

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 66 OF 2003

- | | | |
|-----------------------------------|---|-------------------------------|
| Madhavrao Ramchandra More, |] | |
| Since deceased through his LRs. |] | |
| 1. Milind Madhavrao More, |] | |
| Age 48 years, Occu. Agrist. |] | |
| 2. Ravindra Madhavrao More, |] | |
| Age 45 years, Occu. Service. |] | |
| 3. Arundhati Madhavrao More, |] | |
| Age 74 years, Occu. Housewife, |] | |
| All (1) to (3) Residents of |] | |
| 614, B Ward, Mangalwar Peth, |] | |
| Kolhapur |] | |
| 4. Mrs. Madhurani Sarjerao Patil, |] | |
| C/o. S.N. Patil, |] | |
| B-9, 2:4, Bhima Shankar CHS Ltd, |] | |
| Sector 194, Nerul, Navi Mumbai. |] | <u>... Appellants.</u> |

Versus

- | | | |
|-----------------------------------|---|--------------------------------|
| 1. Rajendra Sahakari Griha Nirman |] | |
| Sanstha Maryadeet, Kolhapur, |] | |
| 1325/7, Shivaji Udyam Nagar, |] | |
| Kolhapur. |] | |
| Through its Chairman, |] | |
| Shashikant Narayan Bhosale, |] | |
| Age 62 years, R/ol. 204/Kh/12, |] | |
| Kolhapur. |] | |
| 2. Milind Madhavrao More, |] | |
| Age 38 years. |] | |
| 3. Ravindra Madhavrao More, |] | |
| Age 35 years. |] | |
| 4. Sou. Arundhati Madhavrao More, |] | |
| Age 62 years. |] | |
| R. Nos. 2 to 4 R/o. 614, B-Ward, |] | |
| Mangalwar Peth, Kolhapur. |] | <u>... Respondents.</u> |

ALONG WITH
SECOND APPEAL NO. 67 OF 2003

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| Age 38 years. |] | |
| 2. Ravindra Madhavrao More, |] | |
| Age 35 years. |] | |
| 3. Sou. Arundhati Madhavrao More, |] | |
| Age 62 years. |] | |
| All R/o. 614, B-Ward, |] | |
| Mangalwar Peth, Kolhapur. |] | <u>... Appellants.</u> |

Versus

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| 1. Rajendra Sahakari Griha Nirman |] | |
| Sanstha Maryadeet, Kolhapur, |] | |
| 1325/7, Shivaji Udyam Nagar, |] | |
| Kolhapur. |] | |
| Through its Chairman, |] | |
| Shashikant Narayan Bhosale, |] | |
| Age 62 years, R/ol. 204/Kh/12, |] | |
| "E" Ward, Shahapuri, |] | |
| Kalyani Co-operative Society, | | |
| Kolhapur. | | |
| 2. Madhavrao Ramchandra More, |] | |
| (Since deceased) |] | |
| [Deleted as per Courts Order] |] | |
| 3. Mrs.Madhurani Sarjerao Patil, |] | |
| C/o.S.N.Patil, |] | |
| B-9, 2:4, Bhima Shankar CHS Ltd, |] | |
| Sector 19-A, Nerul, Navi Mumbai. |] | <u>... Respondents.</u> |

- Mr.Y. S. Jahagirdar, Senior Advocate a/w. Mr.Chetan G. Patil i/b. YKS Legal for the Appellant in SA/66/2003.
- Mr.Shriniwas Patwardhan a/w. Mr.Chetan G. Patil i/b. Mr.Chetan G. Patil i/b. YKS Legal for the Appellant in SA/67/2003 and for Respondent Nos.2 to 4 in SA/66/2003.
- Mr.Vishwanath S. Talkute for Respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

RESERVED ON : 3rd AUGUST, 2018.

PRONOUNCED ON : 8th AUGUST, 2018.

JUDGMENT. :

1] Heard Mr.Y. S. Jahagirdar, learned Senior Advocate for the Appellant in SA/66/2003, Mr.Shriniwas Patwardhan for the Appellant in SA/67/2003 and for Respondent Nos.2 to 4 in SA/66/2003 and Mr.Vishwanath S. Talkute for Respondent No.1.

2] As both these Second Appeal(s) are arising out of one and the same judgment of the First Appellate Court and they are raising common questions of law, they are being decided by this common judgment.

3] These Appeals challenge the common judgment and order dated 14/11/2002 passed by the 4th Additional District Judge, Kolhapur, in Regular Civil Appeal No.221 of 2000 and Regular Civil Appeal No.331 of 2000, which were preferred against against the judgment and decree dated 29/09/1994, passed by the 4th Joint Civil Judge, Senior Division, Kolhapur in Special Civil Suit No.165 of 1984.

4] The Appellant in Regular Civil Appeal No.66 of 2003 is the original Defendant No.1-Madhavrao Ramchandra More. He is the father of original Defendant Nos.2 and 3; and the husband of Defendant No.4. Defendant Nos.2 to 4 have preferred separate Second Appeal bearing No.67 of 2003.

5] Respondent No.1, in these Appeals is original Plaintiff. It is a registered Co-operative Housing Society, which was formed with an object to purchase the open site for construction of residential houses for its members.

6] For the sake of convenience, the Appellants are referred to by their original nomenclature "Defendant Nos.1, 2, 3 and 4", as the case may be.

7] Factual Matrix of the case depicts that, Defendant No.1 is the owner of the land bearing revised Survey No.545/2 and 556 situated at Karveer, District : Kolhapur. He had converted the said land for the purpose of non agriculture use and got the layout plan sanctioned from Town Planning Authority, for totally 81 plots therein. Out of those 81 plots, Defendant No.1 has agreed to sell 30 plots at the

rate of Rs.1.10 paise per square feet to the Respondent Society and accordingly executed an 'Agreement of Sale' in favour of Respondent on 18/02/1970. By virtue of another 'Agreement of Sale' dated 06/09/1970, Defendant No.1 further agreed to sell 41 additional plots to the Respondent. Out of them, 23 plots were agreed to be sold at the rate of Rs.0.25 paise per square feet and other 18 plots at the rate of Rs.0.50 paise per square feet. According to Respondent, Defendant No.1 orally agreed to sell remaining 10 plots also to the Respondent at the rate of Rs.0.50 paise per square feet.

8] It is undisputed that prior to the year 1976 itself, Defendant No.1 had executed sale-deed in respect of 26 plots out of 30 plots agreed to be sold by him by agreement dated 18/02/1970 at the rate of Rs.1.10 paise per square feet. However, in respect of sale of remaining 55 plots, on the request of the Defendant No.1, the time was extended by the Respondent to complete the sale transaction on 18/02/1970 and 06/09/1970 respectively, and thereafter from time to time, and lastly, upto 17/02/1978. It is in respect of these 55 plots Respondent-Society has filed this suit for specific performance of the agreement of sale.

9] According to the Respondent, the Society was always

ready and willing to perform its part of the contract for execution of the sale-deed in respect of these remaining 55 plots also. However, as in the year 1976, *'The Urban Land (Ceiling and Regulation) Act, 1976'* (for short, "*ULC Act*"), came into operation, the necessary permission was required to be obtained by Defendant No.1 from Competent Authority for sale of these plots. Accordingly, Defendant No.1 applied for such permission. However, he failed to inform the Respondent-Society about the receipt of the said permission. When Respondent got the knowledge of the same, the Respondent issued notice to Defendant No.1 calling upon him to execute the sale-deed in respect of remaining 55 plots. Defendant No.1, however, avoided to do so and refused to comply with the requisition. Hence, the Respondent was constrained to file this suit for specific performance of the agreement in respect of the sale of these remaining 55 plots.

10] Defendant No.1 resisted this suit denying the execution of the agreement and further denying the readiness and willingness on the part of the Respondent to perform its part of the contract. It was contended that, as per the agreement, the sale-deed was to be executed within three months from the execution of the first agreement and within one year from the execution of the second agreement. Even though the time for execution of the sale-deed was

extended, the last extension was granted on 17/02/1977 and 06/09/1976 respectively for a period of 1 year only. The Respondent has failed to apply for execution of the sale-deed within the stipulated period and therefore, the suit filed in the year 1984 is expressly barred by limitation. It was denied that the time for execution of the sale-deed was suspended on account of *the ULC Act* coming into effect in the year 1976. It was also contended that there was no such oral agreement as to the sell of remaining 10 plots and hence, the question of execution of sale-deed in respect of these 10 plots does not arise for consideration.

11] As regards Defendant Nos.2 to 4, they resisted the suit by their separate written statement contending *inter-alia* that the suit land being the ancestral joint family property of Defendant No.1, Defendant Nos.2 and 3 are also having undivided share therein; therefore Defendant No.1 had no authority or power to alienate their share in the suit land. It was submitted that both the Defendant Nos.2 and 3 were minor on the date of 'Agreement of Sale' and hence, as the transaction was not for the legal necessity of the family, the agreements of sale cannot be enforced against them and they are not bound upon the said agreements.

12] On these respective pleadings of the parties, the trial Court framed necessary issues at Exhibit-13. In support of its case, Ex-Chairman of the Respondent Society, namely, Shashikant Narayan Bhosale has examined himself and also led the evidence of one witness; as against it, Defendant No.1 alone entered into the witness box.

13] On appreciation of their oral and other documentary evidence on record and after considering various contentions on the legal and factual issues advanced before it, the trial Court was pleased to hold that the Respondent has proved the execution of these two written agreements of sale in respect of 71 plots and also the oral agreement of sale in respect of remaining 10 plots. It was further held by the trial Court that the Respondent had also proved its readiness and willingness to perform its part of contract. On the issue of limitation, it was held by the trial Court that, in view of *the Urban Land (Ceiling and Regulation) Act*, coming into effect in the year 1976, without obtaining the permission of the Competent Authority, the suit for specific performance could not have been filed. Hence, the suit filed, after the receipt of permission under the said Act, was within limitation. Accordingly, the trial Court decreed the suit in its totality.

14] This judgment of the trial Court was challenged by Defendant No.1 by preferring First Appeal No.30 of 1995; whereas by Defendant Nos.2 to 4, by preferring First Appeal No.31 of 1995. Initially these Appeals were preferred in this Court. After enhancement of the pecuniary jurisdiction of the District Court, these Appeals were transferred to the District Court at Kolhapur and re-registered as Regular Civil Appeal No.331 of 2000 and Regular Civil Appeal No.221 of 2000.

15] The First Appellate Court reconsidered all the contentions raised by the parties and in the light of the oral and documentary evidence produced on record by them and also in the light of the legal contentions advanced by their learned counsels, the First Appellate Court framed for its determination as many as 9 points and by answering them in favour of the Respondent, confirmed the judgment and decree of the trial Court on all the counts.

16] Being aggrieved thereby, these two separate Appeals are preferred by Defendant Nos.1 and Defendant Nos.2 to 4 respectively. Both these Second Appeals were heard and admitted by this Court vide its order dated 07/01/2004 on the following substantial questions of law:-

- “(a) As to whether the Plaintiff's readiness and willingness to perform their part of the agreements dated 18/02/1970 and 07/09/1970 has been proved?*
- (b) As to whether suit can be said to be within limitation?*
- (c) As to whether the oral agreement in respect of 10 plots could be specifically performed in the absence of any specific price being mentioned by the parties?”*

Reasons

Admitted Facts

17] Before entering into these substantial questions of law, it would be necessary to consider the factual aspects of the case, which are not much in the realm of dispute. The Respondent has come before the Court with a specific case about the execution of these two agreements of sale dated 18/02/1970 and 06/09/1970. Both these agreements are produced on record at Exhibit-68 and 69. Though in the written statement Defendant No.1 has denied the execution of these agreements, in evidence before the Court, in unequivocal terms, as observed by the First Appellate Court, Defendant No.1 has admitted the execution of these agreements. He has even admitted the correctness of the contents of both these agreements, including the

rates agreed between the parties in respect of the suit plots which are found mentioned in the agreements. He has further admitted that in pursuance of these agreements of sale, he has also made an application to the competent authority under *the Urban Land (Ceiling and Regulation) Act, 1976* for exemption of the excess land from the clutches of the said Act, so that he can execute the sale-deeds of the remaining plots in favour of the Respondent-Society. Not only that even in the partition deed Exhibit-86, which was executed between Defendant No.1 on the one hand and Defendant No.2, 3 and 4 on the other hand, there is specific mention regarding the execution of these agreements of sale in respect of the suit plots in favour of the Respondent. Most importantly, in the application made Exhibit-85 and 90, which he has made before the competent authority under Urban Land (Ceiling and Regulation) Act, 1976, he has specifically mentioned the terms and conditions of these two agreements of sale and also the price of the suit plots. This fact is admitted by him in his cross-examination also. Defendant No.2 has also in the written statement at Exhibit-89 given before ULC Authorities admitted the execution of these 'Agreements of Sale' in favour of the Respondent.

18] Thus, as regards the execution of these agreements, there is more than sufficient evidence on record to prove the same. For that

matter, it is also not disputed by Defendant No.1 that for execution of the sale-deed of the suit plots the permission from competent authority under ULC Act was required and accordingly, he has applied for such permission vide Exhibit-85 and 90. The said permission was received on 01/09/1983 and it is produced on record at Exhibit-62. This permission is given on the basis of these two 'Agreements of Sale' in respect of sale of all the 81 plots. The averments in the application preferred by Defendant No.1 before the competent authority and the very contents of the permission Exhibit-62 is more than sufficient to show that the permission was sought specifically for execution of the sale-deed of these remaining 55 plots in favour of Respondent-Society on the basis of the agreements executed with them and the permission was also granted on the ground that this excess land was agreed to be sold, much prior to the enactment of ULC Act and therefore, the exemption was granted for the purpose of executing the sale-deed of these remaining plots in favour of the Respondent-Society.

Point No.(a)

19] In the backdrop of these facts, one has to consider whether the suit filed by the Respondent-Society for specific performance of these agreements is within limitation or otherwise. According to learned Senior Counsel for the Appellant, the recitals in both the

'Agreements of Sale' Exhibit-68 and 69 are more than sufficient to show that the sale-deeds were to be executed, as stated in the agreement dated 06/09/1970 Exhibit-68 within one year and as stated in the agreement dated 18/02/1970 within three months. According to him, through it is true that the period for execution of the sale-deed was extended from time to time, initially on 06/09/1971, thereafter on 06/09/1972, then 06/09/1973, 06/09/1974, 06/09/1975 and lastly on 06/09/1976, the extension was only of one year and last extension granted on 06/09/1976 had expired on 05/09/1977. It is the submission that the suit therefore should have been filed within one year therefrom. However, the suit is filed in the year 1984; therefore definitely beyond the period of three years and hence, it has barred by limitation.

20] In this respect, learned Senior Counsel for the Appellant has relied upon Article 54 of the Limitation Act, which provides limitation period of 3 years from the date fixed for specific performance of the contract between the parties. Learned counsel for the Appellant has also relied upon the provisions of Section 9 of the Limitation Act to advance the submission that once the time has begun to run, it cannot be stopped, as Section 9 provides for continuous running of time and lays down that, "where once time has

begun to run, no subsequent disability or inability to institute a suit or make an application stops it". The only Exception provided is where the letter of administration to the estate of a creditor have been granted to his debtor, then only the running of the period of limitation for a suit to recover the debt from the estate of the creditor shall be suspended while the administration continues.

21] Here, in the case, according to learned counsel for the Appellant, the period of limitation for the performance of the agreement started running on the expiry of the last extended period i.e. 5/09/1977 and that period cannot be said to have stopped, merely because the permission from the competent authority under ULC Act was found necessary. According to him, even if, such permission was necessary, the Respondent need not have waited to receive it. Respondent could have filed the suit and the suit would have been kept pending, if found necessary, till the permission was received, but the Respondent could not have delayed the filing of the suit itself and that too, beyond the period of limitation, on the ground that for completion of transaction such permission was essential.

22] To substantiate this submission that provisions of Section 9 of the Limitation Act are binding and mandatory in nature, learned

Senior Counsel for the Appellant has relied upon the judgment of the Patna High Court in the case of *Ramnath Prasad V/s. State Transport Appellate Authority, Bihar, Patna and Others*¹, wherein it was held as follows;

“Section 9 of the Limitation Act provides that ‘once time has begun to run, no subsequent disability or inability to sue stops it’ except in the only case mentioned in the proviso to S.9. The Indian Limitation Act is undoubtedly an exhaustive Code governing the law of limitation in India. The cases in which the running of limitation can be suspended are contained in the sections of this Act. There is nothing in the Limitation Act which would justify the Court in holding that once the period of limitation has begun to run, it could be suspended. If the Courts were to hold that by some reason the period of limitation was suspended, they would be deciding contrary to the express enactment of S.9 of the Limitation Act.

Therefore, there can be no saving of limitation apart from the provisions of the Limitation Act, and apart from the provisions of that Act there is no principles which can legitimately be invoked to add to, or supplement, its provisions.”

23] In my considered opinion, there can hardly be any dispute

1 AIR 1957 Patna 117 (V.44, C 37 March)

about the legal prepositions on which learned counsel for the Appellants wants to rely upon. It is absolutely true that once the time has begun to run, it cannot be stopped. But here in my considered opinion, the real question for consideration is, *whether the time has really begun to run? and Secondly, whether the time was the essence of the contract?*

24] As regards the first aspect, undisputedly, only on obtaining permission from the competent authority under the ULC Act, the sale-deeds could have been executed. Factual position that this land was the surplus or excess land of Defendant No.1 is not disputed and therefore, in view of the statutory intervention by way of the operation of ULC Act in the year 1976, which was even before the period extended lastly, upto 05/09/1978 was to expire, there was no cause of action, as such for the Respondent to file the suit or even to seek specific performance of the agreements. It is pertinent to note that ULC Act came into effect from 02/11/1976 and under the said Act, the permission of the competent authority was mandatory for execution of the sale-deed, which fact is not disputed by Defendant No.1 also. That was the very reason why Defendant No.1 has applied for such permission. His application for permission is produced on record at Exhibit-85, in which he has clearly admitted the execution of

these agreements with Respondent and the necessity of permission for completion of the sale-deeds. This permission was sought by him on 17/11/1979 and permission was received on 01/09/1983.

25] The cause of action therefore in this case arose only when the Defendant No.1 received the said permission and not prior thereto. It is pertinent to note that Defendant No.1 has not even informed about this permission to the Respondent. It is the Respondent which has itself applied for the 'Certified Copy' of the permission and received the same on 14/03/1984. Immediately thereafter Respondent has called upon the Appellant to execute the sale-deed, by issuing notice dated 06/08/1984.

26] Thus, in the present case, the cause of action for seeking specific performance of the execution of the sale-deeds itself arose when the permission from competent authority was received by Defendant No.1 on 01/09/1983. Till then, otherwise also, Defendant No.1 has not refused the specific performance of the agreement. He has, even in the partition deed executed on 21/07/1984 Exhibit-86, admitted the execution of these agreements of sale. Therefore, there was in that real sense, no cause of action for the Respondent to file the suit, as there was no refusal on the part of the Defendant No.1 to

perform his part of contract.

27] Hence, as rightly submitted by learned counsel for the Respondent, the present case falls under Clause 2 of Article 54 of the Limitation Act, which provides that suit is to be filed within three years from the date when the Respondent/Plaintiff has notice that the performance is refused. In this respect, learned counsel for the Respondent has rightly placed reliance on the judgment of the Hon'ble Apex Court in the case of *Panchanan Dhara & Ors. V/s. Monmatha Nath Maity (Dead) Through LRs. & Ors.*², wherein the similar question was raised for consideration before the Hon'ble Apex Court and, in paragraph No.14, it was held as follows;

“A plea of limitation is a mixed question of law and fact. The question as to whether a suit for specific performance of contract will be barred by limitation or not would not only depend upon the nature of the agreement but also the conduct of the parties and also as to how they understood the terms and conditions of the agreement. It is not in dispute that the suit for specific performance of contract would be governed by Article 54 of the Limitation Act, 1964. While determining the applicability of the first or the second part of the said provision, the Court will firstly see as to whether any time was

fixed for performance of the agreement of sale and if it was so fixed, whether the suit was filed beyond the prescribed period unless any case of extension of time for performance was pleaded and established. When, however, no time is fixed for performance of contract, the Court may determine the date on which the plaintiff had notice of refusal on the part of the defendant to perform the contract and in that event the suit is required to be filed within a period of three years therefrom."

28]

It was further held in this judgment that,

"In terms of Article 54 of the Limitation Act the period prescribed therein has begun from the date fixed for the performance of the contract. The contract is to be performed by both the parties to the agreement and in that situation, the extension of the time for performing the contract is not necessarily to be inferred from written document. It could be implied also. The conduct of the parties in this behalf is relevant. Once a finding of fact has been arrived at, that the time for performance of the said contract had been extended by the parties, the time to file a suit shall be deemed to start running only when the plaintiff had notice that performance had been refused'.

29] It was held that,

“The date fixed for parties for performance of the agreement should be ascertained on the basis of the terms of the contract.”

30] In paragraph No.21 of the judgment, it was held that,

“Performance of a contract may be dependent upon several factors including grant of permission by the statutory authority in appropriate cases. If a certain statutory formality is required to be complied with or permission is required to be obtained, a deed of sale cannot be registered till the said requirements are complied with. In a given situation, the vendor may not be permitted to take advantage of his own wrong in not taking steps for complying the statutory provisions and then to raise a plea of limitation.”

31] It was also held that,

“There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by

evidence of conduct including forbearance on the part of the other party. Thus, in this case, there was a variation in the date of performance by express representation by the defendants, agreed to by the act of forbearance on the part of the plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the article, which provided the suit to be filed within 3 years from the date when the plaintiff has noticed that performance is refused.”

32] Here, in the present case also, admittedly, the time was not at all considered by the parties to be the essence of the contract; otherwise they would not have extended the time for not less than on five to six occasions, even before the ULC Act came into force in the year 1976. Otherwise also, the law is well settled that in respect of the contract for sale of immovable property, the time is not the essence of the contract. Moreover, by their own conduct, in this case, the parties had made it abundantly clear that it was never their intention to treat the time as essence of the contract. By his own conduct Defendant No.1 has made it clear that the time was not the essence of the contract and it was extended, only for him to comply his part of the contract. It was legally mandatory for Defendant No.1 to obtain the requisite permission for the competent authority for execution of

the sale-deeds. Hence, he could not perform his part of the contract before obtaining the permission from the competent authority. He had also not refused to obtain such permission. Conversely, by making the applications to the competent authority, he has shown readiness and willingness to perform his part of the contract and has also started performing the same.

33] Thus, as by his own conduct Defendant No.1 has extended the time for performance of the contract, there was no occasion for the Respondent to seek specific performance. As such, there was no cause of action has accrued to Respondent, considering that the requisite permission, which was statutorily necessary was yet not obtained by the Defendant No.1. Only when such permission was received on 01/09/1983, one can say that the cause of action has accrued and that too, if Defendant No.1 has informed about the same to the Respondent. Defendant No.1 has not done so. Therefore, only when the Respondent got knowledge about the same and called upon the Defendant No.1 to execute the sale-deed, by issuing the suit notice, which notice was not complied by the Defendant No.1, the cause of action accrued to the Respondent. Immediately thereafter, within two to three months, the Respondent has filed the suit. Therefore, it can hardly be said that the suit is barred by limitation. In this case, when the performance of the

contract was dependent upon the permission of the Competent Authority, which was a statutory formality, it cannot be accepted that the time has started to run prior to that. Therefore, it cannot be said the suit filed is beyond the period of limitation.

34] This inference can be further strengthened from the legal position upheld by the Hon'ble Apex Court in the latter judgment of *S. Brahmanand & Ors. V/s. K.R. Muthugopal (D) & Ors.*³ also, wherein it was held that the time for specific performance of the agreement may be extended in view of Section 63 of the Contract Act. Such extension may be by express agreement or even by implied conduct of the parties and therefore, what was originally covered by first part of Article 54 can now fall within purview of second part thereof.

35] This is a case wherein the performance was due only after the permission under the ULC Act was obtained and only on the receipt of such permission the time has started running and not prior thereto. Therefore, as the suit is filed within three years from the receipt of such permission, it is required to be held as filed within limitation and not at all barred by law. Both the trial Court and the Appellate Court had, in this respect rightly construed the provisions

3 AIR 2006 SC 40

of the Limitation Act and answered this point accordingly. As a result, no interference is warranted in the said finding.

Point No.(b)

36] This brings me to the second issue as to whether there is failure on the part of Respondent to prove its readiness and willingness to perform their part of the contract. According to learned counsel for the Appellant, the very fact that the suit was not filed within one year from the date of last extended period itself is sufficient to prove that the Respondent was never ready and willing to perform its part of contract and that was the reason why earlier also the time was extended from time to time. However, in my considered opinion, this contention is also without merits. The reliance placed by learned counsel for the Appellant on the judgment of the Hon'ble Apex Court in the case of *Ouseph Varghese V/s. Joseph Aley & Ors.*⁴, in this respect is also totally misplaced. Here, in the case, Respondent has very well not only pleaded but proved on record its readiness and willingness to perform their part of the contract. It is a matter of record that the Respondent could not perform their part of the contract for want of permission from the Competent Authority under ULC Act, which the Defendant No.1 was required to obtained and has accordingly applied

4 (1969) 2 SCC 539

for. As unless and until that permission was received, the sale-deeds could not be executed, there was no point in the Respondent showing its readiness and willingness to perform their part of the contract. Since prior to receipt of such permission, it was not necessary for Respondent to even issue notice to Defendant No.1 calling upon him to perform the contract; especially when Defendant No.1 was taking the requisite steps to obtain such permission. Hence, though it is contended that in the plaint Respondent has merely stated that it was ready and willing to perform its part of the contract from the date of last period of extension of the contract and hence, Respondent has not pleaded about its readiness and willingness for the earlier period, this contention is also bereft of substance. The cause action for the Respondent to prove its readiness and willingness arose only after the last extension of the period of the agreement. Prior to that, both the parties had willingly extended the period for performance of such agreement.

37] Moreover, in the present case, there is no specific denial to the averments made by the Respondent in the plaint that, the Respondent was always ready and willing to perform its part of the contract. This fact is taken note of by both the Courts below and it was therefore, held that in the absence of specific denial in the written

statement about the fact pleaded in the plaint amounts to admission and admitted facts need not be proved.

38] Otherwise also, there is absolutely no material on record to arrive at any other conclusion. As rightly submitted by learned counsel for the Respondent, this aspect of readiness and willingness also cannot be considered as substantial question of law. It is a question of fact on which there is concurrent finding of fact recorded by both the Courts below. Hence, as held in the judgment of the Hon'ble Apex Court in the case of *Veerayee Ammal V/s. Seen Ammal*⁵, even if on appreciation of evidence another view is possible, that would not clothe the High Court to assume the jurisdiction by terming it as substantial question of law and disturb the concurrent findings arrived at by both the Courts below, by substituting its own findings. As a matter of fact, in this case, there is also no material on record to take any other view of the matter. First it was for Defendant No.1 to perform his part of the contract viz. to obtain the permission from ULC Authorities for executing the sale-deed. Only after such permission was obtained, the question arises of ascertaining the readiness and willingness on the part of the Respondent to perform its part of the contract and there is nothing on record to show that, in any

5 AIR 2001 SC 2920

way the Respondent had failed to show its readiness and willingness. In such situation, the finding arrived at by both the Courts below on this aspect needs to be confirmed, it being based on proper appreciation of evidence on record.

Point No.(c)

39] The main grievance of the Appellant is in respect of oral agreement of sale as regards remaining 10 plots. It is submitted that, it is difficult to prove the oral agreement and especially when such agreement is also very vague and uncertain, its specific performance cannot be granted. It is pointed out by learned counsel for the Appellant that both the trial Court and the Appellate Court had concurrently held that there is no evidence about the price at which 10 plots were agreed to be sold by Defendant No.1 to the Respondent. Hence, the trial Court has granted specific performance in respect of the said 10 plots by giving maximum price for the said plots at the rate of Rs.1.10 paise per square feet. It is urged that if the parties themselves had not agreed and have not specified the price of the said plots, the Court cannot do the job of the parties and decide the price of the said plots. Moreover, the area of the plots is also not stated. Hence, they also cannot be identified. According to learned counsel for the Appellant, on this very ground of uncertainty in such oral agreement,

the specific performance thereof should not have been granted by the Courts below.

40] In support of this submission, learned counsel for the Appellant has relied upon the judgment of the Hon'ble Apex Court, in the case of *Mayawanti V/s. Kaushlya Devi*⁶, wherein it was held in paragraph No.8 as follows;

“In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and

6 (1990) 3 SCC 1

enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation.”

41] Here, in the case, it is urged that there is no valid and enforceable contract between the parties. The contract suffers from the uncertainty and vagueness for want of description for the 10 plots and its price and therefore, such performance should not have been granted.

42] Learned Senior Counsel for the Appellant Mr. Jahagirdar has then also placed reliance on the judgment of the Hon'ble Apex Court in the case of *Nahar Singh V/s. Harnak Singh & Ors.*⁷, wherein also it was held that, *“in order to grant specific performance of contract of sale of immovable property, such property must be identifiable. If the material produced on record leads to positive conclusion that the agreement neither contains the exact area of the land to be sold, not boundaries thereof and no length and breadth of the land has been given it, such agreement cannot be enforced”*.

43] Then reliance is placed by learned Senior Counsel for the

Appellant on the judgment of the Hon'ble Apex Court in the case of *Keshavlal Lallubhai Patel & Ors. V/s. Lalbhai Trikumlal Mills Ltd.*⁸, wherein it was held that, “*if on a fair construction of the document, the condition mentioned in the document is held to be vague or uncertain, no evidence can be admitted to remove the said vagueness or uncertainty under the provisions of S.93 of the Evidence Act. It is the language of the document alone that will decide the question. It would not be open to the parties or to the Court to attempt to remove the defect of vagueness or uncertainty by relying upon any extrinsic evidence. Such an attempt would really mean the making of a new contract between the parties*”.

44] Here, in the case, therefore it is urged that the Court cannot decide the price of the remaining 10 plots as it would amount to the Court making the new contract between the parties.

45] Mr.Suryawanshi, learned counsel for the Appellant i.e. Defendant Nos.2 and 3 has also relied upon the judgment of the Hon'ble Apex Court in the case of *V.R. Sudhakara Rao & Ors. V/s. T.V. Kameswari*⁹, to submit that in case of oral contract, if except the oral evidence, there is no clear evidence to prove several of the essential

8 AIR 1958 SC 512

9 (2007) 6 SCC 650

terms of the alleged contract for sale, which is being sought to be specifically enforced, the relief specific performance being discretionary relief cannot be granted.

46] In my considered opinion, in the facts of the present case, none of the above judgment can be made applicable. As rightly considered by both the Courts below, here in the case, the terms of the contract are very clear and they were clear even to the knowledge of the parties also, when they executed the written agreements. The recitals in the agreements Exhibit-68 and 69 are more than clear to that effect. Admittedly, the layout plan of the said land was approved and sanctioned since beginning for totally 81 plots, out of which 26 plots were already sold and in respect of the remaining 45 plots also, there is written agreement. Even in the application given by Defendant No.1 to the ULC Authorities, Exhibit-85, it is clearly stated that 26 plots are already sold to the Respondent, remaining 45 plots are to be sold as per the written agreement and balance 10 plots are to be sold to the Respondent-Society by virtue of oral agreement. The permission Exhibit-62 was also granted accordingly.

47] It is also worth to note that in the partition deed Exhibit-86 executed between Defendant Nos.1, 2, 3 and 4 also, there is

description of these plots, specifying which plots are allotted to the share of Defendant No.1 and which plots are allotted to the shares of Defendant Nos.2, 3 and 4. Not only that, the numbers and the areas of those plots are also mentioned therein in the written statement filed by Defendant No.1 to the ULC Authorities on 27/11/1979. He has further confirmed therein that after layout was sanctioned, he has entered into the agreement in respect of these 81 plots with the Respondent-Society and then there is description of these 81 plots.

48] Therefore, it follows that the defendants were very much aware and so also the Respondent purchasers were also very much aware about the identity of these plots. What remained to be mentioned in these documents is only the purchase price of the said plots. However, it was implied that these remaining 10 plots were also to be sold at the same price at which the earlier plots were sold and that may be the reason that it was not specifically mentioned. Despite that, the trial Court has considered the maximum price for which the parties had agreed the sale of the plots and accordingly, granted specific performance in respect of these 10 plots at the rate of Rs.1.10 paise per square feet.

49] Thus, in this case, as there is sufficient evidence and

material on record to prove the identity of the plots and also to arrive at its market price, there is no question of the Court deciding the terms of the contract between the parties. Again this issue also pertains to the proper appreciation of the facts and the evidence on record. Both the Courts have in this respect arrived at the concurrent finding of fact on its proper appreciation. Therefore, no interference is warranted at all in the said finding, as no other view of the matter can be taken.

50] This brings me to the contention raised by learned counsel for the Appellant that the Respondent being a co-operative society, it could not have entered into oral agreement. It is submitted that, as admitted by Ex-Chairman of the Respondent, in evidence before the Court, the 'By-Laws' of the Society cannot permit it to enter into oral agreement. Therefore, according to learned counsel for the Appellants, such oral agreement which is against the 'By-Laws' and against the Statute cannot be enforced. In my considered opinion, this contention is only a last ditch attempt made by the Appellants to avoid the specific performance of the contract. Whether Society or its office bearers can enter into oral agreement or not, that is the internal matter of the Society. The Appellant cannot take advantage thereof and avoid or refuse the specific performance of the agreement.

Moreover, as stated above, it is not merely an oral agreement but it is found reflected in the documents executed by the Defendants themselves. Therefore, this contention can hardly be accepted.

51] These were the only three issues-cum-substantial questions of law on which the Second Appeals were admitted and none of them hold merits.

Additional Points

52] In the course of final hearing of the Appeals, however, learned counsel for the Appellants viz. Defendant Nos.2 to 4, Mr.Suryawanshi, has pressed into submission two more issues. They are as follows:-

- (i) *Whether granting the relief of specific performance at this stage, which is a discretionary relief would put the Defendants in more hardship than that of the Plaintiff?*

53] By placing reliance on the judgment of the Hon'ble Apex Court in the case of *K.S. Vidyanadam & Ors. V/s. Vairavan*¹⁰, it is submitted that the prevailing circumstances are required to be considered in exercising the discretion, if the specific performance is

¹⁰ (1997) 3 SCC 1

not sought within the reasonable time. It is urged that the agreements are executed in the year 1978 and the specific performance thereof is granted by the trial Court after the lapse of more than 24 years. Even if, the time is not considered to be the essence of contract, during this period of 24 years, the prices of the landed property has escalated to such an extent that allowing specific performance at this stage is going to cause substantial loss and hardship to the Defendants; especially to Defendant Nos.2 and 3 who were not even parties to the said agreement and despite that they are held to be bound by the same.

54] Learned counsel for the Appellant Mr.Suryawanshi has in this respect also submitted that the money paid towards the earnest amount in the present case is very negligible and these factors are required to be considered by this Court, while confirming the decree for specific performance of the contract, as granted by the Courts below.

55] In this respect, learned counsel for the Appellant has also placed reliance on the judgment of the Division Bench of this Court in the case of *Niwas Builder V/s. Chanchalaben Gandhi*¹¹, wherein relying on Section 20 of the Specific Relief Act, it was held that the decree for

11 2003(3) Mh.L.J. 312

specific performance being a discretionary one, the Court is not bound to grant the same merely because it is lawful to do so. A judicial note of the rise in prices during the *pendency* of the appeal can always be taken by the Court. It was held that, the Court can irrespective of the data produced by the defendant can safely conclude that the prices of immovable property have been increased; especially in Pune, Mumbai, Aurangabad and Nagpur belt of the Maharashtra in the last 21 years. A similar trend is found in the other parts of the country. This aspect of the matter therefore, cannot be ignored while considering the appeal; especially when the Court is considering the question as to whether the decree for specific performance should be granted or not.

56] However, in my considered opinion, the facts of this reported judgment show that in that case the trial Court has refused specific performance of the agreement and granted refund of the earnest amount. Hence, for the first time before the High Court, in the Appeal, the High Court was required to consider, whether the decree for specific performance should be granted or not and in that context it was held that the judicial note of the increase in the prices of immovable property is required to be considered. Here, in the case, the decree is already granted by both the Courts below and it is not for the first time, this Court is considering the question as to whether to

grant it or not.

57] Similarly, as regards the judgment of the Hon'ble Apex Court in the case of *Hemanta Mondal & Ors. V/s. Ganesh Chandra Naskar*¹², relied upon by learned counsel for the Appellants, the facts of the said case clearly go to prove that as the possession of the plots was not given to the Plaintiff at the time of the execution of the agreement nor the area of land agreed to be sold was clear, in that context, it was held that it would not be proper to grant the decree for specific performance of the contract. Here, in the case, it may be true that the possession of the plots is yet not given to the Respondent-Society, but then the fact remains that the Society was formed with a particular object of providing plots to number of its members; the intention was to purchase all these 81 plots so as to form the co-operative society. The possession of 26 plots with the execution of the sale-deed is already handed over. Now, if the specific performance of the remaining plots is not granted, then those members of the Respondent who have invested their life earnings and are hoping their dream of the house to come true are going to suffer irreparable loss and far more hardship.

58] It is particularly so in the facts of the present case, as the Appellants/Defendants have taken advantage of these agreements to exempt their surplus land from the rigors of the ULC Act. On the basis of these agreements only, they got their surplus land protected. Therefore, now they cannot turn around and say that if the relief of specific performance is granted, they will suffer more hardship. After taking the benefit from the Statute to their advantage, the Appellants are now precluded from raising this contention. Both the Courts below have considered this aspect in its proper perspective and rejected this contention, which was raised before them also. As such, no substantial question of law is raised on this aspect also, so as to reconsider the same.

59] As regards original Defendant Nos.2, 3 and 4 in respect of their appeal, no substantial questions of law is framed at the time of its admission. Despite that, learned counsel for the Appellant Mr.Suryawanshi was permitted to argue the question of law raised therein in their appeal and it is,

(ii) *“Whether these agreements of sale can be held binding on Defendant No.2 and 3, who were at the relevant time minor children of Defendant No.1?”*

60] It is submitted by learned counsel for these Defendants that, admittedly the suit property is the ancestral joint family property of Defendant No.1, therefore Defendant Nos.2 and 3 are having coparcenary rights therein. They were minor when the agreements were executed. Hence, the burden was upon the Respondent to prove that these agreements were executed for legal necessity. However, no such case is made out or proved. Hence, these agreements cannot be binding on the shares of these defendants. To support this submission, the reliance is placed by learned counsel for these Appellants on the judgment of the Division Bench of this Court in the case of *Shrikant Trimbakrao Begade & Ors. V/s. Natthu Maroti Shivarkar (Dead) Through LRs. & Ors.*¹³, wherein relying upon Section 243 and 244 of the Hindu Law (Mulla), it was held that, “the burden to prove the legal necessity is always on the purchaser of the joint family property”. Here, in the case, according to learned counsel for the Appellants, as no such enquiry was made by the Respondent before purchase of the property to prove the existence of legal necessity for Defendant No.1 to sell the suit land, the agreements of sale cannot be binding on the share of Defendant Nos.2 and 3 and also on the share of Defendant No.4.

61] However, in my considered opinion, this contention is also devoid of merits because, as per the legal position, the transactions entered into by the karta of the Hindu Joint Family are binding on the undivided share of the minors as well as other members of the family, not only when they are executed for the legal necessity but also for the benefit of joint family. Here, in the case, on account of these agreements of sale executed by Defendant No.1 with Respondent, Defendant No.1 can save the surplus land held by the joint family from the clutches of ULC Act. The entire joint family is thus benefited by this transaction. Hence, these transactions bind not only Defendant No.1 but also Defendant Nos.2, 3 and 4, who are benefited thereby.

62] Moreover, it is pertinent to note that Defendant No.2 has also affirmed the transactions reflected in the agreement of sale, in his written statement filed at Exhibit-89 before the competent authority under the ULC Act for getting these lands exempted and thereby admitted these transactions. None of the Defendant Nos.2 and 3 has, even after attaining the majority had challenged these transactions. Therefore, after taking benefit under these transactions, they can no more contend that these transactions are not binding on them.

63] As regards the contention of learned counsel for the Appellant that the suit in this case, as against Defendant Nos.2 to 4 suffers from misjoinder of necessary parties in view of Section 19 of the Specific Relief Act, to say the least this contention is again totally devoid of merits. Defendant Nos.2 and 3 who were having share in the suit land and by executing the partition deed, they had affirmed their share in the suit plots, were very much necessary parties to this suit. It cannot in any way be said that their joinder in the suit is suffering from misjoinder of the parties.

64] To sum up therefore, both the Second Appeals are without any merits and hence, they stand dismissed with costs throughout.

65] At this stage, learned counsel for the Appellants seek extension of the stay granted to the execution of the decree by this Court during *pendency* of this appeal.

66] Learned counsel for the Respondent submits that the stay may be granted subject to the Appellants not creating any third party interests in the suit land and not parting with the possession of the suit land.

67] Accordingly, the execution of the decree is stayed for a period of 8 weeks from today, subject to the Appellants filing undertaking in this Court within two weeks that they will not create third party interest or part with the possession of the suit land till 8 weeks and subject to the order of the Hon'ble Apex Court.

[DR.SHALINI PHANSALKAR-JOSHI, J.]