

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

FIRST APPEAL No. 532/2014

1. Bharatbhushan S/o Gyanchand Madan,
aged about 49 years, Occupation-Business,
R/o Plot No.315, Wardhaman Nagar, Nagpur,
Tahsil & District-Nagpur (Maharashtra State).
2. Kishor S/o Subhashchand Puniyani,
aged about 35 years, Occupation-Business,
R/o Plot No.315, Wardhaman Nagar, Nagpur,
Tahsil & District-Nagpur (Maharashtra State).
3. Hitesh S/o Ashokkumar Madan,
aged about 33 years, Occupation-Business,
Through his constituted Attorney Ashokkumar
S/o Chhadkandaram Madan, aged about 61
years, Occupation-Business, R/o 201, Jaydeo
Apartment, Chhaprunagar Chowk, Nagpur,
Tahsil & District-Nagpur (Maharashtra State).

APPELLANTS

.....VERSUS.....

Kamalkishor S/o Kishanlal Jaiswal,
aged about 50 years, Occupation Business,
R/o 539, Azamshah Layout, Nagpur, Tahsil
& District-Nagpur (Maharashtra State).

RESPONDENT

Shri H.D. Dangre, counsel for the appellants.
Shri D.N. Mehta, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND N. B. SURYAWANSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : 05TH FEBRUARY, 2021.

DATE ON WHICH JUDGMENT IS PRONOUNCED: 05TH MARCH, 2021.

ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)

This appeal under Section 96 of the Code of Civil Procedure, 1908 has been preferred by the original plaintiffs who are aggrieved by

the judgment of the trial Court dated 02.05.2014 in Special Civil Suit No.1221 of 2007 refusing to grant the relief of specific performance of the contract of sale dated 16.03.2007 but instead granting the relief of refund of the earnest amount of Rupees Seventy One Lakhs.

2. It is the case of the plaintiffs as pleaded in the plaint (Exhibit 1) that the respondent-defendant was the owner of Plot No.539 admeasuring about 5500 square feet land. A public notice was published on 07.03.2007 inviting objections to the proposed transaction. On 16.03.2007 the defendant executed an agreement intending to sell aforesaid land to the plaintiffs for a total consideration of Rupees Two Crores Nineteen Lakhs. Earnest amount of Rupees Twenty One Lakhs was paid on the date of the agreement. An amount of Rupees Fifty Lakhs was to be paid by 10.04.2007 and further amount of Rupees Fifty Lakhs was to be paid by 15.08.2007. The balance consideration of Rupees Ninety Eight Lakhs was to be paid on the execution and registration of the sale-deed. According to the plaintiffs on 30.04.2007 an amount of Rupees Fifty Lakhs was paid to the defendant. An amount of Rupees Twenty Five Lakhs was also paid by the plaintiffs on the same day for being further paid to M/s Maharaja Developers at the instance of the defendant. Thereafter amounts of Rupees Five Lakhs each came to be paid on three separate dates thus making a total payment of Rupees Fifteen Lakhs. The defendant however did not accept the further amount

of Rupees Ten Lakhs as offered by them. It is the further case of the plaintiffs that having made a total payment of Rupees One Crore Eleven Lakhs they were ready and willing to make the balance payment to the defendant. As per the agreement the defendant was required to obtain a no dues certificate from the ICICI Bank with which he had mortgaged the suit property. The defendant was also required to obtain the 'No Objection Certificate' from the Nagpur Improvement Trust/Town Planning Department. Without complying with these requirements the defendant on 09.10.2007 instead issued a notice to the plaintiffs and terminated the agreement of sale. This was done by stating irrelevant and baseless reasons. The plaintiffs replied to the said notice on 15.10.2007 and called upon the defendant to execute the sale-deed in their favour. The plaintiffs also published a public notice on 17.10.2007 warning public at large not to deal with the suit property. Thus according to the plaintiffs despite being ready and willing to perform their part of the contract it was the defendant who defaulted in performing his part of the contract and on the contrary proceeded to terminate the agreement. The plaintiffs therefore prayed for a decree of specific performance of the agreement dated 16.03.2007. By amending the plaint, the alternate relief of refund of the amount of Rupees One Crore Eleven Lakhs that was paid to the defendant was prayed for along with interest. The suit in question was accordingly filed on 20.11.2007.

3. The defendant filed his written statement (Exhibit 25) and opposed the reliefs sought in the suit. Besides denying the plaint averments it was pleaded that since the defendant was in dire need of money he intended to sell the suit property. For that reason the agreement dated 16.03.2007 was entered into by the defendant. The receipt of Rupees Twenty One Lakhs was admitted by the defendant. Though the plaintiffs had paid an amount of Rupees fifty Lakhs on 30.04.2007 the further payment of Rupees Fifty Lakhs which was to be made by 15.08.2007 was avoided by the plaintiffs. The agreement dated 16.03.2007 was entered into between three plaintiffs and the defendant but the plaintiffs told the defendant to obtain the 'No Objection Certificate' from the Nagpur Improvement Trust in the name of ten persons most of whom were not parties to the agreement. The defendant was always willing to execute the sale-deed on 30.09.2007 but it was the plaintiffs who defaulted and avoided to meet the defendant on various occasions. The defendant admitted receiving only an amount of Rupees Seventy One Lakhs and nothing further. It was then pleaded that on 07.05.2007 the defendant entered into another agreement with two other persons for selling the suit properties for a consideration of Rs. One Crore Forty One Lakhs Seventy Five Thousand. On account of breach of agreement by the plaintiffs the defendant was put at a loss. On that count the defendant issued notice dated 09.10.2007 to the plaintiffs and

terminated the agreement. It was thus submitted that the suit was liable to be dismissed.

4. The parties led the evidence before the trial Court and after considering the same the learned Judge of the trial Court held that the plaintiffs had failed to prove that they had paid an amount of Rupees One Crore Eleven Lakhs to the defendant. It was held that the plaintiffs had merely paid an amount of Rupees Seventy Lakhs to the defendant. As the plaintiffs were found not to be ready and willing to perform their part of the agreement they were held not entitled to the relief of specific performance. Accordingly by the impugned judgment, the plaintiffs were denied the relief of specific performance of the agreement dated 16.03.2007. However, the defendant was directed to refund the earnest amount of Rupees Seventy Lakhs to the plaintiffs along with interest at the rate of 10% per annum. This decree is under challenge in the present appeal at the instance of the plaintiffs.

5. Shri H.D. Dangre, learned counsel for the appellants-plaintiffs submitted that the trial Court committed an error firstly in holding that the plaintiffs had paid only an amount of Rupees Seventy One Lakhs to the defendant thereby ignoring the payments made as per Exhibit 64 of Rupees Twenty Five Lakhs and further payment of Rupees Fifteen Lakhs

as per Exhibit 67. Further error committed by the trial Court was by not holding the plaintiffs ready and willing to perform their part of the contract and thereby refusing the relief of specific performance. He referred to the pleadings of the parties as well as the documentary evidence to contend that in terms of the agreement dated 16.03.2007 Exhibit 62 the plaintiffs had complied with all the stipulations therein which indicated their readiness and willingness to complete the transaction. He submitted that as per the said agreement the defendant was to obtain the 'No dues Certificate' from the ICICI Bank where the said property had been mortgaged. Similarly the defendant was also required to obtain the 'No Objection Certificate' from the Nagpur Improvement Trust. The transaction was to be completed by 30.09.2007 but prior to that date the defendant neither informed the plaintiffs about obtaining the 'No Dues Certificate' from the Bank nor was the 'No Objection Certificate' obtained from the Nagpur Improvement Trust for executing the sale-deed.

6. It was then submitted that the trial Court committed an error in recording a finding that the payment as disclosed by Exhibit 64 dated 30.04.2007 and the subsequent payment of Rupees Fifteen Lakhs-Exhibit 67 had not been duly proved by the plaintiffs. These documents were signed by the defendant and it was not open for the defendant to raise a

plea contrary to what was stated in the said documents after having accepted his signatures thereon. In that regard he referred to the provisions of Chapter VI of the Indian Evidence Act, 1872. The amount of Rupees Twenty Five Lakhs was paid to M/s Maharaja Developers so as to clear the liability/objection that was existing which liability was incurred by the defendant and due to which the transaction could not be completed. Further though under the agreement the amount of Rupees Fifty Lakhs was to be paid by 10.04.2007 but that amount was accepted by the defendant without any protest even though it was paid on 28.04.2007. Similarly on 28.08.2007, 03.09.2007 and 06.09.2007 the defendant accepted the amount of Rupees Five Lakhs each from the plaintiffs which indicated that the dates stipulated in the agreement for making the various payments were not being strictly insisted by the defendant. The amount of Rupees Ten Lakhs though offered by the plaintiffs was not accepted by the defendant. Despite the plaintiffs indicating their readiness and willingness to complete the contract and there being nothing further to be done by them except to make the balance payment that was ready with them the defendant proceeded to terminate the agreement on 09.10.2007-Exhibit 68 without any justifiable cause. When the sale-deed was to be executed by 30.09.2007 and the plaintiffs were ready with the balance consideration, without calling upon the plaintiffs to have the sale-deed executed the defendant proceeded to

unilaterally terminate the agreement. The plaintiffs expressed their readiness and willingness again by replying to the aforesaid notice on 15.10.2007-Exhibit 69 and thereafter immediately filing the suit for specific performance on 20.11.2007. To substantiate these contentions the learned counsel referred to the document at Article A-1 which was the application for grant of No Objection made to the Nagpur Improvement Trust. On 27.09.2007 such application was made by the defendant after receiving the payment of Rupees Fifteen Lakhs from the plaintiffs by 06.09.2007. In the aforesaid backdrop there was hardly any reason to terminate the agreement. He then submitted that in the light of the fact that execution of various documents from Exhibits 62 to 67 was admitted by the defendant and the plaintiffs having demonstrated their readiness and willingness the trial Court ought to have passed the decree of specific performance. He referred to the provisions of the Specific Relief Act, 1963 (for short, 'the said Act') as amended by the Act No.XVIII of 2018 to urge that grant of specific performance was the rule and unless there was any bar under Section 16 of the said Act there would be no reason to refuse the decree of specific performance. The discretion under Section 20 of the said Act ought to be exercised in favour of the plaintiffs and the decree for specific performance of the agreement dated 16.03.2007 ought to be passed.

7. On the other hand, Shri D.N. Mehta, learned counsel for the respondent-defendant supported the impugned judgment by submitting that the relief of specific performance of the contract was rightly refused by the trial Court. The learned counsel referred to various exhibited documents as well as the evidence led by the parties to submit that the trial Court had rightly recorded a finding that the plaintiffs had paid only an amount of Rupees Seventy One Lakhs to the defendant and no further amount. Referring to the documents at Exhibits 62 and 63 he submitted that the manner in which each plaintiff made separate payments by cheque and cash had been referred to in detail. No such details about the manner in which Rupees Twenty Five Lakhs were paid in cash as per Exhibit 64 were mentioned therein. Referring to the signature of the plaintiff no.3 thereon it was submitted that the same appeared to be different from the signature of the plaintiff no.3 on the agreement at Exhibit 62. There was no reference of the payment of Rupees Twenty Five Lakhs which was alleged to be part of the consideration in the document at Exhibit 63 despite the fact that Exhibit 63 and Exhibit 64 were executed on the same day simultaneously. It was then submitted that despite the time stipulated in the agreement to make the various payments that time schedule was not abided by the plaintiffs. The variation in the terms of the contract was at the instance of the plaintiffs and not the defendant. It was submitted that the defendant in his

deposition had clearly denied receiving any objection to the public notice that had been published on 07.03.2007 much less such objection being raised by M/s Maharaja Developers. Though according to the plaintiffs the payment of Rupees Twenty Five Lakhs was made to M/s Maharaja Developers through its partner in a hospital the witnesses examined by the plaintiffs could not disclose the name of the hospital.

The defendant was not conversant with English language and all the documents were prepared in English language without explaining their contents to the defendant. The Bank statement at Exhibit 76 indicating absence of any dues was given to the plaintiffs much prior to the filing of the suit but the plaintiffs did not come forward on 30.09.2007 to have the sale-deed executed. It was urged that though the defendant had sought the details as regards the Income Tax Returns of the plaintiffs to substantiate his contention of not having received any amount other than Rupees Seventy One Lakhs that application at Exhibit 108 came to be rejected. The order of rejection of that application was challenged by filing a writ petition but that writ petition too was dismissed and the subsequent review application was not entertained on merits. Despite this the learned counsel for the defendant submitted that the correctness of the order passed below Exhibit 108 could be re-considered in the present appeal as the entire decree was under challenge.

8. The request made by the plaintiffs to include about ten names for obtaining the 'No Objection' from the Nagpur Improvement Trust was also unjustified especially when the agreement was entered into only by three plaintiffs. The trial Court rightly disbelieved the stand of the plaintiffs with regard to the alleged payments besides the amount of Rupees Seventy One Lakhs. Considering the conduct of the plaintiffs and the absence of readiness and willingness on their part, the agreement in question was rightly terminated by the defendant on 09.10.2007. Despite being served with that notice and thereafter replying to the same, the plaintiffs did not seek any declaration that the termination of the contract was illegal. Since the contract was not in existence it was necessary for the plaintiffs to have sought a declaration that the cancellation of the contract by the defendant was illegal. By not seeking such declaration no relief of specific performance could be granted to the plaintiffs. The learned counsel therefore submitted that the trial Court rightly refused to grant the relief of specific performance. Invoking the provisions of Order XLI Rule 33 of the Code of Civil Procedure, 1908 (for short, 'the Code') it was submitted that the earnest amount received by the defendant was directed to be repaid along with 10% interest per annum. The rate of interest was on a higher side and the same was thus liable to be reduced. The learned counsel therefore urged that besides the aforesaid no relief could be granted to the plaintiffs and the appeal was liable to be

dismissed. In support of his submissions, the learned counsel for the defendant placed reliance on the following decisions:

- (a) *I.S. Sikandar Versus K. Subramani & Others* [(2013) 15 SCC 27].
- (b) *Mohinder Kaur Versus Sant Paul Singh* [(2019) 9 SCC 358].
- (c) *Union of India Versus Ibrahim Uddin & Another* [(2012) 8 SCC 148].
- (d) *Manager, Reserve Bank of India, Bangalore Versus S. Mani & Others* [(2005) 5 SCC 100].
- (e) *Ramrati Kuer Versus Dwarika Prasad Singh & Others* [AIR 1967 SC 1134].
- (f) *Kalawati & Others Versus Rakesh Kumar & Others* [(2018) 3 SCC 658].
- (g) *Amresh Tiwari Versus Lalta Prasad Dubey & Another* [(2000) 4 SCC 440].
- (h) *Saradamani Kandappan Versus S. Rajalakshmi & Others* [(2011) 12 SCC 18].

9. In the light of aforesaid contentions, the following points arise for adjudication:-

- (i) Whether the trial Court has rightly held that the plaintiffs had paid only an amount of Rupees Seventy One Lakhs to the defendant?

- (ii) Whether it is open for the defendant to re-agitate the challenge to the order passed by the trial Court on the application giving notice to produce documents at Exhibit 108?
- (iii) Whether the plaintiffs have proved that they were always ready and willing to perform their part of the agreement?
- (iv) In the absence of any challenge to the cancellation of the agreement by the defendant on 09.10.2007 whether the plaintiffs would be entitled to a decree of specific performance?
- (v) Whether earnest amount if directed to be repaid should it be so repaid at 10% per annum or any lesser rate of interest should be applied?
- (vi) Whether the judgment of the trial Court deserves to be interfered with?

10. We have heard the learned counsel for the parties at length and with their assistance we have gone through the documentary evidence as well as the testimonies of the parties.

AS TO POINT NO.(i) : According to the plaint averments it is the case of the plaintiffs that pursuant to the agreement dated 16.03.2007 an amount of Rupees One Crore Eleven Lakhs had been paid to the defendant. While entering into the agreement on 16.03.2007 an amount of Rupees Twenty One Lakhs was paid. Thereafter an amount of Rupees

Fifty Lakhs was paid on 30.04.2007. On the same day, it is claimed by the plaintiffs that a further amount of Rupees Twenty Five Lakhs was paid by the plaintiffs to M/s Maharaja Developers on behalf of the defendant. Thereafter on 28.08.2007, 03.09.2007 and 06.09.2007 an amount of Rupees Five Lakhs each was paid to the defendant in cash totalling Rupees Fifteen Lakhs. It is in this manner that it is pleaded that amount of Rupees One Crore Eleven Lakhs has been paid to the defendant.

In the written statement filed by the defendant it was admitted that on 16.03.2007 pursuant to the agreement being entered into, an amount of Rupees Twenty One Lakhs was received by the defendant. It was further admitted that an amount of Rupees Fifty Lakhs was received by the defendant on 30.04.2007. It was however denied that any further payment as pleaded by the plaintiffs was made to the defendant. On the contrary, it was stated that the amount of Rupees Fifty Lakhs paid on 30.04.2007 was partly by cheque and partly in cash. While Rupees Twenty One Lakhs were paid by cheque, an amount of Rupees Twenty Nine Lakhs was paid by cash. From the said amount received in cash, Rupees Twenty Five Lakhs was directed to be paid to M/s Maharaja Developers as per the directions of the plaintiffs. It has been specifically denied that the defendant received an amount of Rupees One Crore Eleven Lakhs as pleaded by the plaintiffs.

11. As stated above, the agreement dated 16.03.2007-Exhibit 62 has been admitted by the defendant and it is undisputed that pursuant to the said agreement the defendant received an amount of Rupees Twenty One Lakhs. Similarly, the payment of Rupees Fifty Lakhs received on 30.04.2007 by executing an acknowledgment receipt-Exhibit 63 has also been admitted by the defendant. The dispute pertains to the alleged payment made in cash thereafter.

According to the plaintiffs after the execution of the agreement dated 16.03.2007 an objection was raised on behalf of M/s Maharaja Developers on the ground that the said Firm had paid an amount of Rupees Eleven Lakhs Fifty Thousand to the defendant and the same was required to be recovered from him along with damages. In view of such objection, the plaintiffs contended that it was mutually decided between the parties that the claim of M/s Maharaja Developers would be settled. Accordingly, the plaintiffs state that the amount of Rupees Twenty Five Lakhs which included the amount of Rupees Eleven Lakhs Fifty Thousand which was due was paid along with amount of Rupees Thirteen Lakhs Fifty Thousand by way of damages. This amount was paid in cash thereby settling the claim of M/s Maharaja Developers. The evidence on record led by the parties with regard to this transaction indicates that in paragraph 2 of the agreement-Exhibit 62 it has been stated that the plaintiffs had issued a public notice in two local

newspapers on 07.03.2007 expressing their intention to purchase the suit property. However no objection of any kind was received by the defendant for completing the transaction. The memorandum as to the cancellation of the agreement-Exhibit 64 records on Page 3 thereof that M/s Maharaja Developers had raised an objection to the intended sale by the defendant. The defendant in his cross-examination has deposed that he did not receive any objection whatsoever to the proposed transaction which resulted in agreement dated 16.03.2007. He further states that against his wishes he was required to part with an amount of Rupees Twenty Five Lakhs for being paid to Mr. Vijay Dangre on behalf of M/s Maharaja Developers. He has denied having any agreement with M/s Maharaja Developers or Mr. Vijay Dangre. In his cross-examination he admitted that the document at Exhibit 64 was signed by him. He further admitted that on 30.04.2007 an amount of Rupees Twenty Five Lakhs was paid to M/s Maharaja Developers and that he had obtained a loan of Rupees Eleven Lakhs Fifty Thousand from M/s Maharaja Developers.

12. As regards the evidence of the plaintiffs it is seen that Exhibits 63 and 64 were executed on the same day being 30.04.2007. PW1 and PW2 were however not in a position to indicate as to which receipt was executed first. Further PW2 Bharatbhushan is a signatory to Exhibit 64 but in his affidavit in lieu of evidence he has not stated anything about

execution of the document at Exhibit 64 and payment of Rupees Twenty Five Lakhs to the defendant. In his cross-examination PW1 Kishor though stated that Mr. Vijay Dangre was paid an amount of Rupees Twenty Five Lakhs in hospital, he was not aware of the name of that hospital. He also could not tell which document amongst Exhibits 63 and 64 was executed first and he further admitted that there was no reference of payment of Rupees Twenty Five Lakhs as mentioned in Exhibit 64 in the receipt at Exhibit 63. It is also to be noted that the document at Exhibit 64 is signed by the plaintiff no.3 but PW2 in his cross-examination admitted that the plaintiff no.3 was not present at the hospital when Exhibit 64 was executed.

13. According to the learned counsel for the plaintiffs since the defendant had admitted his signatures on Exhibit 64 it would not be now open for the defendant to dispute the contents of the memorandum as to cancellation of agreement-Exhibit 64. The fact that Rupees Twenty Five Lakhs were paid to Mr.Vijay Dangre in hospital was also admitted by the defendant. In the light of this position on record the plaintiffs contend that the payment of Rupees Twenty Five Lakhs as per Exhibit 64 stands duly proved. On the other hand according to the learned counsel for the defendant there was no transaction with M/s Maharaja Developers in connection with the suit property. Though the defendant admitted having borrowed an amount of Rupees Eleven Lakh Fifty Thousand

from Mr. Vijay Dangre and the subsequent payment of Rupees Twenty Five Lakhs to him, this amount of Rupees Twenty Five Lakhs as stated by the defendant was part of the total amount of Rupees Fifty Lakhs received by the defendant while executing the acknowledgment receipt-Exhibit 63 on 30.04.2007. The amount of Rupees Twenty Five Lakhs was not separately paid besides this amount of Rupees Fifty Lakhs. This stand was initially taken by the defendant in his reply dated 26.10.2007-Exhibit 131.

14. A perusal of the acknowledgment receipt Exhibit 63 indicates that an amount of Rupees Twenty One Lakhs was paid by cheque and an amount of Rupees Twenty Nine Lakhs was paid in cash on 30.04.2007. The stand of the defendant was that the amount of Rupees Twenty Five Lakhs paid to Mr. Vijay Dangre in cash was from the amount of cash received by the defendant as indicated in the acknowledgment receipt Exhibit 63. It is also to be noted that though Exhibits 63 and 64 are executed on the same day there is no reference of this amount of Rupees Twenty Five Lakhs in Exhibit 63 as being paid by the plaintiffs to the defendant besides the amount of Rupees Fifty Lakhs that was admittedly paid to the defendant. There is also substance in the contention of the learned counsel for the defendant that whenever cash payments were made, the name of the particular plaintiff making such cash payment was

specifically mentioned in the documents executed in that regard. This is clear on the perusal of the agreement of sale Exhibit 62 which indicates that the plaintiff no.1 paid an amount of Rupees Seventeen Lakhs in cash while the plaintiff no.2 paid Rupees Seven Lakhs in cash and the plaintiff no.3 paid Rupees Two Lakhs in cash. Similarly in the acknowledgment receipt Exhibit 63 dated 30.04.2007 it has been clearly stated that the plaintiff no.1 paid Rupees Eleven Lakhs in cash, the plaintiff no.2 paid Rupees Ten Lakhs in cash and the plaintiff no.3 paid Rupees Eight Lakhs in cash. Conspicuously, though the memorandum as to the cancellation of the agreement Exhibit 64 specifically refers to the entire amount of Rupees Twenty Five Lakhs being paid in cash there is no specification as to which particular plaintiff has paid what amount in cash. The fact that the plaintiff no.2 was a Chartered Accountant is an admitted fact. In this context the notice to produce documents given by the defendant at Exhibit 108 to the plaintiffs cannot be lost sight of. By that notice the plaintiffs were called upon to produce their Income Tax Returns, Computation of Income, Balance-Sheet, Profit & Loss Account as well as Books of Account for the Financial Year 2007-08 and Assessment Year 2008-09. Though the trial Court did not favourably consider this request made by the defendant, the fact remains that there is no further corroborative evidence to indicate the payments made in cash at least with regard to the document at Exhibit 64. In the light of the admission

of the defendant that an amount of Rupees Twenty Five Lakhs was in fact paid to Mr. Vijay Dangre the stand of the defendant that this amount was part of the total amount received while executing the receipt at Exhibit 63 appears more probable in the light of the overall material on record. Since it was the specific defence raised by the defendant in his written statement that the amount of Rupees Twenty Five Lakhs was paid from the total amount of Rupees Fifty Lakhs received by him on 30.04.2007 it was necessary for the plaintiffs to have brought some more evidence on record to substantiate their stand that this amount of Rupees Twenty Five Lakhs paid in cash was besides the amount of Rupees Fifty Lakhs as per the receipt at Exhibit 63.

15. The learned Judge of the trial Court while deciding Issue No.1 in paragraph 31 has recorded a finding that the payment of Rupees Twenty Five Lakhs on 30.04.2007 by the plaintiffs besides the amount of Rupees Fifty Lakhs as per Exhibit 63 was not proved and we find no justifiable reason to disagree with this finding recorded by the trial Court. It is thus held that the plaintiffs have not led sufficient evidence on record to hold that on 30.04.2007 besides the amount of Rupees Fifty Lakhs paid while executing the receipt at Exhibit 63 further amount of Rupees Twenty Five Lakhs in cash was paid to the defendant as sought to be urged by the plaintiffs by relying upon the cancellation agreement at Exhibit 64.

16. The further payments made according to the plaintiffs was the amount of Rupees Five Lakhs each paid in cash on 28.08.2007, 03.09.2007 and 06.09.2007. In this regard, the plaintiffs have relied upon the receipt at Exhibit 67. Perusal of this document indicates that on a single piece of paper under the letter head “Radha Madhav Textiles” there are handwritten statements that on the respective dates the defendant received Rupees Five Lakhs each in cash. There is overwriting on the third acknowledgment which indicates that earlier figure 8 was written over which the figure 6 in Hindi has been written. PW1 Kishor in his cross-examination admitted that all the three separate writings made in Exhibit 67 were in different hand. The defendant in his affidavit denied having received amounts of Rupees Five Lakhs each on 28.08.2007, 03.09.2007 and 06.09.2007. The suggestion in that regard given on behalf of the plaintiffs has been specifically denied in the cross-examination. Again in Exhibit 67 there is no mention as to which of the plaintiffs have paid the amount of Rupees Five Lakhs each on the dates mentioned therein. Absence of any further evidence by the plaintiffs to indicate individual payments by the respective plaintiffs of Rupees Five Lakhs each is not available on record. The person who has scribed the said receipt Exhibit 67 has also not been examined by the plaintiffs. Moreover, if the earlier receipts were executed on stamp papers, there is no explanation for executing Exhibit 67 on the defendant’s letter head.

17. It is also to be noted that the stand of the defendant that he had received only an amount of Rupees Seventy One Lakhs has been stated by him in the notice dated 09.10.2007-Exhibit 68 which is the first notice exchanged between the parties. The plaintiffs in their reply dated 15.10.2007-Exhibit 69 to the aforesaid notice took the plea that on 30.04.2007 besides the amount of Rupees Fifty Lakhs further amount of Rupees Twenty Five Lakhs was paid to the defendant and thus on that date an amount of Rupees Seventy Five Lakhs was paid to the defendant. Further payment of Rupees Fifteen Lakhs on three various dates and refusal by the defendant to accept amount of Rupees Ten lakhs was also stated therein. The defendant on 26.10.2007-Exhibit 131 in reply to the plaintiffs' notice reiterated his stand and stated that the amount of Rupees Twenty Five Lakhs paid to M/s Maharaja Developers was out of the amount of Rupees Fifty Lakhs that was paid on 30.04.2007 and no amount was separately received by him.

The learned Judge of the trial Court has in paragraphs 32 to 34 of the impugned judgment considered the aforesaid evidence and has thereafter recorded a finding that the plaintiffs had failed to prove the actual payment of Rupees Fifteen Lakhs to the defendant. On a re-appreciation of the entire evidence on record, we do not find any justifiable reason to hold that the aforesaid finding has been arrived at by ignoring any material on record. A possible view of the matter has

been taken by the learned Judge of the trial Court based on the evidence on record and we do not find any reason whatsoever to take a different view.

This conclusion is recorded after considering the provisions of Sections 91 and 92 of the Evidence Act, 1872. In the light of the aforesaid, we find that the trial Court has rightly held that the plaintiffs had paid the defendant only an amount of Rupees Seventy One Lakhs and not Rupees One Crore Eleven Lakhs as stated by them. Point No.(i) stands answered accordingly.

18. **AS TO POINT NO.(ii):** According to the learned counsel for the defendant, a notice to produce documents had been given by the defendant on 23.09.2013. The plaintiffs were called upon to produce the Income Tax Returns as well as the Computation of Income, Balance-Sheet, Profit and Loss Account as well as books of Accounts for the financial year 2007-08 and assessment year 2008-09. This application was opposed by the plaintiffs by stating that the defendant was trying to delay the adjudication of the suit. The trial Court on 23.09.2013 was pleased to reject the said request made by the defendant by observing that the plaintiffs' witness was being cross-examined and he had answered questions regarding assessment of income as well as the returns. On that count the said application was not entertained and it

came to be filed. The defendant being aggrieved by that order had filed Writ Petition No.185 of 2014 before this Court. On 06.02.2014 the learned Single Judge observed that the notice to produce documents ought to have been given well in advance as the suit was pending since the year 2007. The impugned order passed below Exhibit 108 was therefore not interfered with and the same was confirmed. Since this order was passed in the absence of the counsel for the defendant, he moved an application seeking grant of hearing. This application came to be rejected on 14.02.2014. According to the learned counsel for the defendant, this order passed below Exhibit 108 being an interlocutory order, the same could be challenged by the defendant after final adjudication of the suit. Since the suit is now decided the challenge to the said interlocutory order was permissible in the appeal preferred under Section 96 of the Code. Placing reliance on the decision in *Amresh Tiwari* (supra), it is sought to be urged that interim orders even if they have been confirmed by the higher Courts were not binding and the Court was not prevented from passing a contrary order at the stage of final hearing. Thus according to the learned counsel, it would be open for the defendant to even now contend that the application below Exhibit 108 had been wrongly rejected by the trial Court despite the fact that the challenge to that order was unsuccessful before this Court.

19. We are unable to accept this contention for the reason that the principles of *res-judicata* and issue estoppel would be applicable in the present case. In this regard, reference can be made to the observations in paragraph 26 of the decision in *Hope Plantations Ltd. Versus Taluk Land Board, Peermade & Another* [(1999) 5 SCC 590] wherein it has been observed thus:

26. It is settled law *that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel through these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstrably wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are “cause of action estoppel” and “issue estoppel”. These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in*

the same suit in which the issue had been determined.”.....

Accepting the contention of the learned counsel for the defendant would amount to sitting in appeal over the order passed in the writ petition. On this count, we have not examined the correctness of the order passed by the trial Court below Exhibit 108. The decision in *Amresh Tiwari* (supra) holds that an interim order passed by the trial Court even if confirmed by higher courts would not prevent the trial court to take a different view of the matter at the stage of final hearing of the same proceedings. The position in the present case is different and hence ratio of this decision would not be applicable. Point No.(ii) stands answered accordingly.

20. **AS TO POINT NO.(iii):-** Under the agreement of sale Exhibit 62 dated 16.03.2007 the manner in which the entire consideration of Rupees Two Crores Nineteen Lakhs was to be paid to the defendant was stipulated. Amount of Rupees Twenty One Lakhs was paid when the agreement was executed and receipt of this amount is not in dispute. Further amount of Rupees Fifty Lakhs was to be paid by 10.04.2007 and it also not in dispute that the defendant received this amount on 30.04.2007 by executing acknowledgment receipt- Exhibit 63. Further amount of Rupees Fifty Lakhs was to be paid by 15.08.2007 and the

balance consideration of Rupees Ninety Lakhs was to be paid while executing and registering the sale-deed. While answering Point No.(i) it has been held that the plaintiffs had paid to the defendant only an amount of Rupees Seventy One Lakhs. The amount of Rupees Fifty Lakhs which was to be paid by 10.04.2007 was received by the defendant on 30.04.2007. The payment of Rupees Fifty Lakhs which was to be paid by 15.08.2007 was not received by the defendant. The transaction in question was to be completed by 30.09.2007. The aspect that the plaintiffs failed to pay the amount of Rupees Fifty Lakhs as agreed by 15.08.2007 is a factor that has to be taken into consideration while adjudicating the readiness and willingness of the plaintiffs.

21. It was also agreed between the parties in the agreement Exhibit 62 that the defendant would obtain a 'No dues Certificate' from the ICICI Bank Limited. Exhibit 76 is the Bank Statement of the defendant's account with ICICI Bank which indicates that by 03.10.2007 there was no dues payable to the bank by the defendant. The plaintiffs had placed on record the aforesaid bank statement and PW1 in his cross-examination admitted that before filing of the suit the document at Exhibit 76 which was statement of the bank account of the defendant had been supplied by the defendant to them and the same was filed along with the suit. The suit in question was filed on 20.11.2007 and the

statement indicates that there were no dues payable by the defendant at that point of time. In his cross-examination the defendant in paragraph 5 categorically stated that he had repaid entire loan amount of Rupees Forty Lakhs to Rupees Forty Five Lakhs to ICICI Bank prior to 30.09.2007. He however could recollect the exact date of such repayment. He however admitted that he did not inform the plaintiffs that he had obtained 'No dues Certificate' from the Bank. Be that as it may, the fact remains as is clear from the document at Exhibit 76 that prior to filing of the suit the defendant had satisfied the loan that he had obtained from the ICICI Bank. He had also applied to the Nagpur Improvement Trust and had sought its no-objection for selling the suit plot.

PW1 Exhibit 58 in his cross-examination in paragraph 15 admitted that the plaintiffs had not placed on record any document to indicate availability of the balance consideration with them for being paid to the defendant. These factors have to be taken into consideration while adjudicating the readiness and willingness of the parties.

22. Having found that the plaintiffs had paid only an amount of Rupees Seventy One Lakhs to the defendant and having failed to prove any further payment coupled with the fact that the defendant had cleared the liability of the loan that was outstanding with the

ICICI Bank, the defendant had applied for grant of 'No Objection Certificate' to the Nagpur Improvement Trust as per Article A-1 and the plaintiffs having admitted in the cross-examination of PW1 that there was no document on record to indicate availability of the balance consideration with them for completing the transaction leads us to conclude that the plaintiffs have failed to prove their readiness and willingness to complete their part of the agreement. There is no notice issued by the plaintiffs to the defendant either on 15.08.2007 when the amount of Rupees Fifty Lakhs was due and payable or any notice thereafter at least prior to 30.09.2007 calling upon the defendant to accept the balance consideration and have the sale-deed executed. On the contrary it is the defendant who has issued a notice on 09.10.2007 Exhibit 68 proceeding to cancel the agreement on the ground that by failing to abide by the stipulation in the agreement of paying an amount of Rupees Fifty Lakhs by 15.08.2007 it was the plaintiffs who had committed breach of the agreement. Accordingly, Point No.(iii) is answered by holding that the plaintiff had failed to prove that they were always ready and willing to perform their part of the agreement. The provisions of the said Act as amended in 2018 do not aid the case of the plaintiffs in this regard.

23. **AS TO POINT NO.(iv):-** It is not in dispute that on 09.10.2007 Exhibit 68, the defendant issued a legal notice to the plaintiffs and informed them by not making the payments as agreed under the agreement dated 16.03.2007 Exhibit 62, the plaintiffs had committed breach of the agreement. On that count, the defendant proceeded to terminate the aforesaid agreement. This was replied to by the plaintiffs on 15.10.2007-Exhibit 69 terming the cancellation of the agreement to be illegal. It thus becomes clear that prior to filing of the suit for specific performance on 20.11.2007 the defendant had on 15.10.2007 terminated the agreement with the plaintiffs.

In *I.S. Sikandar* (supra) the Hon'ble Supreme Court has in clear terms held that if an agreement of sale stands terminated at the instance of the vendor it is necessary for the plaintiff who seeks the relief of specific performance to also seek the declaratory relief that the termination of the agreement of sale was bad in law. In absence of such prayer by the plaintiffs in the suit, the relief of specific performance of the agreement in question is not liable to be granted on the basis of a non-existing agreement of sale. This view has been reiterated in *Mohinder Kaur* (supra).

It thus becomes clear that the plaintiffs despite being aware of the fact that on 15.10.2007 the defendant had terminated the agreement dated 16.03.2007 failed to seek the declaratory relief that the termination of the agreement at the instance of the defendant was not in accordance with law and therefore the agreement was still subsisting. The fact that the agreement was terminated/cancelled has been pleaded in paragraph 17 of the plaint but there is no declaratory relief sought by the plaintiffs in that regard. This is another reason that disentitles the plaintiffs from being granted the relief of specific performance of the non-existent agreement dated 16.03.2007-Exhibit 62. Point No.(iv) stands answered accordingly.

24. **AS TO POINT NO.(v):-** The trial Court while directing refund of the earnest amount of Rupees Seventy One Lakhs received by the defendant has directed the same to be repaid with interest at 10% per annum. According to the learned counsel for the defendant, the rate of interest at 10% per annum is on a higher side and that in exercise of jurisdiction available under the provisions of Order XLI Rule 33 of the code the Court may reduce the rate of interest suitably. The defendant has not challenged that part of the decree directing refund of the earnest amount with interest at the rate of 10% per annum either by filing a cross appeal or by raising a cross objection. By seeking reduction in the rate of

interest from 10% per annum the defendant seeks modification of the decree as passed by the trial Court. In absence of any cross appeal or cross objection being filed by the defendant for seeking modification of the decree, the prayer as made for reducing the rate of interest from the one awarded by the trial Court cannot be accepted. This position is clear from the decision in *Tummalla Atchaiah Versus Venka Narasingarao* [AIR 1978 SC 725] as followed in *Indrakumar Daulat Khushalani Versus Atmaram Vitthal Zade & Others* [2015(3) Mh.L.J. 613]. In the appeal preferred by the plaintiff such relief cannot be granted to the defendant in absence of any cross appeal or cross objection. Point No.(v) is accordingly answered by holding that the rate of interest at 10% per annum as awarded by the trial Court cannot be reduced.

25. **AS TO POINT NO.(vi):-** In the light of the aforesaid, it is found that the trial Court has rightly arrived at the conclusion that the plaintiffs had paid only an amount of Rupees Seventy One Lakhs to the defendant. The overall conduct of the plaintiffs indicated absence of their readiness and willingness to complete their part of the agreement. The plaintiffs have also failed to seek a declaration that the termination of the agreement by the defendant on 09.10.2007 was illegal.

26. We therefore find that the alternate relief granted by the trial Court of directing the defendant to refund the amount of Rupees Seventy One Lakhs to the plaintiffs along with interest at the rate of 10% per annum is the only relief to which the plaintiffs are entitled. Consequently the judgment of the trial Court dated 02.05.2014 in Special Civil Suit No.1221/2007 stands confirmed. First Appeal No.532/2014 accordingly stands dismissed leaving the parties to bear their own costs.

(N.B. SURYAWANSHI, J.)

(A.S. CHANDURKAR, J.)

APTE

**Rohit
Apte**

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