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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 477 OF 2015
WITH
CIVIL APPLICATION NO.11745 OF 2016
IN
SECOND APPEAL NO. 477 OF 2015**

1. Shankar Narayan Jadhav,
since deceased through his
legal representatives -
- 1/a. Smt. Kamlabai w/o Shankar Jadhav,
Age: 86 years, Occ: Household,
- 1/b. Sou. Maya @ Latabai Dinkar Salunkhe,
Age: 68 years, Occ: Household,
R/o. C/o. Dinkar Shankar Salunkhe,
Pathrad, Tq. Erandol, Dist. Jalgaon,
- 1/c. Sou. Rekha Kashinath Nehe,
Age: 66 years, Occ: Household,
R/o. Songal Galli, near Gajanan
Theatre, Varangaon, Tq. Bhusawal,
Dist. Jalgaon.
- 1d. Sou. Sandhya Sitaram Bobade,
Age: 56 years, Occ: Household,
R/o. Ratna Pimpri, C/o Sitaram
Bhivsan Bobade, Tq. Parola,
Dist. Jalgaon.
- 1/e. Chandrakant Shankar Jadhav,
Died
- 1/f. Ku. Lata Shankar Jadhav,
Age: 58 years, Occ: Household,
- 1/g. Ku. Kalpana Shankar Jadhav,
Age: 56 years, Occ: Household,
- 1/h. Ku. Nirmala Shankar Jadhav,

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Age: 52 years, Occ: Household,

1/i. Vinayak Shankar Jadhav,
Age: 42 years, Occ: Student,

Appellant Nos. 1/a and 1/e to 1/i
R/o. Lane No.5, City Survey No.2693,
Dhule.

2. Chandrakant Shankar Jadhav,
Died

3. Vinayak Shankar Jadhav,
Age: 42 years, Occ: Business,
R/o. Lane No.5, City Survey No.2693,
Dhule. ..APPELLANTS

VERSUS

Mohan s/o Subhash Malia,
Age: 64 years, Occ: Business,
R/o. Lane No.5, City Survey No.2693,
Dhule. ..RESPONDENT

Mr F.R. Tandle, Advocate for appellants;
Mr Vinesh Solshe, Advocate h/f Mr Mahesh H. Patil,
Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 11th JULY, 2017

ORAL ORDER :

The appellants are defendants in Special
Civil Suit No.145 of 1986 decided by Civil Judge,
Senior Division, Dhule on 1st August, 1994, in

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which decree for specific specific performance of contract in relation to the house property came to be passed against the present appellants. Respondent-plaintiff was directed to deposit balance consideration of Rs.17,000/- in the Civil Court.

2. Present appellants preferred appeal being Civil Appeal No. 35 of 2012 before learned District Judge, Dhule, which came to be dismissed on 21st December, 2013. As such, this second appeal.

3. Mr. Tandale, learned Counsel for the appellants after having argued the matter for some time has tried to convince this Court to accommodate him for period of three weeks so as to enable him to produce on record documents viz., receipt of deposit of Rs.1,00,000/-, Rs.22,000/- in Special Darkhast No.48 of 1983 and other relevant receipts whereby respondent-plaintiff has deposited part consideration before the Court in execution proceedings. According to him, in addition to

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above, there are other documents i.e., settlement took place between the parties in Special Civil Suit No. 55 of 1969 are also required to be brought into notice of this Court and as such sought adjournment.

4. Prayer for adjournment is seriously objected by learned Counsel for respondent-decree holder on the ground that he is litigating since 1984, though parted with amount of consideration, he is unable to enjoy the property. Having considered the request made, it is required to be noted that this appeal is pending since 2013. Apart from above, the plaintiff is litigating for his rights since 1984 before the Courts and in my opinion, he has rightly objected for grant of adjournment.

5. Apart from above, it is required to be noted that the documents viz., receipts of amount deposited by the plaintiff before the executing Court are already appreciated by trial Court and

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lower appellate Court. In view thereof, in my opinion, prayer for adjournment is liable to be rejected and appeal is taken out for disposal.

6. Mr. Tandale, learned Counsel for the appellants-defendants would urge that agreement dated 19th April, 1984 was not disputed by the appellant-original defendant or his legal heirs. According to him, time was essence of the contract and in view thereof, learned Courts below have committed an error in decreeing the suit for specific performance of contract when the plaintiff was not ready and willing to perform his part of contract. He would submit that from the decree of trial Court it can be inferred that the plaintiff was in arrears of Rs.17,000/- of consideration and as such, decree in the suit is not sustainable. He would urge that findings recorded are contrary to the provisions of Section 20 of the Specific Relief Act. In addition, Mr. Tandale, learned Counsel for the appellants would urge that the amount deposited by the plaintiff-respondent in the

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executing Court is without consent of the present appellants and respondent-plaintiff cannot take mileage of the same. He submits that the appeal deserves to be allowed.

7. While countering the above referred submissions, Mr. Solshe, learned Counsel for the respondent-decree holder would urge that the decree is based on the appreciation of factual matrix, particularly payments made from time to time by plaintiff. He would invite attention of this Court to the various observations made by both the Courts below thereby recording findings of payment of amount from time to time. According to him, such payments are made in terms of recitals of agreement dated 19th April, 1984, which is at Exhibit-124. According to him, once both the Courts below have recorded concurrent findings of fact, it is not open for this Court to reappraise the evidence. The appeal, as such, according to him, is liable to be dismissed.

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8. At the outset, it is required to be noted that the suit in question is based on agreement dated 19th April, 1984. The said document at Exhibit-124 was duly admitted and based on the same, suit was brought into action. Though payment of consideration was agreed to be extended till 15th February, 1986 as is apparent from document vide Exhibit-125. Though Mr. Tandale, learned Counsel for the appellants was right in contending that since time was essence of the contract, time was extended only upto 15th February, 1986, however, I am not in agreement with the submission that time was essence of the contract for the following reasons.

9. The recitals in agreement at Exhibit-124 speaks of acknowledgment of initial payment of Rs.24,000/- out of total consideration of Rs.2,11,000/-. Present appellant-defendant has agreed that the present-plaintiff was depositing amount as will be ordered in Special Civil Suit No. 55 of 1969. Accordingly, present respondent-

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plaintiff has paid and deposited from time to time total amount of Rs.1,94,000/- as is reflected in observations in paragraph-22 of the judgment of the trial Court.

10. Apart from above, as per recitals of Exhibit-124, the respondent-plaintiff paid amount of Rs.21,000/- to Premchand Jasraj Jain and Rs.19,000/- to Shantilal Gulabchand Jain as reflected in the record vide Exhibit-130 and 131 respectively. The said payment was made to the parties named therein, from whom original defendant had borrowed the amount. Leave apart, the amount was also paid towards getting suit property vacated as agreed in Exhibit-124.

11. Apart from above, payments as are made from time to time by the respondent depict of his readiness and willingness and both the Courts below upon appreciation of evidence in the backdrop of pleadings have recorded findings. The Courts below in exercise of discretion conferred under Section

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20 of the Specific Relief Act have decreed the suit, which in the backdrop of above observations, in my opinion, cannot be objected to. In my opinion, present second appeal, which is against concurrent findings is devoid of merit. As such, second fails, stands dismissed.

12. Consequently, civil applications stands disposed of.

13. Learned Counsel for the respondent undertakes that he shall keep his hand away from executing the decree for a period of four weeks from today.

(N.W. SAMBRE, J.)

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