

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

SECOND APPEAL NO.963 OF 2007

1. Mrs.Sugrabi Gulam Shaikh }
 1 (a) Masrur Ahmed Shaikh
 2. Mrs.Nadira wife of Ross Masud Shaikh } .. Appellants
 (Orig.Respt nos.7 & 8)

vs

1. Mr.A.S.D'Silva through his legal heirs
 A.Mrs.Luella Dias }
 B.Mrs Lola Sequeria
 C.Mrs.Viola Mederia }
 2. Mrs.Grace D'Silva
 3.Paramount Apartments }
 Co-op Hsg.Scty
 4.Managing Committee
 Paramount Apts Coop Hsg. Society }
 5. Poonawalla Promoters Pv.Ltd
 6. Mr.Rusi Poonawalla }
 7.Mr.Rajgandhi K.Sayani ..
 Respondents
 (Orig.Respt nos.1 to 5)

Mr.Rajiv Narula with Mr.Atharv Sanghavi
 and Mr.Ryan Menezes I.b M/s Jhangiani Narula
 & Associates for Appellants

Mr.Nitin P.Deshpande for Respondent nos.5 & 6
 Mr.S.S.Patwardhan with Ms.S.M.Dandekar
 for Respondent nos.1A to 1C and Respondent no.,2

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CORAM: A.M.DHAVAL, J

JUDGMENT RESERVED ON : 25th SEPTEMBER 2018

JUDGMENT PRONOUNCED ON: 12th OCTOBER 2018

JUDGMENT

1. This appeal is by original defendant nos.7 and 8 from Special Civil Suit No.130 of 1979 filed by respondent nos.1 and 2. The respondent no.1 is dead and he is represented in this matter through his legal heirs. The suit was filed against the co-operative housing society Paramount Apartments, and its managing committee as defendant nos.1 and 2, builder promoter defendant nos.3 and 4, Secretary of defendant no.2, defendant no.5 and one G.H.Shaikh (Defendant no.6) to whom the suit flat was allotted. He was found dead and his legal heirs defendant no.7 and 8 were added. According to the plaintiffs, by virtue of allotment dated 31.12.1973 defendant nos.3 and 4 agreed to allot to them Flat No.A-5 of 790 sq.ft area in the proposed building to be constructed as 'Paramount Apartments.' The agreed price was Rs.53,975/-. Out of the same a sum of Rs.34,245/- was given by the plaintiffs to defendant no.4 who received it on behalf of defendant no.3 and gave allotment letter. The plaintiffs claimed that they through brother of the plaintiff no.2, occupied the suit flat no.A-5 since 18.3.1978. Thereafter, defendant nos.3 and 4 started committing irregularities and/or fraud by allotment of flats to several persons.

Then the flat holders formed a co-operative society which was in the hands of the managing committee i.e. defendant no.1 of which defendant no.5 was the Secretary. It is the case of the plaintiffs that on 18.9.1979 defendant no.5 with the help of defendant nos.1 and 2 forcibly entered the flat and removed the articles of the plaintiffs and dispossessed the caretaker Mr.Francis Pinto brother of plaintiff no.2. Thereafter, the defendant nos. 3 and 4 in collusion with defendant nos.1 and 2 created interest in respect of the flat in favour of defendant no.6. Mr.Francis Pinto lodged a criminal complaint against these illegalities at the police station. The plaintiffs sought membership of defendant no.1 which was declined by defendant nos.1 and 2. The plaintiffs approached the Joint Registrar, Co-operative Societies who held that the plaintiffs should obtain necessary relief from Civil Court and thereafter membership issue can be determined. Thereafter, the plaintiff issued a notice under section 164 of the Maharashtra Cooperative Societies Act, 1961 and filed the suit for following reliefs :

- (a) A declaration and confirmation of allotment of flat no.A-5 to the plaintiff no.1;*
- (b) A declaration that the defendant no.3 have unlawfully notified or withheld notifying allotment of the flat;*
- (c) A declaration that the plaintiffs are valid members of defendant*

no.1 ;

(d) *A declaration that the allotment of flat by defendant no.1 society was illegal, malafide and unwarranted.*

(e) *Direct the defendant nos.1 to 2, 7 and 8 to put the plaintiffs in possession of the suit flat.*

(f) *To pay full costs.*

Or in the alternative (a) if the defendant nos.1 and 3 were unable to give the suit flat, they should give alternative flat of same area and amenities to the plaintiffs in the said building.

(g) *to return the amount of Rs.38,245/- with interest at the rate of 18% p.a. from the date of credit.*

2. Defendant nos.1,2 and 5 denied for want of knowledge, most of the rights claimed by the plaintiffs. They challenged the authority of defendant no.4 to grant allotment to the plaintiffs. They further denied that the plaintiffs or their caretaker one Mr.Francis Pinto were in possession of the suit flat. They denied that the plaintiffs were dispossessed by defendant no.5 as allotted. They claimed that the suit flat was allotted to defendant no.6 by defendant nos. 3 and 4 and he was in possession and occupation thereof. They denied the alleged collusion between them and defendant nos.3 and 4. They admitted that the plaintiff no.1's request for membership was declined by them but the said order was not challenged. They denied service

of notice under section 164 of the Maharashtra Co-operative Societies Act. They also challenged the valuation. According to their specific case, the plaintiffs were bound to pay instalments up to 3.7.1975 but those were unpaid and therefore, the agreement in favour of the plaintiffs was forfeited. Besides, it is claimed that the plaintiffs had taken away Rs.10,000/- from the defendant nos.3 and 4 and thereby accepted cancellation of allotment in their favour. It is claimed that the suit was barred by limitation. Defendant nos. 3 and 4 admitted that they had entered into an agreement with the plaintiffs but, denied that the plaintiffs were ready and willing to pay the same. They claimed that the plaintiffs were defaulters and declined to make payment of instalments as agreed. The plaintiffs had taken away a sum of Rs.10,000/- from defendant nos. 3 and 4. They denied that actual possession was delivered to the plaintiffs or that Mr.Francis Pinto brother of plaintiff no.2 was occupying the premises from 18.3.1978 and on that day the building construction was not even complete. With these pleadings they have refuted the claim of the plaintiffs.

denied various contents of the plaint and claimed that the alleged agreement in favour of the plaintiff was not registered and was therefore invalid and therefore, unenforceable. They denied that the plaintiffs were in possession of the suit flat at any time. According to defendant no.7 application of the plaintiffs for membership was rejected and no appeal was preferred against the same in the Civil Court. The suit was not maintainable in view of section 163 of the Maharashtra Co-operative Societies Act, 1963. They claimed that market value of the suit flat was above Rs.3,00,000/-. The valuation was not proper.

4. According to defendant no.7, the deceased G.M.Shaikh was her husband working as a school teacher. He entered into agreement to sell and he was put in possession of the suit flat in part performance of the agreement. He died on 14.3.1983. She was in possession of the suit flat along with her deceased husband and she denied that the plaintiffs were in possession. She claimed that other legal heirs of defendant no.6 are not added as parties.

5. On the basis of these pleadings, the learned trial Judge

framed issues and by a judgment dated 8,12,1987 dismissed the suit with regard to possession and partly decreed the suit to the extent of refund of earnest money of Rs.29,011/- with interest at the rate of 9% p.a.

6. The legal heirs of plaintiff no.1 filed First Appeal No.485 of 1989. The learned Ad-hoc District Judge-9 Pune by its judgment dated 29.9.2017 allowed the appeal with costs, set aside the judgment and decree of the Joint Civil Judge, Senior Division and granted a declaration that the agreement of sale in favour of the plaintiff that flat no.A-5 was subsisting and the appellants were entitled for allotment of the suit flat on becoming members of the society, subject to payment of balance consideration of the purchase price and payment of improvement charges. He held that allotment of the suit flat to defendant no.6 was illegal and was liable to be cancelled and the plaintiffs were entitled for possession of the suit flat on becoming a member, The original defendant no.7 (in First Appeal Mrs.Sugrabi) has preferred this Second Appeal.

7. Mr.Rajiv Narula learned Advocate for the appellants argued the following points :

i) The learned Additional District Judge completely overlooked the pleadings of the parties. There was no suit for specific performance of the agreement. There was no pleading of readiness and willingness to perform the contract still he granted a decree for specific performance. The original agreement between the plaintiffs and defendant no.3 and 4 was unregistered. Subsequently, there was a novation and a fresh agreement was entered into. This second agreement was not pleaded nor was it duly stamped and registered and was not duly proved still it was acted upon. The First Appellate Court ignored the material evidence of the plaintiff that they were not ready and willing to perform their part of the contract. There were no necessary pleadings. On the contrary there was evidence that she had taken back Rs.10,000/- from defendant no.4.

(ii) The learned First Appellate Court entered into conjectures and surmises and decreed the suit. The defendant no.7 was admitted as a member of the society and the share certificates were on record. The entitlement of defendant no. 7 was not very much relevant. It was for the plaintiffs to make out a case for his entitlement which was not properly considered. The judgment is totally shocking and unconscionable. There are no justifiable reasons to

reverse the findings recorded by the trial Court in well-reasoned judgment. Hence, the appeal may allowed.

8. Mr.Rajiv Narula learned Advocate for the appellants has relied on the following judgments :

(a) **Suraj Lamp & Industries Pvt.Ltd vs State of Haryana & anr (2012) 1 SCC 656** wherein it is held that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed) and in the absence of conveyance duly stamped and registered as required by law, no right, title or interest in an immovable property can be transferred. A registration of conveyance of immovable property is necessary and its advantages are stated in para 15 in above judgment.

Scope of power of attorney:

20. “A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grant or authorizes the grantee to do the acts specified therein on behalf of grantor which when executed will be binding on the grantor as if done by him (see section 1-A and section 2 of the Powers of Attorney Act,1882) It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.”

(b) **Nair Service Society Ltd vs Rev.Father K.C.Alexander & ors (1968) 3 SCR 163: AIR 1968 SC 1165.**

32. *“Now it is a fixed principle of law that a suit must be tried on the original cause of action and this principle governs not only the trial of suits but also appeals. Indeed the appeal being a continuation of the suit new pleas are not considered. If circumstances change they can form the subject of some other proceedings but need exceptions. Sometimes it happen that the original relief claimed becomes inappropriate or the law changes affecting the rights of the parties. In such cases courts may allow an amendment pleading the changed circumstances. Sometimes also the change circumstances, shorten litigation and then to avoid circuitry of action the courts allow an amendment. The practice of the courts is very adequately summarized. In Ram Ratan Sahu v Mohant Sahu Mookerjee and Holmwood, JJ have given the kind of changed circumstances which the courts usually take notice with illustrations from decided cases. The judgment in that case been consistently followed in India. In Raicharan Mandal vs Biswanath Mandal other cases are to be found in which subsequent events were noticed. The same view was taken by the Federal court in Lachmeshwar Prasad Shukul vs Keshwar Lal Chaudhuri following the dictum of Hughes C.J. In Patterson vs State of Alabama. In Surinder Kukar vs Gian Chand this court also took subsequent events into account and approved of the case of the Federal court. In view of these sections, it is hardly necessary to cite further authorities. “*

Duties of Ist appellate Court

(c) **Madhukar & ors vs Sangram & ors (2001) 4 Supreme Court Cases 756.** It is held in para 5 as under :

5. “We have carefully perused the judgment and decree of the High Court in the first appeal. We find that substantial documentary evidence had been placed before the trial court including certified copies of certain public records besides copy of the judgment and decree of the earlier suit (OS) No.93 of 1971. Oral evidence had also been led by the parties before the trial court which was noticed and appreciated by the trial court. However, the impugned judgment in the first appeal is singularly silent of any

discussion either of documentary evidence or oral evidence. Not only that we find that though the trial court had dismissed the suit on the ground of limitation as also on the ground that the decision in the earlier suit (OS) No.93 of 1971 operated as res judicata against defendant 1 only, the High Court has not even considered much less discussed the correctness of either of the two grounds on which the trial court had dismissed the suit. Sitting as a court of first appeal it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. It has failed to discharge the obligation placed on a first appellate court. The judgment under appeal is so cryptic that none of the relevant aspects have even been noticed. The appeal has been decided in a very unsatisfactory manner. First appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.”

Law of limitation

(d) **Bina Manohar Dudani & anr vs Major Charanjitlal Verma (Retd) & ors 2007 (5) Mh.L.J. 224.**
Para 6 and 7 reads as under :

6. *“It is the case of the appellants that they pursued the transaction on behalf of the respondents for many years thereafter and that much latter on 28th May 1998 a letter came to be addressed by the Army Welfare Organization to appellant no.1 informing her that the respondent no.1 continued in the records of the Army Welfare Association as owner of the suit flat and that she may pursue her transfer application with the society since the flat has been transferred to Salunkhe Vihar society. The respondents have contended that letter (not addressed to the respondent no.1) but, addressed to appellant no.1 saved the bar of limitation and the suit having being filed on 3rd December 1998 could not be dismissed as having been barred by limitation. The learned Judge has considered the*

issue of limitation on entirely different point. It has held that the suit will be governed by Article 65 of the Limitation Act since it relates to recovery of possession of immovable property. The suit is essentially for declaration that the agreement dated 15th April 1988 executed between the parties is void. It is not for claiming recovery of possession of a property which has been lawfully in possession of the parties sued. Article 65 relates to the right of prescription that the defendant can legitimately claim if within the period of limitation mentioned in the said Article (which is 12 years) the plaintiff does not sue. It therefore does not relate to suits based upon transfer of title. The applicable Article of the Limitation Act in this case first accrued on 8th June 1990 when the first respondent was informed about the refusal of the permission for sale. The suit should therefore should have been filed on or before 7th June 1993.

7. *The period of limitation cannot be saved by any correspondence made to the defendants by the granting authority. Hence, reliance upon the letter dated 28th May 1998 addressed to the appellants by the Army Welfare Housing Organization is entirely misplaced. The suit became distinctly barred by the law of limitation. “*

(e) **Agyarani Dua vs Vidyagauri Tripathi 1998 (3)Mh.L.J. 797.** It is held as under :

“Limitation Act (36 of 1963) Art 58 and S.14-Plaintiff obtaining exparte decree for possession on 18.3.1991-Suit for declaration that agreement for sale dated 24.11.1984 stands abdicated or in the alternative is to be declared to be void/voidable for want of consideration and therefore illegal and not binding on plaintiff filed on 1.8.1988. Notice to quit issued-Right to sue accrued to plaintiff when terms of agreement dated 24.11.1984 were not complied with and on expiry of fifteen days of notice dated 12.12.1984 when agreement stood revoked-Suit filed on 9.6.1996 barred by Limitation under Article 58 Limitation Act and liable to be rejected under Order 7 Rule 11 of Civil procedure Code-Article 65 not attracted and no case for exclusion of time

under section 14, Limitation Act. “

(f) Nagrao Narayan Diwane since deceased through L.Rs. Vs Narayan Awadutrao Dighe since deceased thr.LRs Smt Sulochana Narayan Awadutrao Dighe &ors (2000 (2)Mh.L.J.273. It is held as under :

“(a) Specific Relief act (47 of 1963) S.34 Suit for declaration of title-Plea raised that suit was not maintainable for declaratory relief simpliciter without claiming the relief of possession-Although plaintiff did not seek consequential relief of possession, he had asserted and claimed that he was in possession of the suit property-Court had also found as a fact that the suit property was in possession of the plaintiff-Plaintiff's suit was therefore maintainable for the relief of declaration simpliciter and was not barred by section 34 of the Specific Relief Act, AIR 1993 SC 957 AIR 1972 SC 2685 AIR 1993 SC 597 Ref.(Para 21).

(b) Civil Procedure Code S.100 and Limitation Act (36 of 1963) S.3-Second appeal-Plea of limitation though not raised in the trial court can be raised on the second appeal. It is the duty of the court to see and go into the question of limitation irrespective of the fact that the same was not raised in the suit before the trial court AIR 1991 Bom 35 Rel. AIR 1991 Ker.83 (Paras 26 and 29).

9. Per contra, learned Advocate Mr.S.S.Patwardhan for the respondents supported the judgment stating that agreement to sell under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale Management and Transfer, Act 1963. (Hereinafter referred to as MOFA) means a conveyance and no separate conveyance was required to be executed. In this

regard, he relied on the judgment in State of Maharashtra vs Mahavir Lalchand Rathod 1993 MLJ 1492. He argued that defendant nos.3 and 4 have committed fraud. There was no security to the money paid to them and therefore, the plaintiffs had not paid balance amount to them. An amount of Rs.10,000/- was refunded by the defendant no.4 to the plaintiff in respect of different transactions and the same has been properly explained by the learned first appellate Court. He submitted that the plaintiff was always ready and willing to perform his part of the contract. He could not have been deprived of his right to get the suit flat. The defendant nos.7 and 8 had no documents and title of the plaintiffs was a better title. Hence, no interference is called for.

10. On 24.6.2008 following substantial questions of law were framed :

1. *Whether the appellate court erred in passing a decree for possession of immovable property under section 3 of the Specific Relief Act, 1963 without the plaintiff establishing his title or legal entitlement to the suit property ?*
2. *Whether the appellate court ought to have considered that the suit is barred by law of limitation as per Article 58 of the Limitation Act, 1963?*
3. *Whether the decree cannot be passed in favour of plaintiffs on the basis of unregistered document?*

4. *Whether findings in the judgment cannot be passed on the evidence given by witness purely in her capacity as constituted attorney of the plaintiffs having no personal knowledge of the facts of the case?*

5. *Whether decree for possession of suit flat could not have been passed in the absence of all the heirs of deceased defendant no.6 ?*

6. *Whether the suit is not maintainable in view of section 164 of the M.C.S.Act and as such liable to be dismissed ?*

7. *Whether the appellate Court has committed serious errors in interpreting several statutory provisions of law in case of specific performance of alleged agreement dated 3rd December 1973 ?*

11. On the basis of the evidence on record, and arguments advanced, I answer the above questions as follows :

Issue No.1 : ***In the affirmative***

Issue No.2 : ***In the negative***

Issue no.3: ***In the affirmative***

Issue no.4: **Evidence of the constituted attorney in the absence of personal knowledge was not admissible but the plaintiff no.2 has also examined herself.**

Issue No.5: ***In the negative***

Issue No.6: ***In the negative***

Issue No.7: ***In the affirmative***

12. From the pleadings and evidence on record, following facts emerge as undisputed :

13. Defendant no.4 as Director of defendant no.3 floated a scheme for construction of Paramount Apartments Co-operative Housing society. On 31.12.1973, the plaintiffs entered into agreement with defendant nos. 3 and 4 for purchase of one flat admeasuring 790 sq.feet for a consideration of Rs.53,975/-. The possession was to be delivered by July 1975. During the intermediate period, the plaintiffs inall paid Rs.34,245/-. The building was under construction and in May 1977 defendant no.3 issued a note allowing the plaintiff no.1 to see his flat (Exh 106. There were complaints that defendant nos.3 and 4 were selling the same flat to many persons. The aggrieved flat purchasers came together. It seems that defendant nos.3 and 4 abandoned the project and the flat purchasers of the society formed a society- defendant no.1. The defendant no.,2 is the managing committee and Defendant no.5 is the Secretary of the society. The plaintiffs had applied for membership of the society in 1980 but the said application was rejected. The plaintiffs thereafter approached the

police claiming that on 18.3.1978 they have taken possession of the flat

A-5 and it was occupied by their agent plaintiff no.2 s brother Mr.Francis Pinto but he was forcefully dispossessed by the defendants. The plaintiffs issued a letter to the society showing willingness to make extra payment. Defendant no. 3 by a letter dated 21.3.1979 cancelled the agreement of the plaintiffs on account of non-payment of the balance amount. The plaintiffs disputed the said termination. Defendant no.3 communicated to the society about the cancellation of the allotment. Defendant no.3 allotted the said flat to defendant no.6 who later expired and defendant nos.7 and 8 are his legal heirs. This is the broad outline of the factual aspects.

14. It is apparent that the plaintiffs ' claim is based on the agreement Exhibit 96 dated 3.12.1973. By this agreement, the original builder and promoter (defendant nos.3 and 4) had agreed to sell the suit flat to the plaintiffs for.53,975/- and a sum of Rs.12,000/-was paid on and or before the date of the agreement. Besides, there are subsequent payments of Rs.4.775/- each on four

occasions, Rs.3000/- on one occasion. Thus total, Rs.34.245 was paid and balance payable was Rs.19,330/-. The schedule of the agreement shows the balance amount was to be paid by way of 10 instalments. Admittedly, the entire payment was not made and the agreement to sell was not registered under section 4 of the MOFA Act.

15. The facts indicate that the subsequent conduct of the defendant nos.3 and 4 was such that the plaintiffs were justified in not trusting them for making further payments. However, when the behaviour of defendant nos.3 and 4 indicated that rights of the plaintiffs to get the flat were in jeopardy, the plaintiffs ought to have filed a suit for registration of the agreement and for a specific performance of the agreement and should have also prayed for appointment of a receiver for completion of the scheme. The plaintiffs have not filed such a suit. It is axiomatic that unless the agreement is registered and a decree for specific performance of the said agreement is obtained, the plaintiffs cannot claim a right to become a member and to claim allotment of the flat.

16. Reliance on the judgment of **State of Maharashtra vs. Mahavir Rathod (supra)** by the learned advocate for the respondents is mis-placed. The said ruling is in respect of the liability to pay stamp duty for the Deemed conveyance under Article 25 Explanation proviso (c) of the Bombay Stamp Act. The now pointed the agreement to sell with delivery of possession is required to be stamped as a conveyance and the entire stamp duty is required to be paid. However, this deeming fiction will not make such an agreement to sell a conveyance as claimed by Mr. Patwardhan learned advocate for the respondents. It remains an agreement to sell only and the law requires that it must be registered and a decree for its specific performance should have been obtained. Mere unregistered agreement did not create a right in favour of the plaintiff to get the suit flat allotted in their name and a right to become a member of the society. Pertinently, the plaintiffs approached the Registrar of Cooperative Societies, for membership. The Registrar passed an order directing the plaintiffs to approach the civil court. The order dated 15.6.1983 Exhibit 113 passed by the Joint Registrar, Co-operative Societies shows that the society's decision in rejecting the membership of the

appellants' claim was found reasonable and just at that stage. However, the society was directed to finally take a decision on the basis of the decision of the civil court in the suit filed by the plaintiffs. During that time, the issue of membership was to be deferred. This does not mean that the registrar accepted that the issue of membership is to be decided by the Civil court as contended by the learned advocate for the respondents/plaintiffs. It meant that the plaintiffs ought to have obtained a decree of specific performance of the agreement which could have been done after getting the agreement registered. The provisions of MOFA Act make it mandatory that such an agreement must be registered and the said reliefs can be given by the civil court if the suit for specific performance would have been filed and the same would have been decreed, the plaintiffs could have claimed membership. The plaintiffs wrongly interpreted the provisions and filed a suit for wrong reliefs and in a wrong format. The suit should have been for specific performance with necessary pleadings of readiness and willingness. But, there is no prayer for specific performance of the contract and of readiness and willingness.

17. The learned appellate court ignored this material defect in the plaint pleadings. It is well-settled that evidence without pleadings is of no use and cannot be taken into consideration (A.A.Inamdar's case AIR 1996 SC 112). The declaration claimed by the plaintiffs could have been consequential and could have been granted only subject to decree of specific performance. The plaintiff did not claim specific performance and therefore, there was no specific pleading and readiness and willingness which is the statutory requirement.

18. It is also found that there was a novation of the contract and a new agreement was entered into. The plaintiffs had not pleaded about the same nor the agreement was produced earlier, When it was produced, it was not duly proved. It was unregistered. It is certain that once there is a novation, the earlier agreement dated 3.12.1973 Exhibit 96 could not have been specifically enforced even with a prayer for registration. The subsequent agreement should have been pleaded and the claim for its registration and specific performance should have been made. Nothing of this sort was done.

19. The learned first appellate court presumably had anxiety to do substantial justice to the plaintiffs. He noticed that defendant nos.3 and 4 were mischievous and wanted to defeat the rights of the plaintiffs. He found that the plaintiff had bonafide claim for the suit flat and thereafter he went beyond the provisions of law and the established principles of law. He ignored that there was requirement of essential pleadings and essentially prayers and in the absence of prayers, he granted a decree for specific performance,. He should not have neglected the issue of readiness and willingness. The evidence disclosed that the plaintiff had received Rs.10,000/- from the defendant no.4 as refund which he ignored and entered into conjectures and surmises and held that it might have been in respect of different transactions. There is no proper explanation by the plaintiffs for the receipt of Rs.10,000/- from defendant no.4.

20. In the circumstances, I find that considering the bleak chances of getting the suit flat allotted to them and the apprehension of loss of money, the plaintiffs at some stage, changed their mind and received back Rs.10,000/-.The contention of the plaintiff that

they were in possession of the suit flat is also not substantiated. If they were in possession, there is no explanation how they were dispossessed. Apart from the issue of possession, I find that the above referred other facts were sufficient to dismiss the appeal and maintain the judgment and decree passed by the learned trial Judge regarding refund of earnest money with interest. In the absence of specific pleadings, the learned first appellate court erred in granting a decree which is like a decree of specific performance holding that the rights of the plaintiffs were subsisting and they were entitled to be member by payment of balance consideration.

21. It is true that it is the duty of the court to do substantial justice to the parties but, it must be within the four corners of law and the court cannot grant substantial justice unless the parties and its advocates take necessary precautions regarding pleadings and evidence.

22. In the light of the facts, I hold that the decree for specific performance could not have been passed considering the

conduct of the defendant nos.3 and 4 and the entire project of building construction being in doldrum, in the intermediate period and as the suit is filed in 1980, and as there were intermediate payments, I find that no issue of limitation could have been raised. Hence, I answer substantial; question no.2 in the negative,.

23. I hold that the plaintiffs should have specifically pleaded specific performance with a prayer that the defendant nos.3 and 4 should be directed to register the agreements and thereafter, the same could have been specifically performed. Point no.3 is answered in the affirmative.

24. As far as evidence is concerned, most of the facts are admitted. The plaintiff has examined herself. Plaintiff no.2 Francis Pinto the constituted attorney whose evidence was admissible restricted only to his personal knowledge and not with regard to other facts. Since the plaintiff no.2 was examined, this was not material defect. Hence, point no.4 is answered accordingly.

25. As far as issue no.5 is concerned, the defendant no.6

was allotted the suit flat subsequently by the society. The rights of the plaintiffs were prior in point of time and if the plaintiffs were entitled for reliefs, the defendant no.6 and after his death his legal heirs were bound by the decree passed in favour of the plaintiffs. The defendant nos.7 and 8 were the two legal heirs of defendant no.6. They were already on record. There was sufficient representation to the interest of defendant no.6 and therefore, non-joinder of other heirs if any could have affected the rights of the plaintiff.

26. The maintainability of the suit under section 164 of the Maharashtra Cooperative Societies Act has been challenged. This issue is not between the cooperative society and a member in true sense. The society was bound to admit all the flat purchases who were entitled for the flat. The plaintiff was one of such flat purchasers. However, the plaintiffs were entitled to become member subject to obtaining a decree for specific performance only. Since no such relief was claimed, I have held that the plaintiffs were not entitled for allotment of the flat. The right of specific performance as between the plaintiff on the one hand and

defendant nos.3 and 4 on the other hand, was the main issue which was not governed under section 164 of the Maharashtra Cooperative Societies Act. However, the plaintiffs have claimed reliefs regarding membership and directions against the society. Such claims were certainly not maintainable in suit. After obtaining a decree for specific performance the plaintiff could have approached the society for admitting him as a member and allotment of the flat and such subsequent dispute could have been decided only before the Registrar of co-operative societies or the Cooperative Court as the case may be. Bar under section 163 of the Maharashtra Co-operative Societies Act, 1963 and services of notice under section 164 could have been necessary for such subsequent reliefs for which the cause of action would have been obtaining a decree for specific performance. Hence, Issue no.6 is answered accordingly.

27. Point no.7: In view of the above discussion, I find that the learned first appellate court has committed a grave error in not considering the pleadings and granting reliefs to the plaintiffs in absence thereof. The learned trial Judge has taken a proper and

logical view. In the suit, the plaintiff had claimed refund of earnest money and the trial court granted the same specific decree of specific performance with plea of readiness and willingness is made in the pleadings and therefore, it was not granted. The Ist appellate Court was thus justified in reversing the said finding.

28. In the light of the above facts, I find the judgment and decree of the learned appellate court is not tenable and deserves to be set aside and the decree of the trial court deserves to be restored.

29. Accordingly, the appeal is allowed. The judgment of the first appellate court is set aside. The judgment and decree passed by the learned trial court is restored.

30. Considering the facts, the parties shall bear their own costs of this Second appeal and the defendants shall bear costs of the plaintiffs in the trial Court and in the first appellate court. The decree shall be drawn up accordingly.

{A.M.DHAVAL, J}

