Court. Defendants No.1C, 7 and 8 have filed their cross-objections against the finding that the suit property is not joint family property. The learned District Judge allowed the Appeal and dismissed the cross-objections of defendants No.1C, 7 and 8 as indicated earlier. It is against this decision, defendants No.2 to 6 have preferred this Appeal under Section 100 C.P.C. The Second Appeal was heard by this Court for 'admission' on 02.03.2010. This Court dismissed the Second Appeal summarily as it did not involve any substantial question of law. Aggrieved by that decision, defendants No.2 to 6 preferred Special Leave Petition. By order dated 05.08.2014, the Apex Court granted leave and set aside this Court's order and requested the Court to reconsider the matter and pass a reasoned order as expeditiously as possible, preferably, within a period of 1 year from the receipt of the order.

11. In pursuance of the order of the Apex Court, the matter was listed before me on 30.03.2015. The Appeal was fixed for 'final hearing' on

15.04.2015 at 3.00 p.m. Parties were put to notice that Appeal will be disposed of finally after formulating substantial questions of law. By consent of the parties, the Appeal was adjourned to 22.04.2015 at 3.00 p.m. Parties were heard at length on the following substantial questions of law:

a. Whether having regard to Section 16(c) of the Specific Relief Act, 1963 (for short 'Act') as also in view of the facts and circumstances of the present case, it can be said that the plaintiff was and is ready and willing to perform her part of contract?
b. Whether the plaintiff has established her case though she did not step into witness box but examined her husband as a Power of Attorney Holder?
c. Whether the evidence of P.W.1-Constituted Power of Attorney was substantive evidence to prove the readiness and willingness of the plaintiff to perform her part of contract?
d. Whether the delay in approaching the Court disentitles the plaintiff from getting the specific performance of contract.?
e. Whether the learned District Judge was justified in interfering with the order of the trial Court refusing relief of specific performance in the light of Section 20 of the Act?

12. During the course of hearing, Mr. Shinde submitted additional substantial questions of law namely,

i. Whether the Power of Attorney can depose for the principal in respect of acts done by the principal and not by him?

ii. Whether the Power of Attorney can depose for the principal in respect of the matter as regards which principal has personal knowledge and for which principal is liable to be cross-examined?

13. In support of this Appeal, Mr. Shinde submitted that the plaintiff in her capacity as Promoter of the Yeshwant Co-operative Housing Society (proposed) entered into agreement of sale on 27.10.1982 with deceased Bhikchand. The sale deed was to be executed within 6 months i.e. on or before 30.04.1983. In terms of clause 4 of the agreement of sale, vendor was to complete all the formalities including obtaining ULC Clearance Certificate under Section 26 for executing the sale deed. Plaintiff was to prepare layout etc. and deceased Bhikchand was to assist her in that regard. Clause 7 recited that possession of the suit land will be given to the plaintiff on or before 15.11.1982 subject to measurement and demarcation. The expenses in that regard were to be borne by the vendor. Clause 8 thereof recited that the parties agreed that the sale deed/s will be executed in favour of any person/s / any society nominated by the plaintiff. In case the society is registered in name other than Yeshwant Co-operative Housing Society (proposed), the vendor will execute the sale deed in favour of such society.

14. Clause 9 recited that the defendant had given Power of Attorney to Shri Yashwantrao Shankarrao Patil to enable him to execute the sale deeds in respect of the plots in the layout or to execute the sale deed in favour of the person nominated by the plaintiff for which defendant will not raise any objection. Deceased Bhikchand also declared that he will have no right to revoke the Power of Attorney.

15. Mr. Shinde submitted that on 28.10.1982 (exhibit-46), deceased Bhikchand executed Power of Attorney in favour of plaintiff's husband. Between 1982 and 1989, no steps were taken by the plaintiff for execution of the sale deed. Even the Power of Attorney Holder of deceased Bhikchand, who is the husband of the plaintiff, also did not obtain requisite permissions as stipulated in the said Power of Attorney

as also clauses 6 to 9 of the agreement of sale. Mr. Shinde submitted that the agreement of sale was executed on 27.10.1982. Power of Attorney was executed by the deceased Bhikchand in favour of Yashwantrao Patil , husband of the plaintiff on 28.10.1982. On 02.08.1988, Bhikchand died. On 27.06.1989 (exhibit-46), plaintiff issued notice to the legal representatives of the deceased Bhikchand and the Suit was instituted on 18.08.1989. Thus, between agreement of sale dated 27.10.1982 till issuing notice on 27.06.1989, neither the plaintiff nor her husband took any action in pursuance of the agreement of sale as also Power of Attorney. There was total inaction on their part, which clearly shows that the plaintiff was never ready and willing to perform her part of contract. Plaintiff's husband Yeshwant did not obtain any permission though he was given Power of Attorney by deceased Bhikchand. He submitted that the learned trial Judge refused the relief of specific performance. The learned District Judge allowed the Appeal. The discretion exercised by the learned trial Judge, in the facts and circumstances of the present case, ought not to have been interfered by the learned District Judge.

16. Mr. Shinde further submitted that perusal of the agreement of sale shows that it was executed in favour of the plaintiff in capacity as a Chief Promoter of Yashwant Co-operative Housing Society (proposed). Society is not in existence. As per Section 15(h) of the Act, the plaintiff did not establish that such contract is warranted by the terms of the incorporation of the proposed society. No material is produced on record by the plaintiff to establish that the terms of the incorporation of the society warranted execution of agreement of sale by the plaintiff, being the promoter of the Yashwant Co-operative Housing Society (proposed) as admittedly, before incorporation of the society, plaintiff had entered into contract for the purpose of the society. In support of

this submission, he relied upon the decision of this Court in the case of *Radhakrishna Vs. Giri Construction*, **1992 Mh.L.J. 836**. The evidence of P.W.1 Yeshwant is liable to be discarded as the Power of Attorney cannot depose for the plaintiff (principal) in respect of acts done by the principal. P.W.1 Yeshwant cannot depose in respect of which plaintiff has personal knowledge. For all these reasons, he submitted that the Appeal deserves to be allowed.

17. On the other hand, Mr. Dhakephalkar supported the impugned order. He submitted that Section 15(h) as also Section 19(e) of the Act are enacted with a view to safeguarding the interest of the company or society, as the case may be. He submitted that the decision of the Court in the case of **Radhakrishna** *(supra)* clearly supports the plaintiff's case. In particular, he invited my attention to paragraphs 8 and 9 of that decision and submitted that pre-incorporation contracts (whether entered into on behalf of a proposed company or proposed society) are binding on the individuals and are enforceable by or against them. On incorporation, the contract becomes enforceable by or against the company or the society depending upon the terms of incorporation and adoption of the contract by the company or society and the provisions of Sections 15(h) and 19(e) of the Act would apply. He further submitted that the plaintiff had issued notice before instituting the Suit. Defendants did not give reply. Defendants also did not enter into witness box. He submitted that the plaintiff was and is all along ready and willing to perform her part of contract. The said fact is evident from diverse payments made by her after execution of the agreement of sale. He submitted that on 12.04.1983, plaintiff had paid Rs.10,000/- and the time of execution of the sale deed was extended upto 15.08.1983. On 03.01.1984, plaintiff had paid Rs.3000/- and the time was extended till 30.04.1984. On 26.08.1984, plaintiff had paid Rs.3,000/-. Deceased

Bhikchand acknowledged these payments. In particular, on 26.08.1984, deceased Bhikchand took upon himself the responsibility of obtaining income tax clearance certificate, and after obtaining such certificate, the sale deed was to be extended within 2 months. He further submitted that on 20.02.1985, defendant deceased Bhikchand accepted Rs.10,000/- and reiterated that the sale deed is to be executed within 2 months from obtaining income tax clearance certificate. He further submitted that on 02.08.1988, Bhikchand expired. After his death, defendant No.2 on her behalf and on behalf of defendants No.2 to 6 as their guardian executed the General Power of Attorney in favour of Yashwantrao Shankarrao Patil on 29.03.1989. The original Power of Attorney was produced by the plaintiff's witness during his cross-examination. Perusal of this Power of Attorney shows that defendants No.2 to 6 authorized Yashwantrao Patil to perform acts, as more particularly set out therein, on their behalf. The Suit is thereafter instituted on 18.08.1989 after issuing notice on 27.06.1989. The said Power of Attorney is duly proved though the learned trial Judge did not mark it as exhibit. He, therefore, submitted that the learned District Judge has rightly held that the plaintiff was and is all along ready and willing to perform her part of contract. He submitted that no substantial question of law arises in this Appeal.

18. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Before I consider the rival submissions advanced by the learned Counsel appearing for the parties, it is relevant to note the following facts, which are not in dispute:

a. Deceased Bhikchand executed agreement of sale in favour of the plaintiff on 27.10.1982. Under that agreement, he agreed to sell 4,250 sq.mtrs. land for a total consideration of Rs.1,17,937/-.

Deceased Bhikchand received Rs.51,000/-.

b. On 28.10.1982, deceased Bhikchand executed Power of Attorney in favour of the plaintiff's husband Yashwantrao;

c. Perusal of the agreement of sale shows that on 12.04.1983, deceased Bhikchand received Rs.10,000/- and extended time upto 15.08.1983 for executing the sale deed. On 03.01.1984, deceased Bhikchand received Rs.3,000/- and extended time upto 30.04.1984 for executing the sale deed. On 26.08.1984, deceased Bhikchand received Rs.3,000/-. The sale deed was to be executed within 2 months from obtaining permission from the Competent Authority under the ULC Act as also income tax clearance certificate. On 20.02.1985, deceased Bhikchand received Rs.10,000/- and reiterated that the sale deed was to be executed after receipt of sale permission as also income tax clearance certificate;

d. Perusal of the clauses of the Power of Attorney dated 28.10.1982 shows that the deceased Bhikchand had authorized Yashwantrao Patil to perform various acts on his behalf. It, however, did not include authorization to Mr. Yashwantrao Patil to obtain income tax clearance certificate;

e. The Courts below have held that time was not essence of contract;

f. On 02.08.1988, Bhikchand expired;

g. Defendants did not enter into witness box.

19. After considering the material on record, the learned trial Judge declined to pass decree for specific performance mainly on the ground that the plaintiff was not ready and willing to perform her part of contract. As against this, the learned District Judge held that plaintiff

was and is ready and willing to perform her part of contract.

20. Mr. Shinde strenuously submitted that for a period of 7 years, there was total inaction on the part of the plaintiff or her husband, who was the power of attorney holder of the deceased Bhikchand. On 27.06.1989, notice was issued by the plaintiff calling upon the defendants No.2 to 6 to execute the sale deed. Between 27.10.1982 and 27.06.1989, no overt acts were performed either by the plaintiff or her husband, who was the power of attorney holder of the deceased Bhikchand. This clearly reflects on the conduct of the plaintiff and disentitles her from claiming specific performance of contract. Plaintiff was not ready and willing to perform her part of contract. It is not possible to accept this submission for more than one reason.

21. In the first place, as indicated earlier, even after execution of the agreement of sale, plaintiff paid diverse amounts, which were received by the deceased Bhikchand. In fact, on 26.08.1984, after accepting Rs.3,000/-, deceased Bhikchand took upon himself the responsibility of obtaining income tax clearance certificate. The said fact was also reiterated subsequently when he received Rs.10,000/- on 20.02.1985. Secondly, no material is brought on record by the defendants to show that income tax clearance certificate was obtained by them and the said fact was intimated to the plaintiff calling upon her to perform her part of contract. Perusal of endorsement made by the deceased Bhikchand on 26.08.1984 and 20.02.1985 clearly shows that the sale deed was to be executed within 2 months from receipt of income tax clearance certificate. It is not the case of the defendants that after obtaining clearance certificate and intimating the said fact to the plaintiff, she did not take any steps for obtaining the sale deed within 2 months from obtaining such certificate. In fact in paragraph 21, P.W.1 Yeshwant

deposed that deceased Bhikchand was to obtain Income Tax Clearance Certificate. The said statement remained unchallenged. Thirdly, on 29.03.1989 i.e. after the death of Bhikaji in August / September 1988, defendants No.2 to 6 executed General Power of Attorney in favour of Yashwantrao Patil for performing acts as set out therein on their behalf. Power of Attorney records that on 02.04.1987, layout was sanctioned and entry No.4360 to that effect in "D Patrak" was made in the revenue records. On 02.08.1988, Bhikchand died. The names of his legal representatives were recorded vide entry No.4563 on 12.09.1988. Defendant No.2 for herself and as guardians of defendants No.3 to 6 executed Power of Attorney in favour of Yeshwantrao to, inter alia-

a. make applications to revenue officers and land officers for obtaining maps, entries, extracts, etc. and to give statement/s, if necessary;

b. get the land actually measured as per the boundary marks;

c. appoint Architect;

d. prepare layout and submit that layout to officers of Town Planning / Zilla Parishad / Gram Panchayat or Corporation for a sanction and for that purpose, to sign on the plans, maps, applications, and also to make necessary changes in the layout as per the orders of such officers and to perform other acts.

22. Defendants No.2 to 6 authorized Yeshwantrao to perform various acts stipulated in the Power of Attorney on their behalf. After execution of the Power of Attorney, Yeshwantrao was to perform those acts. The very fact that defendants No.2 to 6 executed Power of Attorney in favour of Yeshwantrao on 29.03.1989 to perform acts on their behalf shows that defendants No.2 to 6 extended time for execution of the sale deed. Both the Courts have held that time was not the essence of contract. Section 18 of the Limitation Act, 1963 reads as under:

> “ 18. Effect of acknowledgement in writing-
>
> (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.
>
> (2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received,
>
> Explanation : For the purposes of this section-
>
> (a) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;
>
> (b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and
>
> (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.”

23. It is material to note that even after the death of Bhikchand on 02.08.1988, defendants No.2 to 6 executed General Power of Attorney in favour of the Yashwantrao Patil, husband of the plaintiff on 29.03.1989. Perusal of the original record indicates that plaintiff had filed list of documents dated 03.03.2000 enclosing therewith General Power of Attorney dated 29.03.1989 among other documents. During the cross-examination of plaintiff's witness - Yashwantrao Shankarrao Patil, conducted on behalf of defendants No.2 to 6, he had produced original Power of Attorney executed by defendant No.2 for herself and on behalf of defendants No.3 to 6. The said Power of Attorney was produced along with the list exhibit-107. In fact, defendants No.2 to 6 did not

raise any objection about production of the said Power of Attorney and during the cross-examination of Yashwantrao Patil, conducted on behalf of defendants No.2 to 6, he had produced the original Power of Attorney executed by defendant No.2 for herself and on behalf of defendants No.3 to 6. In view of Order VII, Rule 14 read with Order XIII, Rules 1 and 3 C.P.C., I am of the opinion that the plaintiff has duly proved the said Power of Attorney. In my opinion, this Power of Attorney should have been exhibited by the trial Court.

24. In the case of **Musammat Rajeswari Kuar Vs. Rai Bal Krishan**, *(1887) 9 ALL 713*, the plaintiff sued on a bond for a debt of Rs.20,000/-, and the nature of that debt was stated on the face of the bond. Rs.13,000/- was an old debt, and Rs.7,000/- was stated to be a new debt contracted at the time of the bond; and the bond stated also what the object of the contract for the new debt was. The defendant alleged that those recitals were false. It was alleged that object for which Rs.7,000/- was said to be borrowed was not the object, and that the money was not applied to that object. To prove that Rs.7,000/- was not actually advanced, the defendant called for the plaintiff's books of account. Those books of account were produced, and they shewed apparently the whole transaction between the parties, and that the impugned recital was substantially correct. The learned Subordinate Judge considered "whether the items of discharge in the plaintiff's books were corroborated or not". Where they were corroborated, he allowed the discharge, and where they were not corroborated, he disallowed them. Their Lordships of Privy Council thought that the learned Subordinate Judge acted on an entirely wrong principle. He acted on a principle which would have been correct if the plaintiff had relied on his own books as proving his debt; but that was not the case. It was observed that the plaintiff relied upon the bond which was executed by

his debtor, and unless that bond was displaced there was no answer to the action. It was the defendant who sought her defence in the books of the plaintiff. She called for the books and extracted her defence out of them, and it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff, and extract from them just such items as proved matters of defence on her part, and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted in toto. Their Lordships thought that the High Court were entirely right, and that the decree could not complained of on that ground. This case was subsequently followed by the Nagpur High Court in the case of **Kisan Ghule Vs. Puransa**, *AIR 1928 Nag. 119*.

25. In my opinion, by executing the Power of Attorney by defendants No.2 to 6 in favour of Yeshwantrao on 29.03.1989, they have acknowledged in writing their liability and right of the plaintiff to get the sale deed of the suit property. Power of Attorney also recorded that on 02.04.1984 layout was sanctioned. The learned District Judge after appreciating the evidence on record held that plaintiff had paid Rs.1,10,000/- out of total consideration of Rs.1,17,937/-. The learned trial Judge held that plaintiff had paid Rs.79,000/-. Thu, even as per the finding of the trial Court, plaintiff had paid substantial consideration. It is only thereafter on 27.06.1989, plaintiff had issued notice to defendants No.2 to 6 calling upon them to execute the sale deed and since there was no compliance, the Suit was instituted on 18.08.1989. What is more important is that defendants did not enter into witness box. Considering the cumulative effect of all the circumstances, I do not find that the learned District committed any error in holding that plaintiff was and is ready and willing to perform her part of contract. The learned trial Judge, in my opinion, did not correctly exercise the discretion under

Section 20 of the Act. Section 20 lays down that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. The learned District Judge rightly applied the principle laid down in Section 20 and reversed the decree of the trial Court and passed the decree for specific performance of contract. I, therefore, do not find that the learned District Judge committed any error in correcting the discretion exercised by the trial Court.

26. Mr. Shinde submitted that under Section 15(h), when the plaintiff being the promoter of the society, had entered into a contract before incorporation for the purposes of the society, she has to establish that such contract is warranted by the terms of the incorporation of the society. However, the plaintiff did not bring any material on record, namely, the terms of incorporation of the society to substantiate that for the purpose of the society, it was necessary to enter into a contract and that, such contract was warranted by the terms of incorporation by the society. In support of this proposition, he relied upon the decision of this Court in the case of **Radhakrishna** (*supra*). It is not possible to accept this submission. Section 15(h) reads as under:

> "15. Who may obtain specific performance.- Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by-
>
> …
>
> (h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:
>
> Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

27. Section 19(e) reads as under:

> "19. Relief against parties and persons claiming under them by subsequent title.- Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-
>
> …
>
> (e) When the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:
>
> Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

28. The learned Single Judge of this Court in the case of **Radhakrishna** (*supra*), after considering the provisions of Sections 15(h) and 19(e) observed in paragraphs 8 and 9 thus,

> "8. Mr. Nesari, learned Counsel for the Vendors has relied upon the judgment of the Division Bench of the High Court of Gujarat in the case of Shri Ramji Mandir Narsinhji and others v. Narisnh Nagar Co-operative Housing Society Ltd. Navsari and others, . In this case that Co-operative Society known as Narsinh Nagar Co-operative Society Ltd. after its incorporation had sought specific performance of an agreement which was entered into by the promoters of the said society before its incorporation. Following certain English cases enunciating the principles of English common law, the Division Bench of the High Court of Gujarat held that the Co-operative Society could not seek specific performance of an agreement which was entered into by its promoters before the society was brought into existence. As a matter of fact, it has been held in several English cases that according to principles of common law prevailing in England at one time, the Company could not enter into a contract before its incorporation because it did not exist in law as a legal person. In some of the cases cited in the above referred Division Bench judgment of the High Court of Gujarat, it was held by the English courts that the Company was not bound by the contract which was entered into by the promoters before its incorporation unless it adopted the said contract or a fresh contract was arrived at. The above referred principle of common law, recognised by the English Court in England in the past no longer holds the field in view of the passing of European Communities Act, 1972, by which it is provided that a person who purports to contract on behalf of a company not yet incorporated, is personally liable on the contract. In other words, pre-incorporated contracts are binding on the persons who make the contracts even though the

same may not be binding on the Corporation when it is incorporated unless the Corporation adopts a contract or enters into a fresh contract. Section 15(h) of the Specific Relief Act, 1963 specifically provides that the specific performance of the contract may be obtained by the Company when the promoters of the Company have, before its incorporation, entered into a contract for the purposes of the Company and such contract is warranted by the terms of the incorporation. Similarly, section 19(e) of Specific Relief Act, 1963 provides that specific performance of a contract may be enforced against the company when the promoters of a Company have, before to incorporation, entered into a contract for the purpose of the Company and such contract, is warranted by the term of incorporation, provided the Company has accepted the contract and communicated such acceptance to the other party to the contract such a contract cannot be treated as nullity merely because it was entered into by the promoters on behalf of the proposed society. The principles of English Common Law followed by the Division Bench of the High Court of Gujarat, are irrelevant and do not have legal efficacy in Indian legal system Clause 12 of the suit contract specifically to enable the plaintiffs to sue for specific performance of contract, in their own favour.

9. On this aspects, I hold as under :---

(a) Pre-incorporation contracts (whether entered into on behalf of a proposed company or proposed society) are binding on the individuals and are enforceable by or against them.

(b) On incorporation, the contract becomes enforceable by or against the company or the society depending upon the terms of incorporation and adoption of the contract by the company or society and the provisions of section 15(e) and 19(e) of the Specific Relief Act, 1963 would apply.

(c) The principles of English Common law followed in the above referred Gujarat case do not hold his field in England or in India.

(d) With respect, I do not agree with the view expressed in the above referred. Gujarat judgment.”

29. Perusal of the above extracted portion clearly shows that pre-incorporation contracts (whether entered into on behalf of a proposed company or proposed society) are binding on the individuals and are enforceable by or against them. Thus, even accepting the case made out by defendants No.2 to 6 that the plaintiff entered into agreement of sale in the capacity of Chief Promoter of the proposed society, nonetheless

even before pre-incorporation of the society, the contract entered into by the plaintiff on behalf of her proposed society is binding on her and is also enforceable by or against her.

30. On incorporation, the contract becomes enforceable by or against the company or the Society depending upon the terms of incorporation and adoption of the contract by the company or society and the provisions of Sections 15(h) and 19(e) of the Act would apply. In my opinion, the contingency referred in paragraph 9(b) is yet to occur in the facts and circumstances of the present case as nothing is brought on record by the defendants to indicate that after entering into agreement of sale, the society has been registered. In view thereof, the reliance placed by Mr. Shinde on the decision in the case of **Radhakrishna** (*supra*) as also Sections 15(h) and 19(e) of the Act does not advance the case of the defendants.

31. Mr. Shinde submitted that evidence of P.W.1 Yeshwant is liable to be discarded as he has no personal knowledge. During cross-examination, P.W.1 Yeshwant stated that he did not produce Power of Attorney given by plaintiff to him. The learned trial Judge held in paragraph 37 that deposition of P.W.1 is as a witness of the plaintiff and not in the capacity of her Power of Attorney. I, therefore, do not find merit in this submission.

32. In view thereof, I do not find any merit in this Appeal. Substantial questions of law formulated are answered accordingly. Defendants No.2 to 6 shall apply for income tax clearance certificate within 2 months from today, if they have not already applied. In case they fail to apply, the plaintiff is at liberty to approach the trial Court for appointment of the Court Commissioner in that regard. Subject to this

modification, Second Appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to costs. In view of the dismissal of the Appeal, Civil Application No.13 of 2015 for fixing Second Appeal for final hearing and Civil Application No.243 of 2009 for stay do not survive and the same are disposed of as such. Order accordingly.

33. At this stage, Mr. Shinde orally applies for stay of this order for a period of 8 weeks from today.

34. As defendants No.2 to 6 intend to challenge this order before the higher Court, I find that the request made by them is reasonable. In view thereof, notwithstanding dismissal of the Appeal, this order shall remain stayed for the period of 8 weeks subject to defendants No.2 to 6 neither creating third party interest nor parting with possession of the suit property.

(R. G. KETKAR, J.)

Minal Parab