

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 357 OF 2009

1. Pandurang s/o Jagannath Kale
Age 53 years, Occ. Private Medical
Practice and agriculture
R/o. Adas, Tq. Kaij,
District Beed
 2. Nandkishor s/o Pandurang Kale
Age 29 years, Occ. Agriculture
R/o. As above
 3. Govind s/o Pandurang Kale,
Age 25 years, Occ. Agriculture
R/o. As above
- ...Appellants
(Ori. Plaintiffs)

versus

1. Deomaharaj Guru Vasudeo Maharaj
(Died) through L.Rs.
Shriram s/o Deo Maharaj Banwaskar
Age 43 years, Occ. Agriculture
R/o. Banwas Now at Pandharpur,
Harides Ves, Tal. Pandharpur
District Solapur
 2. Eknath Deo Maharaj Banwaskar,
Age 45 years, Occ. Agriculture
R/o. Banwas, Tal. Palam
District Parbhani
 3. Laxman s/o Deo Maharaj Banwaskar
Age 43 years, Occ. Service
R/o. Barshi, Tq. Barshi,
District Solapur
 4. Saw. Sanjiwani w/o Mangalmurti Joshi
Age 44 years, Occ. Household
R/o. Airoli, Tal. Panvel,
District Thane
- ...Respondents
(Ori. defendant)

.....

Mr. A. D. Kasliwal, advocate for the appellants
Mr. Suresh M. Kulkarni, advocate for respondent Nos. 1, 2 and 4.

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CORAM : BHARAT P. DESHPANDE, J.

**Date of Reserving
the Judgment : 05.08.2022**

**Date of pronouncing
the Judgment : 20.08.2022**

JUDGMENT:-

1. The appellants are the original plaintiffs. The appellants had filed Special Civil Suit No. 51 of 1989 for specific performance of contract against the defendant/respondents herein. The said special civil suit was decreed by the trial court thereby directing the defendant/respondents to execute sale deed of the suit land in favour of plaintiffs.

2. The defendant/respondents herein preferred Regular Civil Appeal against the said judgment and decree bearing Regular Civil Appeal No. 52 of 2009. The learned first appellate court allowed the said appeal and reversed the finding of learned Civil Court thereby dismissing the suit on two counts i.e. the suit is barred by limitation and also barred under II Rule 2, C.P.C.

3. The appellants/plaintiffs approached this Court. The second

appeal was admitted on following substantial questions of law vide order dated 25.11.2009.

(1) Whether in the facts and circumstances of the present case, the decree for specific performance of the agreement to sell is to be refused only on account of delay and whether findings of the First Appellate court that time of essence of contract is patently erroneous in the context?

(2) Whether in the facts and circumstances of the present case, the First Appellate Court failed to properly construed the terms of the agreement to sell and therefore, reached improper conclusion that the time was stipulated for specific performance and thereafter the rights of the appellants were automatically abrogated?

(3) Whether in the facts and circumstances of the present case, the First Appellate Court committed patent error while causing interference in the use of discretion by the trial Court under Section 20 of the Specific Relief Act, and therefore the impugned judgment is liable to be interfered with?

4. At the time of final hearing and before starting arguments of respective parties, with consent, additional substantial question of law was framed which reads thus:-

(4) In absence of pleadings of bar of suit under Order II Rule 2 of C.P.C. whether the first appellate court is justified in deciding it against the plaintiffs without framing point for determination?

In the case of ***Vijay Arjun Bhagat & Ors vs. Nana Laxman Tapkire and Ors, reported in 2018 (6) All MR 920 (S.C.)***, the Hon'ble Apex Court has observed that the High Court is having jurisdiction to frame additional questions of law by taking recourse to the proviso appended to sub-section (5) of Section 100 of C.P.C. The above additional substantial question of law was framed at the initial stage of the matter being taken up for final hearing and by giving an opportunity to the learned counsel for the respondents to argue on it. This substantial question of law arises out of the finding of the first appellate court as discussed hereinafter.

5. Heard Mr. Kasliwal, learned counsel for the plaintiffs/appellants and Mr. Kulkarni, learned counsel for defendant/respondents

6. The parties are hereinafter called as plaintiffs and defendant as they arrayed before the Civil Court for the sake of convenience.

7. In nutshell, the facts leading to the dispute are as under:-

8. The plaintiffs filed suit for specific performance of agreement dated 23.4.1978 whereby the plaintiffs agreed to purchase suit property from the defendant for an amount of Rs.35,000/-. At the time of agreement of sale, an amount of Rs.10,000/- was paid to the defendant. The plaintiffs agreed to pay remaining amount of

Rs.25,000/- on or before execution of sale deed. Similarly, the possession of suit property was handed over to the plaintiffs on the day of execution of agreement of sale. In the agreement, it was stated that the sale deed was required to be executed on or before 01.12.1978. Since the sale deed could not be executed on that day, the plaintiffs called upon the defendant to show the title deeds and to obtain surrender deeds from the persons whose names appear in the tenancy column of survey record. As there was no response from the defendant, further correspondence was addressed by the plaintiffs calling upon the defendant to perform his part. However, since the defendant did not respond, final notice was issued through advocate on 07.04.1983. The defendant through his advocate replied to the said notice, claimed additional amount of Rs.15,000/- as damages on account of price rise. The plaintiffs sent their counter reply calling upon the defendant to abide by the terms and conditions. Thereafter also, the plaintiffs remained present in the office of Sub Registrar and purchased the stamp papers for executing the sale deed, however, the defendant failed to attend on the fixed day i.e. on 17.06.1983. Finally, the plaintiffs again called upon the defendant to remain present at the office of Sub Registrar on 30.6.1983 alongwith title deeds. However, the defendant did not turn up and therefore, the plaintiffs were left with no other alternative but to approach the Civil Court. It is the specific case of the plaintiffs that they are ready and willing to perform their part of contract. They showed willingness to pay balance amount of Rs.25,000/- at the time

of execution of sale deed. It is his case that the defendant failed to perform his part.

9. On receipt of suit summons, the defendant contested the suit by filing written statement wherein execution of agreement of sale between the parties is admitted. However, it is the contention of the defendant that there was no clause for defendant to obtain surrender deeds from the persons whose names appear in the tenancy column. It is his case that the plaintiffs were knowing about title of the defendant and therefore, there was no question of further showing title deed. The plaintiffs deliberately avoided to perform their part and the defendant was ready and willing to execute the sale deed on or before the date mentioned in the agreement i.e. 01.12.1978. However, the plaintiffs failed to appear and perform their part. It is specific contention of the defendant that the suit filed in the year 1983 is hopelessly barred by law of limitation, as the said suit for specific performance ought to have been filed within a period of three years from the date of performance, as mentioned in the agreement. It is the specific defence raised by the defendant that the time was essence of contract, as the date shown in the agreement for performance of such contract was on or before 01.12.1978. The defendant then claimed that the plaintiffs failed to pay remaining balance of Rs.25,000/- on or before 01.12.1978 and was never willing and ready to perform their part. It is also claimed that the possession handed over to the plaintiffs as per the agreement is now

unlawful after 01.12.1978. The correspondence exchanged between the parties till 1983 is not disputed in the written statement.

10. Learned Civil Court framed necessary issues vide Exh.18. The plaintiffs then stepped into witness box as P.W.1 and examined three witnesses viz. P.W.2 Babruwan Annarao Ghule, P.W.3 Mahadeo Nagnath Patwalre and P.W.4 Bhaurao Shep (advocate). The defendant stepped into witness box as D.W.1 and closed his case.

11. The learned Civil Court vide its judgment and decree dated 24.01.2000 found that the time was not essence of contract and suit was well within limitation. It was also observed that the plaintiffs were always ready and willing to perform their part whereas the defendant failed to perform his part. Accordingly, the suit was decreed. The defendant was directed to execute the sale deed in favour of the plaintiffs on receipt of balance amount of Rs.25,000/-.

12. The defendant challenged the said judgment and decree of the Civil Court vide Regular Civil Appeal No. 52 of 2000. The learned Adhoc District Judge-1, Ambejogai framed points and thereafter observed that the learned trial court erred in considering that the suit was within limitation. The learned Adhoc District Judge-1, also found that the suit was barred by provisions of Order II Rule 2, C.P.C. On these counts, the appeal was allowed thereby reversing the judgment of the Civil Court.

13. Learned counsel for the plaintiffs submitted that the first appellate court has committed grave error in considering the provisions of Order II Rule 2, C.P.C. when there are no such pleadings in the written statement. He then submitted that the learned first appellate court committed error in reversing the reasoned findings of the learned trial court with regard to the aspect of "time was not essence of contract". He submitted that learned trial court elaborately discussed this aspect and found that the intention of the parties clearly shows that time was not essence of the said contract. He then submitted that the plaintiffs were always ready and willing to perform their part and this aspect has been established during evidence. The subsequent conduct of the defendant also clearly proved that time was never essence of contract. In this respect, he submitted that in reply to notice sent by the advocate for the plaintiffs, the advocate for the defendant invited the plaintiffs to the office of Sub Registrar for executing sale deed and claimed additional amount of Rs.15,000/- due to passage of time and increase of price of land. His vital evidence has been ignored by the learned first appellate court. He then submitted that there is no termination of contract by the defendant at any point of time. He never demanded possession of the suit property from the plaintiffs. Therefore, intention of the parties show that the time was never essence of contract. In this respect, he invited my attention to the admission given by the defendant in his testimony. Finally, learned

counsel for the appellants claimed that the plaintiffs deposited balance amount of Rs.25,000/- before the trial court which clearly goes to show that they were ready and willing to perform their part.

In order to substantiate the aforesaid submissions, learned counsel for the appellants placed reliance on the following cases:-

- i) Balasaheb Dayandeo Naik (Dead) Through L.Rs. and Ors. vs. Appasaheb Dattatraya Pawar, reported in AIR 2008 SC 1205;
- ii) Inbasegaran and another vs. S. Natarajan (Dead) through L.Rs., reported in 2014 AIR SCW 6316;
- iii) Dalip Singh vs. Mehar Singh Rathee and others, reported in 2005 AIR SCW 3311;
- iv) Ishwar Dass Jain (Dead) through L.Rs. vs. Sohan Lal (dead) by L.Rs. Reported in AIR 2000 SC 426;
- v) Vijay Arun Bhagat and others vs. Nanal Laxman Tapkire and others, reported in 2018 (6) ALL MR 920 (S.C.)

14. Per contra, learned counsel for the defendant forcefully submitted that the time was essence of contract. There was no agreement between the plaintiffs and defendant in connection with surrender documents to be executed by the defendant. When the plaintiffs failed to pay balance amount on or before 01.12.1978, the amount paid at the time of execution of agreement stands forfeited

and the plaintiffs lost their right over the suit property. He submitted that the suit is hopelessly barred and discretion which has been exercised by the first appellate court was proper and justified in rejecting the case of specific performance.

In order to substantiate the aforesaid submissions, learned counsel for the respondents placed reliance on the following cases:-

- i) Judgment of this Court (Aurangabad Bench) in Second appeal No. 144 of 2022 decided on 14.03.2022 (Rajendra Mohanlal Agrawal vs Abhay Tejraj Rathod and another);
- ii) Gajanan R. Salvi vs. Satish Shankar Gupte and others, reported in 2004 (Supp.2) Bom.C.R. 917;
- iii) Padmakumari and others vs Dasayyan and others, reported in 2016 (2) Mh.L.J. 307;
- iv) K. Prakash vs. B.R. Sampath Kumar reported in 2015 (3) Mh.L.J. 618.

15. With these submissions, firstly, the substantial question of law which was framed at the time of final hearing needs to be considered.

16. The learned first appellate court framed the points which are at para 8 of the impugned judgment. On perusal of these points for

consideration, it is clear that no specific point was framed as to whether the suit is barred under Order II Rule 2, C.P.C.

17. It is the bounden duty of the first appellate court while entertaining Regular Civil Appeal to frame correct points for determination. When no such point is framed, it was not proper on the part of learned first appellate court to deliberate on the aspect of Order II Rule 2 C.P.C. and to dismiss the suit itself. The provisions of Order 41 Rule 31, C.P.C. provides contents, date and signature of judgment. The judgment of the appellate court shall be in writing and shall state (a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall at the same time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein. Thus, the judgment of the appellate court while deciding the first appeal must contain the point for determination and decision thereon alongwith reasons. In the present matter, the first appellate court though framed the points for determination, there is no point framed with regard to bar of the suit Under Order II Rule 2, C.P.C.

18. For this purpose, it is also necessary to peruse the pleadings of respective parties and more specifically the grounds raised before the first appellate court while challenging the judgment and decree of the trial court. Perusal of appeal memo filed by the defendant before

first appellate court in Regular Civil Appeal No. 52 of 2000, it reveals that there is no ground raised with regard to bar of suit under Order II Rule 2, C.P.C.

19. The plaintiffs filed suit for specific performance of contract in the year 1983. In that suit, it is specific case of the plaintiffs that they were cultivating suit land on tenancy basis (Batai) from the year 1971 till 1978 i.e. the date when the agreement of sale was executed. It is also contention of the plaintiffs that at the time of execution of agreement of sale, the possession of the suit land was handed over to them and thereafter they started enjoying suit land as prospective purchasers. Even his name was mutated in the survey record. Though they were ready and willing to perform their part and intimated the defendant accordingly, the defendant failed to execute the sale deed. Subsequently, the plaintiffs themselves tried to obtain surrender deeds from Maruti Mane and Krushnabai Kulkarni and such surrender petitions were presented in Tahsil office at Kaij on 23.02.1979. Thereafter, Krushnabai Kulkarni and her son Vasant developed ill-will against the plaintiffs and they started instigating the defendant not to execute the sale deed. The said persons started instigating Talathi and threatened the plaintiffs to dispossess from suit land. Therefore, the plaintiffs filed R.C.S. No. 376 of 1980 for perpetual injunction against the said persons and the defendant. The said suit was filed in the court of C.J.J.D. Kaij wherein temporary injunction was granted in favour of the plaintiffs. These pleadings are

found specifically in para 10 to 12 of the plaint.

20. The defendant filed written statement. In para 12 of the written statement, the defendant claimed that he was never in collusion with Krushnabai and Vasant, however, according to the defendant, the plaintiffs themselves were in collusion with Krushnabai and Vasant. The defendant admitted about filing of suit by the plaintiffs against him, Krushnabai and Vasant and grant of injunction in favour of plaintiffs. There is no whisper in entire written statement about bar of present suit under Order II Rule 2, C.P.C. Therefore, learned trial court and rightly so, did not frame any such issue. However, learned first appellate court in para 12 of its judgment took such aspect and observed that when the plaintiffs filed suit in the year 1980 against the defendant and others, they ought to have claimed specific performance of contract. When the plaintiffs failed to include such prayer, they are debarred from filing separate suit under Order II Rule 2, C.P.C.

21. First of all, there are no pleadings in the written statement to the effect that suit is barred under Order II Rule 2, C.P.C. In the case of ***Dalip Singh vs. Mehar Singh Rathee and others, (supra)***, the Apex Court in para 12 observed that plea of applicability of Order II Rule 2, C.P.C. and subsequent suit being barred was not taken in the written statement filed in response to the notice of the suit nor any issue was framed on the point. The sine qua non for applicability of

Order II Rule 2, C.P.C. is that a person entitled to grant one relief in respect of same cause of action has omitted to sue for some relief without leave of the court. When the objection regarding bar to the filing of suit under Order II Rule 2 C.P.C. is taken, it is essential for the court to know what exactly was the cause of action, which was alleged in the previous suit in order that it might be in a position to appreciate whether the cause of action alleged in the second suit is identical with one that was subject matter of the previous suit. As the plea had not been raised in the written statement and the issue framed on that point, no opportunity was provided to lead evidence to rebut the same. In absence of pleadings and proof of identity of cause of action, the defendant could not be permitted to raise plea of bar of Order II Rule 2, C.P.C.

22. Applying the said proposition to the matter in hand, it is clear that there was no material before the learned first appellate court to take into consideration such plea of its own, specifically when there is no ground raised by the defendant in his appeal filed before the first appellate court. The written statement filed by the defendant is completely silent on this issue. No opportunity was given to the plaintiffs to rebut such contentions raised for the first time before the first appellate court. Therefore, for want of pleading in the written statement, learned first appellate court erred in taking up such aspect and decide it against the plaintiffs. In sum and substance, the additional substantial question of law framed in this regard needs to

be answered in affirmative. On that count itself, the judgment and decree passed by the first appellate court needs to be quashed and set aside.

23. The next question is whether the time was essence of contract. The substantial question of law at Sr. No.2 deals with such aspect. The plaintiffs specifically claimed that time was never essence of contract. Whereas it is the defendant, who specifically claimed that time was essence of contract.

24. It is admitted fact that the agreement at Exh.98 executed between the parties is the agreement to sale the suit property by the defendant to the plaintiffs. It is registered document. At the time of execution of this document plaintiffs paid Rs.10,000/- and agreed to pay balance amount of Rs.25,000/- on or before 01.12.1978 i.e. the date fixed for executing the sale deed. The most important aspect is the recital in agreement of sale which show that possession of the suit property was handed over to the plaintiffs on the day of execution of agreement to sale.

25. Interestingly, the said document at Exh.98 show that sale deed is required to be executed on or before 01.12.1978. It further shows that if the plaintiffs failed to pay balance amount of Rs.25,000/- on or before 01.12.1978 the date of execution of sale deed, amount of Rs.10,000/- paid at the time of agreement of sale stands forfeited.

26. The said agreement of sale at Exh.98 is conspicuously silent about recovery of possession by the defendant from the plaintiffs in case parties failed to perform their part. This aspect has been completely ignored by the first appellate court. The possession still remains with the plaintiffs as there is no counter claim filed by the defendant to claim possession. Written statement filed before learned trial court by the defendant is completely silent except one line that possession of defendant after 01.12.1978 is unlawful. However, defendant clearly admitted that possession of suit property was handed over to the plaintiffs on the day of executing agreement of sale. It is also admitted that names of plaintiffs are figuring in survey record. Therefore, there was clear intention on the part of defendant while handing over possession of the suit property to the plaintiffs and it further shows such intention when he failed even to seek restoration of possession in his written statement or thereafter till date. The evidence of parties, which has been discussed elaborately by the learned Civil Court, clearly goes to show that whenever the plaintiffs issued notice to the defendant, asking him to perform his part, there was no response from the defendant refusing to perform his part on the ground that time was essence of contract. On the contrary, at one stage, the defendant himself shown readiness to execute the sale deed on 06.06.1983, which is clear from letter addressed through advocate for the defendant asking the plaintiffs to attend the office of Sub Registrar. These documents which have

been discussed by the learned Civil Court, clearly go to show that even in the year 1983, the defendant was ready to perform his part, but was asking amount of Rs.15,000/- extra due to passage of time and increase of price of land. Interestingly, earlier letters addressed by the plaintiffs to the defendant were not replied.

27. First of all, the plaintiffs issued letters to the defendant dated 13.11.1978 and 23.11.1978 asking him to obtain surrender deeds from Maruti Mane and Krushnabai which are at Exh.60 and 62 respectively. This shows that the aforesaid persons were shown as tenants in the survey record and therefore, the plaintiffs insisted that their surrender documents need to be obtained before executing the sale deed. Admittedly, there is no recital in the agreement of sale showing that the defendant was supposed to obtain such surrender documents from Maruti Mane and Krushnabai Kulkarni. However, there is clear admission in the deposition of D.W.1 that the plaintiffs informed him at the time of execution of agreement of sale that such surrender documents are required to be obtained before executing the sale deed. This admission leads to draw inference that there was talk between plaintiffs and defendant in connection with obtaining of surrender documents from the persons whose names appear in the survey record in the tenancy column.

28. It is clear from the record that the defendant did not file any reply to the letters and notice of the plaintiffs dated 13.11.1978 and

23.11.1978. The plaintiffs in these letters clearly called upon the defendant to remain present alongwith clear title deed in the office of Sub Registrar for executing sale deed. This further goes to show that the plaintiffs were ready and willing to perform their part even prior to the date mentioned in the agreement of sale. Thus, it also shows that the plaintiffs were ready and willing to pay balance amount of Rs.25,000/- at the time of execution of sale deed. The pleadings in this respect are also found in the plaint.

29. The plaintiffs therefore, issued notice through his advocate Shri. Opalkar from Beed dated 12.10.1979 calling upon the defendant for execution of sale deed. This notice is at Exh.64. In this notice, the plaintiffs have clearly disclosed that Maruti Mane and Krushnabai filed their affidavits in Tahsil office with regard to surrender of their tenancy rights. Thus, the plaintiffs called upon the defendant to show his title over the suit land to execute the sale deed.

30. The defendant sent a telegram to the plaintiffs which refers to the notice of plaintiffs calling upon them to execute the sale deed in the office of Sub Registrar. In the said telegram, the defendant clearly exhibited his intention to execute sale deed on 06.07.1983 and called upon the plaintiffs to remain present. Thus, even after expiry of four years from the date mentioned in the agreement of sale, the defendant was ready and willing to execute the sale deed in

favour of the plaintiffs. This itself shows the conduct of the parties as well as intention that time was never essence of contract.

31. Apart from it, the defendant till 1983 did not issue any notice to the plaintiffs calling upon them to hand over possession of the suit land and intimating them that the amount paid by the plaintiffs at the time of agreement of sale stands forfeited for non performance of part of plaintiffs. No prudent man would have kept quiet for a period of four years for the purpose of recovery of possession of the suit land from the plaintiffs. This itself further fortify the intention of the parties that time was not essence of contract. Only saying that possession of the plaintiffs after expiry of date mentioned in the agreement of sale is illegal, is not going to serve the purpose. The defendant was duty bound to claim possession of the suit property if the time was essence of contract. Such action on the part of defendant clearly goes to show that he never intended to treat the time as essence of contract between the parties.

32. Once it is observed that time was not essence of contract, the question now arose as to when defendant refused to perform his part so as to give cause of action to the plaintiffs to file suit. In this respect, the pleadings in the written statement and the evidence of D.W.1 clearly goes to show that he never refused to execute the sale deed at the time when the plaintiffs issued him final notice. Admittedly, the plaintiffs themselves obtained surrender deeds from

two persons, whose names were appearing in the survey record. Thereafter, the plaintiffs called upon the defendant from time to time to execute the sale deed. The plaintiffs even issued public notice in the local daily newspaper on 21.11.1978 calling objections from interested parties with regard to intention to purchase the suit property. On 13.11.1978 they issued letter to the defendant under certificate of posting, which is at Exh.58. In the said letter, the plaintiffs called upon the defendant to remain present at Kaij alongwith original documents for execution of sale deed. Thereafter, the plaintiffs issued notice through his advocate dated 23.11.1978 which is at Exh.59. The plaintiffs were present in the office of Sub Registrar and he has also obtained receipt with regard to his presence in the office on that day. The defendant failed to attend the office alongwith the original title documents.

33. The plaintiffs then obtained surrender documents from Maruti Mane and Krushnabai which are produced at Exh.60 to 63. He then issued notice through his advocate dated 12.10.1978 which is at Exh.64. He called upon defendant to execute sale deed within 15 days. The defendant though received such notice did not reply. The plaintiffs then issued inland letter dated 19.11.1979 which is at Exh.66. Then on 10.1.1980, the plaintiffs sent reminder to the defendant through his advocate which is at Exh.67.

34. In between, Krushnabai started obstructing possession of the

plaintiffs and therefore, the plaintiffs filed suit bearing R.C.S. No. 376 of 1980 against the defendant, Krushnabai and others. The said suit was for injunction. The said suit was decreed in favour of the plaintiffs. The certified copy of the judgment and decree is produced at Exh.69.

35. The defendant has admitted about filing of such suit. He did not produce his written statement, if any, filed in that suit. No plea was raised in the present written statement about bar of present suit under Order II Rule 2, C.P.C. as discussed earlier. Therefore, it is clear from the conduct of defendant that he did not respond to the letters and notices of the plaintiffs.

36. The plaintiffs thereafter issued another notice through his advocate dated 07.04.1983 which is at Exh.70. This notice was replied by the defendant through his advocate which is at Exh.71. For the first time, the defendant demanded amount of Rs.15,000/- more from the plaintiffs for execution of sale deed. In this reply at Exh.71, the defendant admitted about execution of agreement of sale, receipt of Rs.10,000/- towards earnest amount and handing over of possession of plaintiffs. Para 8 of the said reply needs to be quoted for ready reference, which has been admitted by the defendant in his cross examination and it reads thus:-

"8. That, in alternative and without prejudice my client says

that as per agreement sale deed of the said land was to be executed on or before 01.12.1978 and your client failed to perform but time was essence of contract even then my client is ready and willing to perform his part under the contract subject to, and in addition to the remaining amount, special damages to the extent of Rs.15,000/-. If your client is ready to pay special damages, my client is ready to perform his part under the contract. Because prices of the said land has been raised more than double. That the contents which are not specifically denied but derogatory to this reply notice are hereby denied."

37. The plaintiffs sent reply to the notice to the defendant dated 20.5.1983 vide Exh.72 which was received by the defendant as it is proved from postal acknowledgment at Exh.73. In this reply, it is specifically stated by the plaintiffs that they are ready and willing to perform their part of payment of Rs.25,000/- and called upon the defendant to perform his part on or before 05.06.1983.

38. The cross examination of the defendant clearly admits the contents of these notices and more particularly telegram issued by him to the plaintiffs. Thus, it is clear from evidence of the parties that there was no specific refusal on the part of the defendant to perform his part. The plaintiffs though time and again called upon the defendant, the first refusal specifically is found in the reply in the year 1983 when the defendant called upon the plaintiffs to pay additional amount of Rs.15,000/-. Therefore, observation of learned first appellate court regarding limitation are completely misplaced by

ignoring the admission of the defendant. It is well settled that denial to perform his part must be specific. It cannot be inferred from the conduct of the parties. The first specific denial from defendant is when he started demanding additional amount of Rs.15,000/- for executing the sale deed. Therefore, the finding of the learned Civil Court are more justified which has been unnecessarily disturbed/upset by the first appellate court. The preponderance of probabilities on which civil proceedings are decided clearly found in favour of the plaintiffs.

39. In this respect learned counsel for the appellants placed reliance in the case of **Balasaheb Dayandeo Naik and Ors. Appasaheb Dattatraya Pawar (supra)**. In para 9 to 13, the Hon'ble Apex Court referred to the Constitutional Bench judgment in the case of **Chand Rani (Smt.) dead by L.Rs. vs. Kamal Rani (Smt.) dead by L.Rs. (1993) 1 SCC 519** and observed thus:-

"9) In Chand Rani (Smt.) (dead) by LRs. Vs. Kamal Rani (Smt.) (dead) by LRs, (1993) 1 SCC 519, a Constitution Bench of this Court has held that in the sale of immoveable property, time is not the essence of the contract. It is worthwhile to refer the following conclusion:

"19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different

from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

"21. In Govind Prasad Chaturvedi v. Hari Dutt Shastri (1977) 2 SCC 539 following the above ruling it was held at pages 543-544: (SCC para 5).

It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. [Vide Gomathinayagam Pillai v. Pallaniswami Nadar 1 (at p. 233).] It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

23. In Indira Kaur (Smt) v. Sheo Lal Kapoor (1988) 2 SCC 488 in paragraph 6 it was held as under:

“... The law is well-settled that in transactions of sale of immovable properties, time is not the essence of the contract.”

10) It is clear that in the case of sale of immoveable property, there is no presumption as to time being the essence of the contract. Even where the parties have expressly provided that time is the essence of the contract, such a stipulation will have to be read along with other provisions of the contract. For instance, if the contract was to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week, the work undertaken remains unfinished on the expiry of the time provided in the contract, such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. In the case on hand, though the parties agreed that the sale deed is to be executed within six months, in the last paragraph they made it clear that in the event of failure to execute the sale deed, the earnest money will be forfeited. In such circumstances, the above-mentioned clauses in the last three paragraphs of the agreement of sale would render ineffective the specific provision relating to the time being the essence of contract.

11) This Court in Swarnam Ramachandran (Smt.) and Another vs. Aravacode Chakungal Jayapalan, (2004) 8 SCC 689 has once again reiterated that time is not the essence of contract relating to immoveable property. The following statement of law in para 12 are rightly applicable to the case on hand:-

“12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of re-conveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of

essence. That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract."

40. In view of above observations, and the well settled proposition of law that in case of sale of immovable property, time is never regarded as essence of contract unless expressly provided so in the agreement and that the person who is ascertaining such plea must prove it, the matter in hand clearly shows that defendant though claimed that time was essence of contract, failed to establish it during trial. Therefore, the observation of the learned first appellate court is contrary to the above settled proposition of law.

41. The agreement of sale executed between the parties nowhere specifically suggest that time was essence of contract. Only because the said document mentions the date for performance of contract on or before 01.12.1978, it cannot be construed as the final date for execution of sale deed and beyond that the plaintiffs shall debarred

from performing or seeking specific performance of contract. No doubt, it is further mentioned that in case the sale deed is not executed on or before 01.12.1978, the part amount of Rs.10,000/- paid by the plaintiffs to the defendant shall be forfeited. However, this statement was never acted upon by the defendant. He never expressed in his reply to the notices or even in the written statement that the said amount paid by the plaintiffs stands forfeited since the plaintiffs failed to perform his part. Therefore, by no stretch of imagination, such sentences in the agreement of sale could be construed otherwise and more specifically to hold that time was essence of contract.

42. Learned civil court elaborately discussed this aspect and arrived at the conclusion. Such conclusion is more probable and acceptable which has been upset by the first appellate court by giving reasons which are not born out of the record. The findings of the learned first appellate court are therefore considered as on the basis of surmises and conjectures and not based on evidence produced on record.

43. In the case of ***Rajendra Mohanlal Agrawal (supra)*** on which reliance is placed by the respondents is totally on facts of that case and the findings are not at all relevant for the purpose of deciding the present matter.

44. In the case of **Gajanan R. Salvi (supra)** on which reliance is placed by the respondents deals with Order II Rule 2, C.P.C. however, in that matter a specific plea was raised of bar of suit under Order II Rule 2, C.P.C. which is not the case in matter in hand. Therefore, such decision is of no help to the respondents.

45. In the case of **Padmakumari and others (supra)** the plaintiff was not ready and willing to perform his part of contract i.e. payment of balance consideration within a stipulated period of nine months and therefore, his suit for specific performance of contract was rejected considering the provisions of Section 16(c) of the Specific Relief Act. The matter in hand is totally different. The plaintiffs were always ready and willing to perform their part and in fact they issued public notice in local daily newspaper calling upon the public to file objections, if any. They called upon the defendant to remain present alongwith title deeds in the office of Sub Registrar at Kaij somewhere in the month of November 1978. The plaintiffs remained present in the office of Sub Registrar which is clear from evidence. The defendant failed to appear. Subsequently, the plaintiffs obtained surrender deeds from the persons whose names appear in the tenancy column of survey record and advocate called upon the defendant to execute the sale deed. On this occasion the plaintiffs even purchased stamp duty and remained present in the office of Sub Registrar which clearly goes to show that the plaintiffs were always ready and willing to perform their part. Admittedly, the

plaintiffs were in possession of the suit land and plaintiff No.1 is also shown as doctor by profession practicing in the said village. Thus, it has to be considered that the plaintiffs were having sufficient means to pay balance consideration. Till 1983, the defendant did not dispute or refuse to execute the sale deed. In fact, he called upon the plaintiffs through his advocate to remain present in the office of Sub Registrar for execution of sale deed. In the notice issued by the defendant through his advocate in the year 1983, additional amount of Rs.15,000/- was demanded towards increase of price of land. This further proved that the plaintiffs were always ready and willing to perform their part and that there was no specific refusal on the part of defendant in performing his part. Thus, when defendant failed to appear in the office of Sub Registrar and execute the sale deed inspite of asking the plaintiffs to pay additional amount of Rs.15,000/- the plaintiffs realized that defendant is avoiding his performance. The suit was therefore, filed within time. The observation of the learned first appellate court that suit was barred by limitation are therefore erroneous.

46. In the case of ***K. Prakash (supra)***, the Hon'ble Apex Court in para 15, 16 and 17 has observed thus:-

“15. Indisputably, remedy for specific performance is an equitable remedy. The Court while granting relief for specific performance exercise discretionary jurisdiction. Section 20 of the Act specifically provides that the court's jurisdiction to

grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with the sound and reasonable judicial principles.

16. *The King's Bench in Rookey's Case [77 ER 209; (1597) 5 Co.Rep.99] it is said :*

"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with" The Court of Chancery in Attorney General vs. Wheat [(1759) 1 Eden 177; 28 ER 652] followed the Rooke's case and observed :

"the law is clear and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be secundum discretionem boni viri, yet when it is asked, vir bonus est quis? The answer is, qui consulta partum, qui leges juraq servat. And as it is said in Rooke's case, 5 Rep. 99 b, that discretion is a science not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been

sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with. This description is full and judicious, and what ought to be imprinted on the mind of every judge.”

17. The principles which can be enunciated is that where the plaintiff brings a suit for specific performance of contract for sale, the law insists a condition precedent to the grant of decree for specific performance that the plaintiff must show his continued readiness and willingness to perform his part of the contract in accordance with its terms from the date of contract to the date of hearing. Normally, when the trial court exercises its discretion in one way or other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under Section 20 of the Specific Relief Act, that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree is established then the Court has to exercise its discretion in favour of granting relief for specific performance.”

These observations are in fact supporting the case of the plaintiffs.

47. Having said so, the substantial questions of law at Sr. Nos. 1, 2 and 3 are answered in affirmative.

48. In the result, second appeal succeeds and hence I proceed to pass the following order:-

O R D E R

- I. Second appeal is allowed.
- II. The judgment and decree passed by the learned first appellate court in Regular Civil Appeal No. 52 of 2000 dated 27.1.2009 is hereby quashed and set aside.
- III. The judgment and decree passed by the learned Civil Court in Special Civil Suit No. 5 of 1989 (new) and 2 of 1984 (old) is restored and confirmed.
- IV. The parties shall bear their own costs.

(BHARAT P. DESHPANDE, J.)

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