



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1841 OF 2024.

- | | | |
|-----|---|-------------------|
| 1) | Sharifa Dost Mohammed (Deleted) |] |
| 1A. | Yasin Khan |] |
| | Aged. 64 years, Occ. Self Employee |] |
| | Residing at 302, Mira Apartment, 3 rd Floor, |] |
| | Opp. Alphine Industries, Marol Military |] |
| | Road, Andheri (East), Mumbai – 400 060 |] |
| 2) | Eshrat Shaikh Age- 60 Years |] |
| | residing at 302, Mira Apartment, 3 rd Floor, |] |
| | Opp. Alphine Industries, Marol Military |] |
| | Road, Andheri (East), Mumbai 400 060. |] |
| 3) | Yashin Khan Aged 64 Years, Occ- Self |] |
| | Employee residing at 302, Mira Apartment, |] |
| | 3 rd Floor, Opp. Alphine Industries, Marol |] |
| | Military Road, Andheri (East), Mumbai 400 |] |
| | 060. |] |
| 4) | Hasina Eshrat Shaikh Aged 54 Years, Occ. |] |
| | Housewife residing at 302, Mira Apartment, |] |
| | 3 rd Floor, Opp. Alphine Industries, Marol |] |
| | Military Road, Andheri (East), Mumbai 400 |] |
| | 060. |] |
| | |] ... Appellants. |

Versus

- | | | |
|----|---|---|
| 1) | M/s. Ajit Developers Pvt. Ltd. |] |
| | A Company Incorporated under the |] |
| | provisions of Companies Act, 1956 having |] |
| | their address at Gokul Apartment, Ground |] |
| | Floor, Haridas Nagar, Behind Kora Kenda, |] |
| | Simpoli Road, Borivali (W), Mumbai 400 092 |] |
| | |] |
| 2) | Kayum Khan |] |
| | Residing at Room No. 1 Haji Sattar Chawl, |] |
| | KBM Compound, Behind Masjid Opp. Ashok |] |
| | Nagar, Marol Military Road, Andheri (East), |] |
| | Mumbai 400 060. |] |
| 3) | Abdul Qaiyum Khan @ Kayum Khan (Since |] |

Deceased). Residing at Room No. 1 Haji]
Sattar Chawl, KBM Compound, Behind]
Masjid Opp. Ashok Nagar, Marol Military]
Road, Andheri (East), Mumbai 400 060.]

...Respondents.

Mr. Mayur Khandeparkar, Mr. Abhishek Walwaikar i/by Mr. Sandeep V. Mahadik, for Appellant.

Mr. Rajesh Kachare and Kashvi Ait i/by Ms. Sonal Dabholkar for Respondent No. 1.

Coram : Sharmila U. Deshmukh, J.

Reserved on: January 8, 2025.

Pronounced on : February 21, 2025.

JUDGMENT :

1. The present appeal has been preferred by the Original Defendants against the Judgment and Order dated 21st September, 2024 passed by the City Civil Court at Mumbai in S. C. Suit No. 6169 of 2005, decreeing the suit by granting the relief of specific performance of agreement of sale dated 19th January, 1995. For sake of convenience, the parties are referred to by their status before the Trial Court.

2. The suit came to be filed against the legal heirs of one Dost Muhammad Ata Muhammed, who was the executant of the Agreement of Sale dated 19th January 1995 by which the deceased Dost Muhammed had agreed to sell the suit property bearing Survey No. 42 Hissa No. 2 admeasuring about 1594 sqr. Mtrs. situated at village Vile

Parle, Taluka Andheri, District Mumbai Suburban. The plaint pleaded that as per the Agreement for Sale, the agreed sale consideration was Rs. 8,51,000/- out of which a sum of Rs. 65,000/- was agreed to be paid on or before the execution of the agreement of sale, 25% of the total consideration as reduced by the amount already paid on the deceased obtaining the agreement from the tenants to provide alternate accommodation within 45 days from date of execution of the agreement, 35% of the total consideration reduced by the amounts already paid upon receipt of letter of intent, 40% of the total consideration reduced by the amount already paid on obtaining intimation of disapproval, 50% of the total consideration reduced by the amounts already paid on obtaining commencement certificate and the balance consideration in six quarterly installments. The plaint sets out various clauses of the agreement and pleads that out of total consideration of Rs 8,51,000/, the Plaintiffs paid Rs 4,40,000/ by cheques to the deceased which were encashed. The possession of the property was handed over by recording a letter of possession dated 19th January, 1995. The Plaintiffs entered into agreement with 44 tenants for providing permanent alternate accommodation of 225 sqr. ft. By separate agreement dated 20th January, 1995 styled as "Manager Agreement", the Defendant No. 1 agreed to carry out certain acts. The proposal for implementing the Slum Rehabilitation scheme was

submitted to the Slum Rehabilitation authorities and in the meantime the deceased expired in the year 2001. By communication dated 22nd August 2003, one Zuber Khan claimed interest in the properties. By letter dated 8th September, 2003 the advocate for Defendant No. 2 disputed the rights of Zuber Khan and confirmed the execution of agreement of sale with a request to send particulars of payment made to the deceased. By communication dated 22nd September, 2003 the Plaintiffs communicated their readiness and willingness to pay the balance amount. On 7th August, 2004 when the Plaintiff's representative visited the suit property it was informed that the Defendant No. 2 was negotiating with the Tenants to vacate their structures. The Plaintiff sought *interalia* the relief of specific performance of the agreements dated 19th January, 1995 and 20th January, 1995.

3. The Defendants failed to file their written statement within the period of limitation and an Application for condonation of delay was filed which came to be rejected by the Trial Court. The order of rejection was challenged before the High Court which came to be dismissed. Resultantly, the suit proceeded without the written statement of the Defendants.

4. The Trial Court framed and answered the issues as under:

<u>Sr.No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether the Plaintiff has succeeded to prove that the father of the defendants, Dost Mohd., has executed the agreement of sale dated 19 th January 1995 for a total consideration of Rs. 8,51,000/- which can be termed as a concluded contract ?	In the affirmative.
2.	Whether the plaintiff has succeeded to prove that he was always ready and willing to perform his part ?	In the affirmative.
3.	Whether the Plaintiff is entitled for the specific performance of the agreement dated 19.01.1995 ?	In the affirmative.
4.	Whether the plaintiff has proved his possession and obstructions at the hands of defendants ?	In the affirmative.
5.	Whether the Plaintiff is entitled for a specific performance of the agreement dated 19.01.1995 ?	In the affirmative.
6.	What order and Decree ?	As per final order.

5. The Plaintiff filed the affidavit of evidence of one Manesh R. Kutmutia authorized signatory of the Plaintiff on 20th July, 2015. The witness produced various documents and relevant for our purpose are the following documents:

- (1) Original copy of Resolution dated 29th August, 2013.
- (2) Photocopy of original agreement dated 19th January, 1995.
- (3) Original receipt dated 29th October, 2004 issued by sub Registrar of Assurances.
- (4) Original letter of possession dated 19th September, 1995 confirming handing over the suit property to the Plaintiff.

6. Although 18 documents were produced by PW-1, the Trial Court exhibited only the documents at Serial no 10, 11,12,13,15,16,17 and 18 of list of documents which did not include the Original Resolution dated 29th August 2013 and Original letter of possession dated 19th January, 1995.

7. The Plaintiff was duly cross-examined and at the stage of final hearing, an Application was filed by the Plaintiff on 19th July, 2024 below Exhibit "17" seeking permission to produce on record the following documents:

(a) The Original agreement dated 19th January, 1995 which had been lodged for adjudication with the office of the Sub-Registrar and was returned upon payment of the stamp duty on 5th April, 2024.

(b) The original statement of bank account of Bank of Baroda of current account No. 010910 as earlier the original bank statement could not be traced.

(c) Original written statement filed by the Defendants in earlier S. C. Suit No. 4130 of 2004 which had been filed by the Plaintiffs against the Defendants for injunction.

8. The Application came to be resisted by the Defendants. By order dated 2nd August, 2024 the Trial Court permitted the production of the documents and exhibited the documents granting liberty to the Defendants to cross examine the Plaintiffs on the documents only on

law point. Subsequently, the Defendants conducted further cross examination on 26th August, 2024 on the agreement dated 19th January, 1995 which was marked as Exhibit 20, the bank statements which were marked as Exhibit-21 and the written statement which was marked as Exhibit-22. The Trial Court on consideration of the evidence decreed the suit by the impugned Judgment dated 21st September, 2024.

9. Heard Mr. Mayur Khandeparkar, learned Counsel appearing for the Appellant and Mr. Rajesh Kachare learned Counsel appearing for the Respondent No. 1.

10. Mr. Khandeparkar, would submit that the Trial Court has relied upon extract of resolution dated 29th August 2013 and possession letter dated 19th September, 1995 though not exhibited and Bank statements and written statement without evidence or deposition. He has taken this Court in detail through the findings of the Trial Court to contend that the Trial Court has decreed the suit based on these four documents which could not be read in evidence. He submits that the Plaintiff was cross examined on these documents however the contents of the said document were not proved as the primary deposition is absent. He submits that the Defendant No.4(a) Abdul Qaiyum had expired and the legal heirs were not brought on record and therefore the suit abated against the Defendant No.4(a). He

submits that the Judgment of the Trial Court is based on inadmissible evidence, which cannot be sustained.

11. Mr. Kachare, learned Counsel appearing for the Respondent/ Original Plaintiff would submit that the Plaintiffs had filed Suit No. 4130 of 2004 against the Defendants for injunction and in that suit the Defendants had admitted the payment of consideration. He points out to the order dated 10th September, 2004 passed in the notice of motion in S. C. Suit No. 4130 of 2004 to contend that the admitted position was that the agreement for sale was executed by the original deceased and the sum of Rs. 4,75,000/- has been paid and that the Plaintiffs are ready and willing to pay the balance amount of consideration. He submits that the bank statement was annexed to the plaint which showed the payment of Rs. 4,75,000/-. He submits that the certified copy of the written statement was produced wherein the Defendants had admitted the execution on the payment of consideration and being certified copy was admissible in evidence. He submits that there is deposition as regards payment of Rs.4,75,000/- and the Plaintiff has been cross-examined on the bank statements and therefore the documents stood proved and could be read in evidence. He submits that the execution of the agreement was proved, payment of consideration was proved and readiness and willingness was proved and therefore the suit came to be decreed. He submits that the order

allowing production of document was not challenged and attained finality. He submits that the affidavit of evidence refers to the original resolution and possession letter which were produced on record.

12. In rejoinder, Mr. Khandeparkar would submit that despite the deposition, the resolution and possession letter were not marked as exhibit and therefore could not be read in evidence. He submits that the Plaintiff has admitted in cross examination that there was no resolution executed in favour of the PW-1. He submits that as far as the order of the earlier proceedings is concerned the same was an interim order and Section 42 of the Evidence Act provides for the relevancy but however does not provide for the conclusiveness. He submits that the matter is required to be remanded for fresh trial.

13. The following points arise for determination:

- (i) Whether the four documents i.e. extract of resolution dated 29th August, 2013, possession letter dated 19th September, 1995, bank statements -Exhibit 21 and copy of written statement Exhibit-22 were not duly proved and could not be read in evidence.
- (ii) Whether the impugned judgment of Trial Court is based on inadmissible evidence.
- (iii) Whether the Plaintiff is entitled to the decree of specific performance of the Agreement for Sale dated 19th January, 1995.

AS TO POINT NO (i):

14. The disputed four documents can be categorised in two categories, the first category are the documents which were not marked as Exhibits but relied upon by the Trial Court and second category are the documents which are alleged to not have been duly proved and admitted in evidence without deposition. The Extract of Resolution dated 29th August, 2013 and the Possession Letter dated 19th September, 1995 fall in the first category and the Bank statements and copy of Written Statement in Suit No 4130 of 2004 marked as Exhibit 21 and Exhibit 22 respectively fall in the second category.

15. Coming to the first category i.e. the documents not marked as Exhibit by the Trial Court, the Plaintiff examined one Manesh R Kutmutia ,the authorised signatory of the Plaintiff Company as PW-1, who filed his Affidavit in lieu of evidence under Order XVIII, Rule 4 of CPC. Along with his Affidavit, PW-1 produced 18 documents including the original copy of Resolution dated 29th August, 2013 and Original letter of possession dated 19th September, 1995 confirming handing over the suit property to the Plaintiff. The deposition about these two documents can be found in paragraph 1 and 8 of the Affidavit of evidence as under:

"1. I say that I am the Authorised Signatory of the Plaintiff above named. I say that I have signed and verified the plaint as a Authorised Signatory of the Plaintiff. I say that the Directors of

the Plaintiff passed a resolution dated 29.08.2013 appointed me the Authorised Signatory of the Plaintiff. I hereby produce the said Original Resolution dated 29.08.2013. The same may be taken on record and marked as Exhibit. I say that I have personal knowledge of the said transaction as I was one of the Director when the Agreement dated 19.01.1995 was executed with the Defendant. I was present at the time of entering into said transaction. I say that the agreement was executed in my presence.

8. I say that the predecessor of the Defendant handed over possession of the suit property. I say that the predecessor of the Defendants have executed a letter of possession dated 19th January, 1995 confirming of handing over possession of the suit property to the Plaintiff. I say that the said letter of possession has been signed by the Dost Mohammed Atta Mohammed predecessor of the Defendant. I say that Shri Ajit Gopaldas Thakkar of the Plaintiff have accepted the peaceful possession of the suit property for and on behalf of the Plaintiff and have signed the said letter of possession. I say that contents of the said letter of possession dated 19th January, 1995 are true and correct. I am producing the original letter of possession dated 19th September, 1995, and the same may be taken on record and marked as Exhibit."

16. The contents of the documents have to be proved by adducing evidence of the person who can vouchsafe about the truth of the documents. PW-1 has deposed that the Directors of the Plaintiff had passed the resolution authorising him as authorised signatory and had produced the original resolution. He has further deposed that he had personal knowledge of the transaction. In respect of the possession letter dated 19th January, 1995, he has identified the signature of the executant and has deposed about the contents of the possession letter and produced the original letter of possession. The original extract of

resolution dated 29th August, 2013 and original possession letter were duly proved and tendered in evidence. Despite the deposition and production of the original documents, the Trial Court failed to mark the document as exhibits, which was a ministerial act.

17. Under Order XIII of Code of Civil Procedure, 1908, (CPC) the original documents are to be produced before settlement of issues. Notice to admit document is to be given under Rule 2 of Order XII. Order XIII governs the production, impounding and return of documents. Rule 3, 4 and 6 of Order XIII of the CPC govern the manner of admission and rejection of documents and reads as under.

"3. Rejection of irrelevant or inadmissible documents.- The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

4. Endorsements on documents admitted in evidence.- (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-

(a) the number and title of the suit,

(b) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted; and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

6. Endorsements on documents rejected as inadmissible in evidence.- Where a document relied on as evidence by either

party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of Rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.”

18. The Civil Manual makes provision for production and marking of documents as exhibits and paragraph No. 522(1), (523)(1) and paragraph No. 524 of Chapter 27 of Civil Manual reads as under.

“522.(1) All documents tendered in evidence shall be accompanied by a list in the form given as No. 5 in Appendix of the first schedule of the Code of Civil Procedure.

523. (1) As soon as the list is filed, the Bench Clerk should endorse on the back of each document the particulars mentioned in clauses (a), (b) and (c) of Rule 4(1), Order XIII, Civil Procedure Code.

(Note): Occasionally, documents are produced which are of great historic value such as old sanads or grants, and such documents may be seriously impaired or damaged by the usual endorsements. It is important that the identity of a document produced in Court and acted upon should be placed beyond question in view of a possible appeal or other future proceeding. But where a document of historical interest is in question, the Court before which it is produced, should make every possible endeavor to prevent its being defaced by marks of any kind. Some means of avoiding disfigurement would generally suggest themselves. The parties may agree to a photographic copy being substituted for the original or the document may be enclosed in a sealed cover or in a locked and sealed box, the necessary particulars being endorsed on the outside. Careful measures should also be taken for the safe custody of such documents.

524. If a document included in the list is referred to in the proceedings before it is tendered in evidence and formally proved, it should be immediately marked for identification. When it is tendered in evidence, it should be detached from the list. If rejected, it should be endorsed as prescribed by Order XIII, Rule 6, Civil Procedure Code, and returned. If admitted, the endorsement referred to in the above rule should be completed and signed by the Judge (Order XIII, Rule 4, Civil Procedure Code) and the document should be assigned the appropriate exhibit number and filed in the record and all references to it in the

depositions and judgment should bear that number. Every document should be further marked with the letter 'P' or 'D', according as it is tendered by the plaintiff or the defendant. The number assigned to each document should be endorsed on the list of documents mentioned above."

19. By Amendment Act of 2002 Order 18 Rule 4 came to be amended and read as under.

"4. Recording of evidence.- (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence cross-examination and re-examination of the witness in attendance, whose evidence examination-in-chief by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit.

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanor of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of Rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule."

20. The proof and admissibility of the documents filed along with the Affidavit is to be judicially determined by the Trial Court as soon as the document is tendered in evidence. The Court is obliged to form its opinion on the admissibility of the document based on which the document is required to be endorsed as admitted or not admitted in evidence. The record is silent as regards the judicial determination of these two documents. Pertinently, the submission of Mr. Khandeparkar is not that the two documents were inadmissible in evidence or were not duly proved, the objection is restricted only to non marking of document as exhibit. The marking of document as Exhibit is for the purpose of identifying the document and what is relevant is the proof of document.

21. The objection to the maintainability of the suit was rejected by the Trial Court in paragraph 32 by noting that the resolution has been produced by PW-1. The Trial Court also accepted the case of the handing over possession by noting the separate possession letter executed by the Defendant. As the documents were duly proved by PW-1, the non exhibiting of the documents, which duty is cast upon

the Court, would not come in the way of the documents i.e. the resolution dated 29th August, 2013 and possession letter dated 19th September, 1995 being read in evidence.

22. Now, coming to the second category of documents i.e. the original statement of Bank Account for the relevant period and the copy of the written statement filed by the Defendant in Suit No 4130 of 2004. The Plaintiff examined its authorised signatory as witness who deposed through his Affidavit of evidence in July 2015 and was cross examined. In paragraph 17 to 20 of the Affidavit of evidence, the PW-1 deposed about the filing of the S.C Suit No 4310 of 2003 and various orders passed therein and tendered the orders in evidence. There is no deposition about the written statement filed in S.C. Suit No. 4310 of 2003. Although it is sought to be contended that the written statement produced by Plaintiff was certified copy of written statement, the Application for production below Exhibit-17, refers to the document as original copy of written statement and in the cross-examination PW-1 has admitted that alleged copy of written statement is not signed by any Defendant. In absence of deposition, the written statement could not have been tendered in evidence.

23. As far as the statement of bank account is concerned, the plaintiff pleads in paragraph 11 as under:

"11. The Plaintiffs state that the Plaintiffs, out of the total consideration of Rs 8,51,000/- paid a total sum of Rs 4,40,000/- the said deceased by cheques under the said Agreement. The said deceased duly received the said payment. The Plaintiffs crave leave to refer to and rely upon the statements of accounts, the Bank statements when produced. Hereto annexed and marked Exhibit "C" is the copy of the statement showing the particulars of total payments made by the Plaintiffs to the deceased inter alia, under the said Agreement."

24. In accordance with the pleading, in paragraph 4 of the Affidavit of evidence, PW-1 has deposed about payment of Rs.25,000/- vide Cheque No 018527 dated 11th October, 1994, Rs.40,000/- vide cheque No.018585 dated 17th November, 1994 drawn on Bank of Baroda, Mangaldas Market Branch. In paragraph 9 of the Affidavit of evidence, PW-1 has deposed about payment of Rs.35,000/- vide Cheque No 013585 and Cheque No 013587 dated 20th January, 1995 of Rs.17,500/- each drawn on Bank of Baroda, Mangaldas Market Branch. The bank statements were not tendered in evidence along with the Affidavit of evidence.

25. Subsequently, an application was filed below Exhibit "17" at the stage of final hearing to produce the original documents i.e original agreement, bank statement and written statement. The Defendants raised objection to admissibility of the documents and as regards the bank statement the objection was that the Plaintiff never placed or sought leave to rely upon the bank statements and in addition, the bank statement is not accompanied by the Bankers Certificate as

mandated by Bankers Book Evidence Act and thus inadmissible in evidence. The Trial Court rejected the objection and admitted the document in evidence.

26. Firstly, the plaint specifically pleads about the payment and relies upon the statement of account. Secondly, in the Affidavit of evidence, there is specific deposition by PW-1 about the cheques drawn on Bank of Baroda and the payments made but the bank statements were not tendered during evidence, and came to be tendered subsequently. As PW-1 had deposed about the bank payments, it cannot be said that there was no deposition about the bank statements. It may not have been deposed in so many words that PW-1 hereby tenders the bank statement, but there was necessary pleading and evidence as regards the bank statement.

27. Coming to the question as to whether the bank statements have been proved and could be relied upon under the Bankers Book Evidence Act, Section 4 of Bankers Book Evidence Act reads thus:

"4. Mode of proof of entries in bankers' books.-Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

28. Section 2(8) of Bankers Book Evidence Act defines "certified copy" as under:

"certified copy" means when the books of a bank,--

(a) are maintained in written form, a copy of any entry in such books together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such books is still in the custody of the bank, and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in the usual course of the bank's business after the date on which the copy has been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title;

(b) consists of printouts of data stored in a floppy, disc, tape or any other electro-magnetic data storage device, a printout of such entry or a copy of such printout together with such statements certified in accordance with the provisions of section 2-A.

(c) a printout of any entry in the books of a bank stored in a micro film, magnetic tape or in any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such printout as a copy of such entry and such printout contains the certificate in accordance with the provisions of section 2-A."

Section 2-A of the said Act reads as under :

"2-A. Conditions in the printout. - A printout of entry or a copy of printout referred to in sub-section (8) of [section 2](#) shall be accompanied by the following, namely: --

(a) a certificate to the effect that it is a printout of such entry or a copy of such printout by the principal accountant or branch manager ; and

(b) a certificate by a person in-charge of computer system containing a brief description of the computer system and the particulars of--

- (A) the safeguards adopted by the system to ensure that data is entered or any other operation performed only by authorised persons;
- (B) the safeguards adopted to prevent and detect unauthorised change of data;
- (C) the safeguards available to retrieve data that is lost due to systemic failure or any other reasons;
- (D) the manner in which data is transferred from the system to removable media like floppies, discs, tapes or other electro-magnetic data storage devices;
- (E) the mode of verification in order to ensure that data has been accurately transferred to such removable media;
- (F) the mode of identification of such data storage devices;
- (G) the arrangements for the storage and custody of such storage devices;
- (H) the safeguards to prevent and detect any tampering with the system; and (I) any other factor which will vouch for the integrity and accuracy of the system.

(c) a further certificate from the person in-charge of the computer system to the effect that to the best of his knowledge and belief, such computer system operated properly at the material time, he was provided with all the relevant data and the printout in question represents correctly, or is appropriately derived from, the relevant data."

29. Admittedly, the bank statements are not accompanied by certificate under the Bankers Book Evidence Act, however, bears the seal of Bank of Baroda and signature of the official. In ***Radheshyam G. Garg vs Safiyabai Ibrahim Lighwalla (1987 SCC Online Bom 22)***, this Court held the certificate under Bankers Book Evidence Act to be directory as under:

"The lower appellate Court by placing reliance on section 2(8) of the Bankers' Books Evidence Act, 1891 has held that 'certified copy' means a copy of any entry in the books of a Bank, together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the Bank with his name and official title. According to the learned Judge since the said extracts of statement of account had not been signed by the principal accountant or manager as required and since the same did not bear any date or official seal, the same could not be treated as certified copy and consequently the same could not be read in evidence.

In my judgment the aforesaid view of the learned Judge of the lower appellate Court was hypertechnical. The said extract of account was duly signed by the Agent of the bank. Implicit in it was a certificate that it was a true copy of an entry contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book was in the custody of the bank. The detailed ingredients mentioned in the defining clause 8 of section 2 of Bankers' Books Evidence Act, 1891 for qualifying to be 'certified copy' are not mandatory but merely directory."

30. In the present case, the original bank statements were not *per se* inadmissible in evidence. What was objected was to the mode and manner of proof. As held by this Court in the decision cited above, the detailed ingredients of Section 2(8) of Bankers Book Evidence Act are merely directory. The bank statements are the original bank statements bearing the seal and signature of the bank. PW-1 has deposed about the cheque payments made through Bank of Baroda and corroborated the same by producing original bank statement. The bank statements could be received as *prima facie* evidence of existence of such entries. Further, the Plaintiff was cross examined by the

Defendant. Once the document is used in cross examination, then the document gets proved and can be read in evidence as held by the Apex Court in case of ***Ram Janki Devi vs Juggilal Kamlapat [1971 (1) SCC 477]***. The Apex Court in that case had held that it is not possible to accept complaint of lack of proof when the documents are shown in cross examination to the witness.

31. The impugned judgment discloses that during final arguments, the objection as regards admissibility of the bank statements was raised by the Defendants and the Trial Court has rightly rejected the contention on the ground that the bank statement is original and duly stamped by the authorised person of the bank.

32. In light of the discussion above, the conclusion is that the resolution dated 29th August, 2013, possession letter dated 19th September, 1995 and the bank statements could be read in evidence. Point No (1) is accordingly answered.

AS TO POINT Nos. (ii) and (iii):

33. Both points are interlinked and taken together for discussion. The Defendants failed to file their written statement and therefore their defence cannot be taken into consideration. The issue is whether the impugned judgment is based on inadmissible evidence and whether the Plaintiff is entitled to specific performance of the

agreement for sale dated 19th January, 1995.

34. From the evidence on record, it can be conclusively stated that Plaintiff has duly proved the execution of the Agreement for Sale dated 19th January, 1995 by the predecessor of Defendant. There is no submission canvassed by Mr. Khandeparkar assailing the finding on execution of the agreement of sale. Though the written statement was sought to be relied upon for supporting the case of admission of execution of agreement of sale by the Defendants, the finding of trial Court is not based solely on the said admission of the Defendants in the written statement. The only reference can be found in paragraph 16 of the judgment where the Trial Court supports its findings on execution of the agreement by noting that the Defendants have specifically admitted the execution of the agreement. Irrespective of the written statement, the evidence on record amply proves the execution of the Agreement by the predecessor of the Defendant.

35. The terms and conditions of the agreement casts an obligation on the Plaintiff under Clause 1 to make payment of Rs.65,000/- on or before execution of the agreement, which payment was acknowledged in the agreement itself and the slab of payment provided for payment of 25% on Vendors obtaining all Tenants Agreements for alternate accommodation within 45 days. Clause 1 provided for further payments upon subsequent events of receipt of further permissions

such as Letter of Intent from SRA, IOD and Commencement Certificate from Corporation and balance on Vendors conveying the property, which were all dependent on obtaining the Tenants Agreement by the vendors.

36. The obligation on the Plaintiff was to make payment of Rs. 65,000/- on execution of the Agreement, which was duly complied. The further payments were subject to the performance of the Defendant's obligation. In his deposition PW-1 has given the details of the cheques and specifically deposed that the Plaintiff has made payment of Rs 4,75,000/- to the Defendant and that Defendant has failed to secure agreement from the tenants as per the agreement. The deposition of PW-1 about making of payment of Rs.4,75,000/- to the Defendant has remained uncontroverted in cross-examination. As there was no written statement filed, there is no denial to the receipt of payment of Rs 4,75,000/- and consequently the case of the Defendant could not be put in the cross-examination.

37. Even if the bank statements are excluded from consideration, there is oral evidence of PW-1 deposing about the payment of Rs.4,75,000/ to the Defendants supported by communications dated 23rd October 2003-Exhibit 7, 8th September, 2003 -Exhibit 8 and 22nd September, 2003- Exhibit 9. By communication dated 23rd August, 2003, the Plaintiff had communicated its readiness and willingness to

make the balance payment as and when due. In response, the Defendants by communication dated 8th September, 2003, called upon the Plaintiff to furnish the statement of payments made to their late father along with mode of payment and receipts, which statement was enclosed by Plaintiff vide communication dated 22nd September, 2003. The absence of any further objection by the Defendants proves that the Defendants had accepted the statement of payment furnished by the Plaintiff. By the said communication, the Plaintiff once again reiterated its readiness and willingness to fulfill its obligations and make the balance payments.

38. On the aspect of payment, the Trial Court held in Paragraph No. 33 as under:-

“33. *In this case, the defendants further contend that the plaintiff has not succeeded to prove the alleged payment made by him to the defendants. On this point, the learned counsel for the defendant argued that though the plaintiff has produced a bank statement to show that he has made a payment to the defendant, this bank statement is not proved by him as per section 2 of the Bankers Book Act. I do not agree with this submission made by defendant because the bank statement produced by the plaintiff is original and is duly stamp by the authorized person of the bank. Furthermore, as per the notice reply of the defendant dated 08.09.2003 to the plaintiff's notice, the plaintiff company has given all details of the payment made by plaintiff's company to defendant by virtue of the reply dated 22.09.2003. The defendant has never challenged the said reply any where, nor has the defendant given a counter reply to the said reply. Therefore, there is also no force in the above said submission made by the defendant.”*

39. The Trial Court has not rested its finding on the aspect of payment of Rs.4,75,000/- only on the bank statement but has considered the notice reply of Defendants dated 8th September 2003. The Trial Court has rightly noted that the defendant has not challenged the said reply nor given counter reply to the Plaintiff's reply dated 22nd September, 2003 and has therefore upon cumulative reading of the correspondence held that the payment of Rs. 4,75,000/- has been made. The case has to be decided on the preponderance of probabilities and when the evidence on record is cumulatively appreciated, there is uncontroverted oral deposition of PW-1 about payment of Rs.4,75,000/- and the correspondence exchanged between the parties wherein the statement of payment was furnished to Defendants. In event the Defendants were not satisfied, there would be a denial which is not found in the present case..

40. The Plaintiff proved the execution of the Agreement for Sale dated 19th January, 1995 and the handing over of possession of the property by proving the possession letter dated 19th January, 1995. The Plaintiff has further proved the failure on part of the Defendant to perform his part of the contract as the Defendants failed to obtain Tenants Agreement within 45 days.

41. The Trial Court in paragraph 18 of the impugned judgment has held that the Plaintiff has complied with its obligations by taking the initiative of removing the hutments by executing agreement and making provision for their alternative residence, applying to Slum Rehabilitation Authority for permission and making the payment of Rs 4,75,000. The Trial Court held that the Defendants have failed to obtain the tenant agreement and execute the necessary agreement in favour of the Plaintiff and therefore the Plaintiff was not under an obligation to make the entire payment before execution of sale deed.

42. On the aspect of readiness and willingness, the Trial Court held that the bank statement shows that the Plaintiff has already made the payment of Rs.4,75,000/- and in the notice reply has specifically mentioned that he is ready to pay the balance consideration subject to execution of sale agreement. The finding indicates that the conclusion of the Trial Court of readiness and willingness is not based solely on the bank statements, but on the various steps taken by the Plaintiff in pursuance of the contract. Though the Trial Court has referred to the bank statement and written statement, the findings are not based solely on these documents. As such, even assuming *arguendo*, that these documents could not be read in evidence, the basis for the impugned judgment is not these two documents but the judgment is

decided on preponderance of probabilities upon appreciation of entire evidence.

43. The sum and substance of the discussion is that findings of the Trial Court on aspect of readiness and willingness is based on the payment of Rs.4,75,000/- by consideration of the oral evidence, the bank statements as well as the communications exchanged between the parties. The findings can be sustained even if the bank statements are excluded from consideration.

44. The evidence on record proves the due execution of the Agreement for Sale dated 19th January, 1995, the handing over of possession, the breach of contract by the Defendant and the readiness and willingness of the Plaintiff to stand with the contract. Even if the bank statement and the written statement are excluded from consideration, in light of the evidence on record, the Plaintiff is entitled to specific performance of the agreement. Point No (ii) and (iii) are accordingly answered.

45. As far as the submission that Defendant No 4a has expired and there no specific performance can be granted of his share, the said issue was not raised during the trial and is sought to be raised for the first time in Appeal, which cannot be permitted. There is nothing to

show that there were any surviving legal heirs apart from the Defendants on record who claim right in the property. In the absence of any such material, the effect of abatement cannot be considered.

46. Resultantly, First Appeal stands dismissed.

[Sharmila U. Deshmukh, J.]

47. At this stage, request is made for stay of the judgment for a period of six weeks. The said request is opposed by learned Counsel appearing for the Respondents. Considering the request, the judgment is stayed for a period of six weeks.

[Sharmila U. Deshmukh, J.]