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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 751 OF 2022**

Madhukanta Premchand Modi Petitioner.
V/s
Ranga Shankar Bhagwat
Since deceased through legal heirs
Mahindra Ranga Bhagwat and Ors. Respondents.

Mr. Kuldeep U. Nikam for the Petitioner.
Ms. Pooja Thakkar for the Respondents.

CORAM: NITIN W. SAMBRE, J.

DATE: MARCH 16, 2022

P.C.:-

1] Based on notarized agreement for sale dated 23/02/2012, Petitioner initiated suit for specific performance being Special Civil Suit No.81 of 2014 on the file of Civil Judge, Senior Division, Sangli in which based on rival pleadings, following issues are framed pursuant to the provisions of order XIV of the Civil Procedure Code.

“1. Does Plaintiff prove that the Defendants agreed to sell suit property to the Plaintiff for valuable consideration of Rs 33,00,001/- on 23/2/2012?

2. Does Plaintiff prove that she paid Rs 11,10,003/- to the defendants & defendants executed agreement of sale on 23/2/2012?

3. Does plaintiff prove that she was ready & willing to perform her part of contract?

4. Does plaintiff prove that defendants committed breach of contract?

5. Does defendants prove that time was essence of contract?

6. Is Plaintiff entitled to specific performance of contract?

7. In the alternative is plaintiff entitled for refund of Rs 11,10,003/- with interest?

8. What Order & decree?"

2] Applications-Exhibits 34 and 35 are preferred by the Petitioner/Plaintiff alleging that since the Respondents/Defendants have given express admission, there is no need to prove the agreement dated 23/2/2012 on the part of the Plaintiff and as such Issue Nos. 1 and 2 have become redundant and need to be deleted.

3] Application-Exhibit-35 is moved in in the backdrop of Section 58 of the Evidence Act alleging that execution, existence and acceptance of earnest amount out of total sale consideration is admitted by the Respondent/Defendant. That being so, Agreement of sale need not be proved.

4] Both these Applications are rejected by the order impugned.

5] In response to the court's query, Mr. Nikam, Counsel for the Petitioner would urge that Deed dated 23/2/2012 shall be proved by the Plaintiff after examining himself and as such by granting liberty to that effect, this Court need not to adjudicate the impugned order passed below Exhibit-35.

6] As such, challenge to Exhibit-35 stands rejected to the aforesaid extent with liberty as prayed.

7] As far as prayer in Exhibit-34 is concerned, perusal of the said application depicts that the Petitioner/Plaintiff has claimed that in the backdrop of pleadings in Written Statement, adjudication on Issue Nos. 1 and 2 is not required. Hence, it is claimed that said issues be waived (cancelled) and deleted. This Court on appreciation of rival pleadings was not inclined to grant such prayer. However, such prayer is pressed at the risk and peril of the Petitioner. Needless to mention that same is opposed by the Counsel for the Respondents on the ground that unregistered agreement of sale is neither proved nor

accepted.

8] In response to the above, Counsel for the Petitioner submits that deletion/waiving of the aforesaid two issues can be allowed at the risk and peril of the Petitioner. The said issue Nos. 1 and 2 which are sought to be waived/deleted, read as under:-

“1. Does Plaintiff prove that the Defendants agreed to sell suit property to the Plaintiff for valuable consideration of Rs 33,00,001/- on 23/2/2012?

2. Does Plaintiff prove that she paid Rs 11,10,003/- to the defendants & defendants executed agreement of sale on 23/2/2012?”

9] In that view of the matter prayer of the Petitioner as moved under Exhibit-34 stands allowed. Issue Nos. 1 and 2 are ordered to be waived, as such waiver is permissible under Order XIV Rule 1 that too at the risk and peril of the Petitioner. As such, Issue Nos. 1 and 2 stand deleted at the risk and peril of the Petitioner.

10] Petition stands partly allowed in the above terms.

(NITIN W. SAMBRE, J.)