

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

SECOND APPEAL NO.785 OF 2017

WITH

**CIVIL APPLICATION NO.15227 OF 2017
IN SA/785/2017**

- 1 Jubeda Iqbal Rajkotwala (**dead**)
Through L.Rs.
 - 1A) Arif Iqbal Rajkotwala,
Age 35 yrs., Occ. Business,
R/o Ganjbazar, Ahmednagar.
 - 1B) Yasmin Mosin Memon,
Age 42 yrs., Occ. Household,
R/o Before Railway Station,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.
 - 1C) Reshma Abdul Memon,
Age 40 yrs., Occ. Household,
R/o Masala, Tq. Masala,
Dist. Raigad.
 - 1D) Shahista Iqbal Rajkotwala,
Age 36 yrs., Occ. Household,
R/o Ganjbazar, Ahmednagar.
 - 1E) Rizwana Forukh Jiwani,
Age 38 yrs., Occ. Household,
R/o Before Railway Station,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.
- 2 Arif Iqbal Rajkotwala,
Age 35 yrs., Occ. Business,
- 3 Shashista Iqbal Rajkotwala,
Age 23 yrs., Occ. Household,

Nos.2 and 3 are r/o Tin Galli, Ganj Bazar,
Ahmednagar.

... Appellants.

... **Versus** ...

- 1 Mangal Gangadhar Gadalkar,
Age 39 yrs., Occ. Household,
- 2 Babasaheb Gangadhar Gadalkar,
Age 23 yrs., Occ. Education,
- 3 Sachin Gangadhar Gadalkar,
Age 20 yrs., Occ. Education,
- 4 Nitin Gangadhar Gadalkar,
Age 18 yrs., Occ. Education,
- 5 Puja Gangadhar Gadalkar,
Age 17 yrs., Occ. Education,
Minor – under guardianship of
natural mother i.e. respondent No.1
Mangal Gangadhar Gadalkar.
- 6 Chabu Eknath Gadalkar,
Age 38 yrs., Occ. Agri.,
- 7 Bharat Eknath Gadalkar,
Age 36 yrs., Occ. Agri.,

All are r/o Near Meghanand Bungalow,
Sarasnagar road, Behind Market Yard,
Ahmednagar.

- 8 Aditya Constructions Company,
A registered partnership firm,
Ahmednagar, Tq. & Dist. Ahmednagar,
Through it's partners.

- 8A) Ajay Chandrakant Akade,
Age 41 yrs., Occ. Agri. & Business,
R/o Shinde Mala, Savedi, Ahmednagar,
Tq. & Dist. Ahmednagar.
- 8B) Yogesh Arjunrao Gondhali,
Age 26 yrs., Occ. Agri. & Business,
R/o Borude Mala, Savedi, Ahmednagar,
Tq. & Dist. Ahmednagar.
- 9 Suresh Piraji Phulsundar,
Age 56 yrs., Occ. Agri. & Business,
R/o House No.7160, Maliwada, Ahmednagar,
Tq. & Dist. Ahmednagar.

... **Respondents.**

...

Mr. A.K. Gawali,, Advocate for the appellants

Mr. A.M. Gholap, Advocate for the respondent Nos.1 to 7

Mr. S.S. Mande, Advocate for the respondent Nos.8, 8A, 8B, 9

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 11th JULY, 2019

PRONOUNCED ON : 13th AUGUST, 2019

JUDGMENT :

1 Present appeal has been filed by the original plaintiffs challenging the concurrent Judgment and Decree passed in Special Civil Suit No.123/2003 by 2nd Jt. Civil Judge Senior Division, Ahmednagar dated 29.11.2004, whereby their suit for specific performance of the contract is

dismissed, however, the defendants were directed to pay amount of Rs.2,90,000/- along with interest to the plaintiffs and the said decree was confirmed in Regular Civil Appeal No.171/2012 (First Appeal No.328/2005) by District Judge-13, Ahmednagar on 22.08.2017.

2 What is not in dispute is that the predecessors of the defendants viz. Chhabu, Gangadhar and Bharat were the owners of Sy.No.50/4/B and Sy.No.51/5 situated at Maliwada, Tq. Nagar, Dist. Ahmednagar.

3 Original plaintiffs had come with a case that Chhabu, Gangadhar and Bharat had agreed to sell the suit lands to their predecessor viz. Iqbal Rajkotwala in the year 1990. An agreement to sell to that effect was executed on 24.05.1990. The consideration was fixed at Rs.2,01,000/- per acre. Iqbal gave earnest amount of Rs.1,00,000/- to the brothers. It was contended that the possession was delivered as part performance of the agreement to sell. One of the conditions in the said agreement was, that the brothers would get permission to convert the land into non agriculture within 11 months and then the sale deed would be executed. However, they failed in getting permission within time. Then they had demanded amount to Iqbal to get the layout sanctioned. Accordingly Iqbal and plaintiffs had paid Rs.1,00,000/- on 06.07.1990, Rs.1,50,000/- on 17.10.2010, Rs.10,000/- on 14.03.1991, Rs.10,000/- on 01.12.1999 and Rs.20,000/- on 23.08.2001.

Thus, in all amount of Rs.2,90,000/- has been paid by the plaintiffs towards consideration. It is further contended that inspite of giving sufficient opportunity to the brothers and the other defendants, who are the heirs of one of the brothers, to get the land converted into non agriculture, they avoided to execute the sale deed and therefore, the plaintiffs had sent notice dated 27.05.2002 calling upon them to execute the sale deed. Inspite of receipt of the notice they failed and therefore, suit has been filed for specific performance of the contract. In the alternative, the plaintiffs prayed for refund of the earnest amount together with interest and also amount of Rs.4,92,450/- as damages. Further, in the alternative, they had prayed that if the relief of specific performance is granted and then if the Court finds that they are not in possession, then possession should be delivered to them.

4 The defendants resisted the claim of the plaintiffs by filing written statement. They have specifically denied that any such agreement was entered into by them with deceased. It is stated that they had close association with deceased Iqbal. They used to borrow the money from Iqbal, whenever they were in need of money. At that time, Iqbal used to obtain their signatures on blank stamp papers. Defendant Nos.6 and 7 or deceased Gangadhar never executed agreement to sell of their lands. It was contended that in the year 1990 the market rate of the suit land was between 8 to 10 lac

rupees per acre. The actual possession is with the defendants. The suit has been filed after 13 years of alleged agreement to sell and therefore, the suit is barred by limitation. The suit is not properly valued. The agreement was not registered and has not been executed on proper Court fee stamp, therefore, cannot be read in evidence. Taking into consideration the facts of the case, it can be said that plaintiffs were never ready and willing to perform their part of the contract. On these counts they prayed for the dismissal of the suit.

5 Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record and hearing both sides, as aforesaid, the relief of specific performance was rejected and taking into consideration the proof of amount extended by the plaintiffs, the defendants were directed to pay amount of Rs.2,90,000/- along with interest.

6 The original plaintiffs challenged the said Judgment and Decree in the aforesaid appeal. In the said appeal the original defendants filed cross objection. The appeal was dismissed and cross objection was allowed. The entire Judgment and Decree passed by the learned Trial Court was set aside and the suit was dismissed. Present appeal is, therefore, filed by the original plaintiffs challenging the concurrent findings and decree against them.

7 Heard learned Advocate Mr. A.K. Gawali for appellants. Learned Advocate Mr. A.M. Gholap for respondent Nos.1 to 7 and learned Advocate Mr. S.S. Mande for respondent Nos.8 and 9.

8 It has been vehemently submitted on behalf of the appellants that the learned Trial Court had held that the plaintiffs have proved the execution of agreement to sell. However, the learned First Appellate Court has negated that findings. It was also negated that the plaintiffs had paid in all amount of Rs.2,90,000/-, from time to time, to defendant Nos.1 to 7. The learned Trial Court has held that the plaintiffs are entitled to get amount of Rs.2,90,000/- with interest, however, that finding is also reversed by the First Appellate Court and therefore, the Judgment, that has been passed by the learned First Appellate Court, is erroneous. Plaintiffs had examined witnesses and proved the execution of agreement dated 24.05.1990. The defendants have not denied the signatures of Chhabu, Gangadhar and Bharat on the agreement. Therefore, the learned First Appellate Court ought to have considered that the said agreement is proved. Same point as regards Section 34 of Maharashtra Stamp Act and Article 24 of the said Act was raised before the learned Trial Court. But the learned Trial Court has arrived at a finding that since in the evidence it had come that the possession of the land was not handed over, then there was no question of application of Section 34 as well

as Article 25 of the Maharashtra Stamp Act. The discussion, that has been made by the learned First Appellate Court, would show that ultimately it has been held that the document is not conveyance and therefore, the Article 25 of Maharashtra Stamp Act will not be attracted and therefore, the document was held to be properly stamped and can be read in evidence in execution of the document. However, the learned First Appellate Court went wrong in holding that the plaintiffs have failed to prove the execution of the document itself. When the defendants had not taken any steps to prove that the said document does not bear their signatures, rather they had come with the defence that their signatures were obtained on blank stamp papers and they could not prove that fact, then the signatures, which were compared by the learned Trial Court from the agreement with admitted signatures; it ought to have been held that the execution of the agreement is proved. Thereafter, both the Courts failed in considering that the brothers had agreed to obtain NA permission within the period of 11 months. They did not take any step towards the same. Further, the endorsement on the agreement regarding acceptance of amount signed by Bharat would show that they had acknowledged the receipt and it would amount to extension of time to perform their part of the contract. He relied on Section 55 of the Indian Contract Act and submitted that in view of the said provisions, time cannot be said to be essence of the contract and in this case with the evidence that

had come on record, that payments have been received in installments subsequently by the defendants, then even the parties had no intention to bind themselves with time limit. It was also submitted that in view of Section 18 of the Limitation Act the signature about acknowledgment gives extension of time. Further, the signature of Bharat will have to be taken as signature of agent on behalf of other brothers also. The learned First Appellate Court has not considered the evidence of witnesses, who were present at the time of execution of the document in proper perspective and unnecessarily they have been disbelieved. When the agreement was proved and it was in respect of immovable property, substantial amount was given to the defendants, both the Courts ought to have granted specific performance of the contract. When only 30% of the amount of the total consideration was remaining, there was no necessity for the plaintiffs to deposit the rest of the amount in Court to show readiness and willingness. Mere lapse of 13 years will not make the time as essence of the contract, taking into consideration the fact that the brothers had taken responsibility to obtain permission regarding non agriculture. Till that condition is observed by them, there was no question of time being essence of the contract or question of limitation. In fact, both the Courts failed to consider the acceptance of amount, which was not denied by other side as extension of limitation.

9 The learned Advocate for the appellants has relied on the decision in Food Corporation of India vs. Assam State Cooperative Marketing and Consumer Federation Limited and others, (2004) 12 SCC 360, wherein it has been observed, the fact of acknowledgment in writing would be extension of period of limitation for filing suit.

 He further relied on the decision in Swarnam Ramchandran (Smt) and another vs. Aravacode Chakungal Jayapalan, (2004) 8 Supreme Court Cases 689, wherein it has been held that -

“Time is not presumed to be of essence in conveyance of immovable property, but it is of the essence in contracts of reconveyance or renewal of lease. However, the burden of proving whether time was of the essence is upon the person alleging it, thus, giving an opportunity to the other side to rebut such a presumption. Therefore, if such evidence is led and not rebutted, the Court is bound to accept plaintiff's plea.”

 Further reliance has been placed on the decision of this Court (Principal Seat) in Madhavrao Ramchandra More and others vs. Rajendra Sahakari Griha Nirman Sanstha Maryadeet and others, 2018 DGLS (Bom.) 963, wherein as per the agreement the sale deed was to be executed within one year and permission from Urban Land (Ceiling and Regulation) Act was received after about 13 years. Then notice was issued to defendant

calling upon execution of sale deed not complied by defendant. The suit is filed within limitation and not barred by law. It was further held that the cause of action for the plaintiff to prove readiness and willingness arose only after last extension of period of agreement. Based upon this decision it was also submitted that in this case the last payment, that has been received by the defendants, was on 23.08.2001 and the suit was filed on 12.06.2003 and therefore, it was within limitation.

10 Per contra, the learned Advocate representing the respondents submitted that Iqbal expired on 18.12.1999. Though the alleged agreement was executed on 24.05.1990, he had never taken any action during his lifetime. There is no evidence led by the plaintiffs as to amongst them who had made the alleged payment on 23.08.2001. Further, the other endorsements bear signatures of Bharat only. Under such circumstance, both the Courts have rightly held that there was no extension of period of limitation, if at all the agreement to sell could have been said to be proved. The learned First Appellate Court has rightly held that the agreement to sell does not bear signature of any witness, but the witnesses who have been examined i.e. PW 1 to PW 3 though contended that they were present at the time of execution of the agreement to sell and they have not explained as to why they have signed it, their testimony cannot be believed. There is

absolutely no explanation by the plaintiffs that they were time and again making inquiry as to what the defendants were doing in respect of obtaining permission for converting the lands into non agriculture. When they had kept mum for such a long period, they can not be said to be ready and willing to perform their part of the contract. The endorsements subsequently appearing in the alleged agreement appear to be forged and they have been made only to bring the suit within limitation. Both the Courts have rightly held that the suit is beyond the period of limitation and the time was essence of the contract. Though the learned Trial Court held that the suit was beyond the period of limitation, yet, order was passed in respect of refund of earnest amount and therefore, the cross objections were filed, which have been rightly allowed by the learned First Appellate Court. The discrepancies in the evidence of the witnesses examined by the plaintiffs, make their evidence unreliable and therefore, no substantial question of law is arising in this case.

11 The learned Advocate for respondent Nos.8 and 9 has relied on the decision in Manjunath Anandappa Urf. Shivappa Hanasi vs. Tammanasa, 2003 DGLS (SC) 307 : AIR 2003 SC 1391, wherein it has been held that -

“Plaintiff who not only raised plea that he had all along been and even on the date of filing of suit was ready and willing to perform the

part of the contract but also must prove it. Only in certain exceptional situation whether exact words had not been used but readiness and willingness can be called out from reading all averments made, coupled with material on record.”

Further reliance has been placed on His Honours Acharya Swami Ganesh Dassji vs. Sita Ram Thapar, 1996 DGLS (SC) 849 : AIR 1996 SC 2095, wherein it has been held that -

“There is a distinction between readiness to perform the contract and willing to perform the contract. Readiness may be meant capacity of the plaintiff to perform the contract which includes his financial position. But for willingness, the conduct has to be scrutinized.”

12 The first and the foremost fact, that is required to be taken a note is, that the execution of the agreement to sell dated 24.05.1990 was denied by the defendants and therefore, it was for the plaintiffs to prove the said fact. The said agreement to sell was attacked by the defendants on two grounds i.e. 1) denial of execution and 2) inadmissibility of the same in reading it in evidence, on the ground that it was executed on insufficient stamp paper and was not registered. Taking into consideration the contents of the same that possession was handed over, the agreement to sell ought to have been executed on sufficient stamp paper and it ought to have been registered. In the nutshell, it was contended that since the document has been executed on an insufficient stamp paper, it cannot be read in evidence,

in view of provisions of Section 34 of the Stamp Act. However, it is to be noted that both the Courts have negated that contention and it was held that the document is properly stamped. There is no challenge on behalf of the original defendants on this point, therefore, the said point cannot be raised once again in Second Appeal by them. Therefore, the objection raised by them in respect of agreement to sell is restricted to the proof of execution of the document.

13 Taking into consideration the evidence led, it appears that the learned First Appellate Court has taken a right decision. Plaintiffs had examined three witnesses i.e. PW 1 Habib, who was the Power of Attorney of the plaintiffs and two other witnesses viz. Sayyad Saifuddin, PW 2 and Pramod Lodha, PW 3. In fact, plaintiffs are the legal heirs of Iqbal and none of the plaintiffs were admittedly present at the time of the execution of agreement to sell. Therefore, they relied on the evidence of these three witnesses. Though these three witnesses stated that they all were present at the time of execution of the document, yet, none of them have signed on Exh.39. They have not given any reason, as to why they had not signed it. But what has been correctly observed by the learned First Appellate Court is that scribe of Exh.39 has kept the space for signature of witnesses as blank. Rightly it has been concluded that though agreement Exh.39 is not a

compulsorily attestable document, yet, when at the time of execution of the same there was no intention that it should not be signed by the witness, then mere oral evidence about presence of PW 1 to PW 3 will not lead to the conclusion, that the three brothers i.e. Chhotu, Bharat and Gangadhar had signed the said document. Unless the burden would have been discharged by the plaintiffs regarding execution of the document, onus would not have been shifted on the defendants to prove that, that particular document Exh.39 does not bear their signatures. No doubt, the defendants had come with a case that they had taken loan from Iqbal from time to time and on those occasions their signatures were taken on blank stamp paper, that does not mean that they were admitting the signatures on Exh.39. When the plaintiffs' witnesses have not given any cogent reason, as to why they had not signed the document when it was executed, their testimony cannot be believed. Further, it is to be noted that all the three witnesses had stated that on each of the occasions when the amount was taken by Bharat, they had witnessed the said fact. Plaintiffs have come with a case that the amount was extended five times. Under such circumstance, why on each of the occasions signature of any one of them was not taken, is a question. Further, none of them is explaining, as to who had paid amount of Rs.20,000/- on 23.08.2001, since the fact has come on record that Iqbal expired on 18.12.1999. Therefore, all these facts create doubt on the evidence, that has

been led by the plaintiffs, on the point that the three witnesses who deposed in favour of plaintiffs were present at the time of execution of the document. The learned First Appellate Court, therefore, correctly held that the agreement is not proved.

14 When the agreement itself is not proved, the corollary of the same is to dismiss the suit in its entirety. However, both the Courts have taken the further points for consideration in respect of readiness and willingness, time was essence of the contract or not and whether the suit is within limitation. Therefore, alternatively cursory discussion is made on these points. If it is held that the agreement was executed on 24.05.1990, then the suit that was filed on 12.06.2003 is required to be assessed from the point of view, as to whether it is within limitation. As per the term of agreement, the sale deed was to be executed after 11 months and within the said period of 11 months, the three brothers were to convert the land into non agriculture. It is to be noted from the evidence of PW 1 that at any point of time for about 12 years (excluding the said period of 11 months) either Iqbal or the plaintiffs had ever made inquiry with defendants as to what steps they had taken to bring the said permission. Merely by stating that Iqbal went on paying further amount towards consideration, whether his duty to make inquiry with the defendants, as to what steps they were taking or what

action they were taking to perform can not be said to have been fulfilled by the plaintiffs. Total silence on this point will not show that either Iqbal till the death and thereafter, the plaintiffs were ever ready and willing to perform their part of the contract. The observations in **Acharya Swami Ganesh Dassji** (supra) that “*Readiness may meant capacity of the plaintiff to perform the contract which includes his financial position. But for willingness, the conduct has to be scrutinized.*” is required to be considered. Here, the conduct of the plaintiffs in not making any inquiry about the steps taken by the defendants to convert the land into non agriculture would lead to conclusion that they were never willing to perform their part of the contract.

15 Now, as regards time was essence of the contract is concerned, the period of 11 months was prescribed in the contents of the agreement itself. A specific stipulation was made in the agreement itself that if the three brothers do not execute sale deed within the said period of 11 months, then it could have been got executed from Court by Iqbal. Further, no stipulation was made, that if the said permission is not brought, then any other consequence to follow. Therefore, the time was the essence of the contract. Another fact to be noted from contents of Ex.39 is, that these two stipulations i.e. remaining amount to be paid by Iqbal within 11 months and then execution of sale deed by the brothers, in case of failure on their part right to

Iqbal to get the sale deed executed through Court, is at one place and the condition that to bring permission of non agriculture and sanction of layout is thereafter. Both these conditions have not been brought together to interpret it in a way that if the said permission is not brought within that period, then Iqbal can get it done through Court or the time will be extended. Now, all the time the plaintiffs were harping upon the fact that they went on to make payments 5 times after the date of agreement to sell. If we peruse Exh.39, mere statement is made regarding receipt of amount. It absolutely does not say that the time to perform part of the contract or execution of sale deed is thereby extended. Learned Advocate for the appellant has relied on Section 18 of Limitation Act. However, in order to take help of the said Section, it should be shown that the said 'acknowledgment' is clear and unambiguous acknowledgment admitting the liability. When the endorsements about receipt of amount does not say anything about the liability or responsibility of the defendants to execute the sale deed, the said alleged payments will not extend the period of limitation for the plaintiffs. Secondly, all those five endorsements are allegedly signed by Bharat alone. In absence of unambiguous acknowledgment for and on behalf of others, it cannot be stated that he was acting for others also.

respect of point of limitation as well as the submission on behalf of appellants based on Section 18 of the Limitation Act that those alleged acknowledgments made subsequent should have been made before the expiration of the period of limitation for the suit. This is the basic requirement to invoke Section 18 of the Limitation Act. As per the contention of the plaintiffs, Exh.39 was executed on 24.05.1990. The second payment was made on 06.07.1990, third was on 17.10.1990 and fourth was on 14.03.1991. By liberally construing it, it can be alternatively said that these would have been the acknowledgments before the expiration of the period of limitation. However, the subsequent payment is on 01.12.1999 and last is on 23.08.2001. As aforesaid, when the time was essence of contract and within a reasonable time no steps were taken by Iqbal during his life time to get the sale deed executed, then the time gap between the alleged payment made on 14.03.1991 to 01.12.1999 cannot be held to be an acknowledgment before the expiration of the period of limitation for the suit. Under such circumstance, the appellants cannot take benefit of Section 18 of the Limitation Act. The suit, that was filed after the period of 13 years has been rightly held to be time barred by both the Courts below.

17 Thus, taking into consideration the facts and the law point involved in this case, it cannot be stated that there was any error in

appreciating the evidence, the facts as well as the law points involved in this case by both the Courts below in dismissing the suit to the extent of specific performance of the contract. The ratio laid down in the authorities relied by the learned Advocate for the appellants cannot be denied. However, for the facts of this case the said ratio cannot be taken into consideration.

18 Though the learned Trial Court had come to the conclusion that the suit is beyond the period of limitation, it went on to grant alternative relief of refund of earnest money to the plaintiffs. It has been rightly held to be not a legal decree by the learned First Appellate Court and therefore, the cross objection has been rightly allowed. When the suit is filed beyond the period of limitation, none of the reliefs which have been prayed by the plaintiffs can be granted. Under such circumstance, no interference is required in the decree, that has been passed by the learned First Appellate Court also. No substantial question of law as contemplated under Section 100 of Code of Civil Procedure is arising in this case. Hence, the Second Appeal is disposed of as **“Not admitted”**.

19 Pending Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)