



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

FIRST APPEAL NO.1180 OF 2014

- | | | | |
|------|--|---|-----------------------------------|
| 1. | Gulam Ali S/o Ismail Khan, | } | |
| | Age: 60 Years, Occu: Business, | } | |
| | Resident of Nawaz Manzil, Koliwada, | } | |
| | Kalyan, District Thane | } | |
| | Died Through his Legal Representatives | } | |
| | (As per order dated 28 th June, 2018 in | } | |
| | Civil Application No.8099/2018 | } | ..Appellants
(Orig. Plaintiff) |
| | | | |
| 1-A) | Saida Gulam Ali S/o Ismail Khan, | } | |
| | Age: 63 Years, Occu: Housewife, | } | |
| | | | |
| 1-B) | Mansoor Ali Gulam Ali Khan, | } | |
| | Age: 44 Years, Occu: Business, | } | |
| | | | |
| 1-C) | Samir Ali Gulam Ali Khan, | } | |
| | Age: 42 Years, Occu: Business, | } | |
| | | | |
| 1-D) | Jamir Ali Gulam Ali Khan, | } | |
| | Age: 40 Years, Occu: Business, | } | |
| | | | |
| | 1-A to 1-D All R/o: H. No. 126, | } | |
| | Mansur Manjil, Station Road, | } | |
| | Near Yamuna Sadan Kothi, | } | |
| | Ahmednagar - 414 001 | } | |
| | Maharashtra | } | |
| | | | |
| 1-E) | Jayada Firoj Pathan, | } | |
| | Age: 47 Years, Occu: Household, | } | |
| | R/o: Nagar Road, Isampura Chauk, | } | |
| | Taluka: Rahata, Kolhar Bk., | } | |
| | Ahmednagar - 413 371 | } | |
| | Maharashtra. | } | |
| | | | |
| 1-F) | Tarannum Rafique Ahmed Shaikh, | } | |
| | Age: 37 Years, Occu: Household, | } | |
| | R/o: A-3, Nawaz Building, | } | |
| | Ground Floor, Govindwadi Road, | } | |
| | Behind Old Boys English School, | } | |
| | Kalyan West - 421 301. | } | |

Versus

- | | | | |
|----|--|-----------------------|--------------------------------------|
| 1. | Shaikh Kalimulla S/o Sk. Barkatulla,
Age: 54 Years, Occu: Service,
R/o: Bungalow No. 23, Cantonment,
Aurangabad and also residing at
United States of America. | }
}
}
}
} | ..Respondents
(Orig. Respondents) |
| 2. | Shaikh Kalilulla S/o Sk. Barkatulla,
Age: 51 Years, Occup: Business,
R/o: As above. | }
}
} | |
| 3. | Shaikh Majidulla S/o Sk. Barkatulla,
Age: 47 Years, Occup: Business,
R/o: As above. | }
}
} | |

.....

Mr. A. D. Soman, Advocate for the Appellants,

Mr. P. R. Katneshwarkar, Advocate for Respondent No.1,

Mr. Rajendra S. Deshmukh, Senior Advocate a/w. Mr. Shriram Deshmukh, Advocate i/by. Mr. Devang R. Deshmukh, Advocate for Respondent No.2,

Mr. S. V. Adwant, Advocate for Respondent No.3.

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WITH
CIVIL APPLICATION NO.1244 OF 2024
IN
FIRST APPEAL NO.1180 OF 2014
WITH
CIVIL APPLICATION NO.5366 OF 2014
IN
FIRST APPEAL NO.1180 OF 2014

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**CORAM : R. G. AVACHAT AND
NEERAJ P DHOTE, JJ.**

**RESERVED ON : 18.07.2024
PRONOUNCED ON : 26.08.2024**

JUDGMENT [PER NEERAJ P. DHOTE, J.] :

. This is the First Appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') against the Judgment and

Order dated 21.11.2013 passed by the learned 2nd Jt. Civil Judge, (S.D.), Aurangabad dismissing the Spl. Civil Suit No.390/2011 instituted for Specific Performance of Contract. The operative Order of the impugned Judgment reads as under :

“ The suit of the plaintiff is hereby dismissed.

- 1] The prayer for specific performance of the contract is hereby rejected.
- 2] The prayer to refund earnest amount is hereby rejected.
- 3] The prayer for compensation is also hereby rejected.
- 4] Decree be drawn up accordingly.”

2. The facts, in brief, giving rise to the present Appeal are as follows:

2.1. The Appellants are the Legal Representatives of the original Plaintiff who died during the pendency of the Appeal. The original Plaintiff went before the learned Civil Court with the Plaint that he entered into an Agreement to Sell (Exh.65) with the Defendants on 20.02.2008 in respect of landed property admeasuring 70,000 Sq. Feet, bearing CTS No.20719, out of Survey No.2, situated at Kokanwadi, Aurangabad (hereinafter referred to as the ‘Suit Property’) for the total consideration of Rs.21,52,50,000/- (Twenty One Crore Fifty Two Lakh Fifty Thousand Only) at the rate of Rs.3,075/- (Rs.Three Thousand Seventy Five Only) per Sq. Feet. It was decided to execute the sale-deed within a period of 6 (six) months from the date of agreement. Time

was essence of the contract. An amount of Rs.50,00,000/- was paid as the earnest money by the Plaintiff to the Defendants.

2.2. On 18.03.2008, the Plaintiff came across the notice published in the daily newspaper that, Defendant No.2 had already executed an Agreement to Sell with the third party in respect of the Suit Property. The Plaintiff contacted the Defendant Nos.2 and 3, who assured that the issue would be settled and they will execute the sale-deed with the Plaintiff. Though, the Plaintiff repeatedly contacted the Defendants for execution of the sale-deed by accepting balance consideration, the Defendants assured that they will execute the sale-deed. By communication dated 26.06.2008 the Plaintiff requested the Defendants to execute the sale-deed in his favour as early as possible and the Defendants requested him to wait for some time. The Defendant No.3 by a reply dated 26.06.2008 showed his readiness to perform his part of contract. Even after the repeated requests by the Plaintiff, the Defendants did not execute the sale-deed. On 20.08.2008 the Plaintiff contacted the Defendants and requested them to complete the transaction before expiry of the stipulated period and the Defendants assured the Plaintiff to complete the transaction on 20.08.2008, however when the Plaintiff went to the office of Sub-Registrar to complete the necessary formalities, the Defendants did not turn up. Therefore, the Plaintiff went to the house of the Defendant No.2. The

Plaintiff handed over one communication titled as 'Samaj Patra' intimating that he was ready and willing to complete the transaction and he was present for the same on 20.08.2008.

2.3. On 23.10.2008 the Plaintiff came across a notice published in the newspaper issued by Defendant No.2 stating that the Plaintiff failed to perform his part of contract within the stipulated period, to which the Plaintiff replied by a paper publication on 29.11.2008 stating that he was ready and willing to execute the sale-deed. The Defendant Nos.2 and 3 sought some time from the Plaintiff to execute the sale-deed. On 31.01.2009 the Plaintiff issued legal notice to the Defendants through his Advocate requesting them to execute the sale-deed. Again on 24.01.2011 the Plaintiff issued legal notice through his Advocate to complete the sale transaction. The Defendant Nos.1 and 2 by their respective replies dated 04.02.2011 denied their liability to perform the contract. Eventually, the Plaintiff instituted the aforementioned suit.

3. Respondents are the Original Defendants. They filed their respective written-statements.

3.1. The Defendant No.1 filed his Written-statement at Exh.32 stating that the Plaintiff failed and neglected to complete the sale transaction within the stipulated period and therefore, he cannot claim specific performance of contract and the earnest money stands forfeited.

He further stated that the Plaintiff was not ready and willing to perform his part of contract and was not having the financial capacity to complete the sale transaction within the stipulated period. He prayed for dismissal of the suit with costs.

3.2. The Defendant No.2 by his Written-statement at Exh.14 opposed the suit stating that the time was essence of contract which was to be completed within a period of 6 (six) months from the date of agreement and the Plaintiff failed to execute the sale-deed within the stipulated period, therefore, the earnest money was agreed to be forfeited. He stated that the Agreement to Sell (Exh.65) was cancelled. He further stated that the Plaintiff was fictitious person put forth by Defendant No.3 and his brother-in-law with a view to grab the Suit Property. After the Agreement to Sell (Exh.65), the Plaintiff never contacted the Defendant No.2 for completion of the sale transaction. Though he tried to contact the Plaintiff, he was not found on the given address and therefore, he was unable to complete the sale transaction. Therefore, he executed another agreement with third person and prayed for dismissal of the suit with costs.

3.3. The Defendant No.3 filed his Written-statement at Exh.18 and supported the case of Plaintiff.

4. The learned Civil Court, on the basis of rival pleadings of the parties, framed the issues and findings on that at Exh.57 which reads thus:

“ISSUES	FINDINGS
1. Whether Defendant Nos.1 to 3 executed agreement to sale of the suit property on 20.02.2008 in favour of the plaintiff?	In affirmative
2. Whether the plaintiff on 20.02.2008 paid an amount of Rs.50,00,000/- to defendants as an earnest amount?	In affirmative
3. Whether the plaintiff was / is ready and willing to perform his part of contract?	In negative
4. Whether the time was essence of the contract?	In affirmative
5. Whether the defendants have committed breach of contract?	In negative
6. Is the plaintiff entitled to get relief of specific performance of contract as prayed for ?	In negative

Or in the alternative

Is the plaintiff entitled to get refund of earnest amount of Rs.50,00,000/- with interest as prayed for?

7. Is the plaintiff entitled to get compensation as prayed for ?	In negative
8. What order and decree?	Suit is dismissed”

5. The Plaintiff examined his General Power of Attorney (GPA) namely Syed Gulam Rasul Yasin as PW1, who filed his evidence affidavit at Exh.59. He was subjected to cross-examination by the Defendant

No.1. The Defendant No.2 adopted the cross-examination of Defendant No.1. The Defendant No.3 declined to cross-examine.

6. The Plaintiff examined another witness namely Mirza Parvez Ali Baig as PW2, who filed his evidence affidavit at Exh.88. He was cross-examined by Defendant No.1 which was adopted by Defendant No.2. Defendant No.3 did not cross-examine.

7. Defendant No.3 namely Shaikh Majidullah Shaikh Barkatullah filed his evidence affidavit at Exh.116 as DW1. He was cross-examined by Defendant Nos.1 and 2.

8. The Defendant No.2 – Sk. Khalilullah Sk. Barkatullah filed his evidence affidavit at Exh.150 as DW2. He was cross-examined by Defendant No.3 and the Plaintiff.

9. The following documents are brought on record in the evidence led by the parties :-

- (a) Agreement for Sell at Exh.65
- (b) Samaj Patra at Exh.66
- (c) Legal notice sent by the Plaintiff to the Defendants – Exh.67
- (d) The Postal Acknowledgment of the above notice – Exh.68
- (e) Legal Notice sent by the Plaintiff to the Defendants – Exh.69
- (f) The U.P.C. for the said notice Exhs.70 to 75
- (g) Reply notice by Defendant No.1 to the Plaintiff – Exh.79
- (h) Reply notice by Defendant No.2 to the Plaintiff – Exh.80
- (i) The Paper publication - Article “B”.

(j) Compromise Petition / Terms in Spl. Civil Suit No.293/2006 at Exh.126.

(k) Receipt issued by the Sub-Registrar towards registration fee and Agreement for Development at Exh.156.

10. Considering the evidence brought on record by the parties, the learned Civil Court passed the impugned Judgment and Order.

11. Heard learned Advocate for the Appellants, learned Advocate for Respondent No.1, learned Senior Advocate for Respondent No.2 and learned Advocate for Respondent No.3. As all the submissions revolved around Point No.3, the submissions are taken while discussing the said point. Scrutinized the evidence available on record. The Parties are referred as per their status / nomenclature before the learned Civil Court. Following points arise for our determination:

POINTS	FINDINGS
1. Whether the Defendants entered into an Agreement to Sell with the Plaintiff on 20.02.2008 in respect of the Suit Property?	In the Affirmative
2. Whether the Plaintiff paid Rs.50,00,000/- (Rs. Fifty Lakh) as the earnest money to the Defendants?	In the Affirmative
3. Whether the Plaintiff was ready and willing to perform his part of contract?	In the Negative
4. Whether time was the essence of the contract?	In the Affirmative

- | | |
|---|---|
| 5. Whether the Plaintiff is entitled for decree on admission by defendant No.3 to the extent of 1/3rd undivided share In the Suit Property? | In the Negative |
| 6. Whether the Plaintiff is entitled for alternate prayer ? | To the extent of refund of earnest money with Interest. |
| 7. What Order? | First Appeal is partly allowed. |

:: REASONS ::

AS TO POINT NOS.1 AND 2 :

12. The Plaintiff in his plaint and in evidence affidavit GPA / PW1 – Syed Gulam Rasul Yasin stated and averred that the Defendants had executed the Agreement to Sell (Exh.65) in respect of the land admeasuring 70000 Sq. Ft. bearing CTS No.20719, Survey No.2 situated at Kokanwadi, Aurangabad.

13. Defendant No.1, though pleaded in his Written-statement that no Agreement to Sell of any property was entered with the Plaintiff, he has averred that Defendant No.3 was managing the entire property of their father and even after the demise of their father Defendant No.3 continued to manage the entire property as he and Defendant No.2 were abroad. He was entirely dependent on Defendant No.3 in respect of the affairs and the management of the properties. When he had come to India in 2008, the Defendant No.3 came to him and asked him to sign on an agreement which he was made

to believe that it was in respect of the disputes with Defendant No.2 and believing him he put his signatures above the signatures of Defendant Nos.2 and 3. However, no evidence is led by Defendant No.1. Though Defendant No.1 cross-examined the witnesses examined by the Plaintiff, however nothing has come in the cross-examination to establish that Defendant No.1 did not enter into the said agreement with the Plaintiff. On the contrary, the tenor of cross-examination show that the said agreement was executed after the talks had taken place between all the three Defendants.

14. Defendant No.2 by his Written-Statement admitted the execution of the said agreement with the Plaintiff. In his evidence affidavit, he averred about the said Agreement to Sell (Exh.65) with the Plaintiff. In his cross-examination it has come that on 20.02.2008 they all three brothers i.e. Defendants No.1 to 3, went separately to the Advocate for signing the agreement where the Defendant No.1, thereafter he and thereafter Defendant No.3 had signed the agreement which was read over by the Advocate to all who were present there.

15. Defendant No.3 in his Written-statement admitted the execution of the said agreement. He admitted the case of Plaintiff. He did not cross-examine the Plaintiff.

16. In view of the above discussion, the Plaintiff has proved that Defendants No.1 to 3 executed the Agreement to Sell (Exh.65) in

respect of the above referred Suit Property with him on 20.02.2008 and hence Point No.1 is answered 'in the Affirmative'.

17. As per the avernments in the plaint and the evidence affidavit of the GPA of the Plaintiff, he paid Rs.50,00,000/- as the earnest money to the Defendants jointly on 20.02.2008.

18. PW2 – Mirza Parvez Ali Baig examined by the Plaintiff in his evidence deposed that he was the brother-in-law of all the Defendants. His evidence show that as per the terms and conditions in the Agreement, Rs.50,00,000/- which was brought by the Plaintiff was handed over to Defendants No.1 to 3 jointly and thereafter Defendants No.1 to 3 signed on every page of the Agreement before him and he and another witness signed as the witnesses. The cross-examination of this witness done by the Defendants No.1 and 2 could not create any dent in his evidence led in support of the Plaintiff. In the cross-examination it has come that the amount of earnest money was distributed to all the Defendants equally in cash. It has come in his cross-examination that he has good relations with Defendants No. 1 and 2.

19. Learned Advocates for the parties submitted that there is no dispute in respect of the Point Nos. 1 and 2 and the findings recorded by the learned Trial Court on the said points. In view of the above, the Point No.2 is answered 'in the Affirmative'.

AS TO POINT NO.3 :

20. It is submitted by learned Advocate for the Plaintiffs that, the learned Trial Court has not considered certain admitted facts that the Defendant No.2 had entered into an Development Agreement with the third parties prior to the Agreement entered between the Plaintiff and the Defendants. The learned Trial Court has not considered the communications between the Plaintiff and the Defendant No.3. He further submitted that in the Civil Suit filed by the third parties regarding the Development Agreement, the learned Civil Court had issued the Temporary Injunction by which the Defendants No.1 to 3 were restrained from creating any third party interest in the Suit Property. The Plaintiff in his pleadings and the evidence categorically stated and proved that he was ready and willing to perform his part of contract and was having capacity to deposit the entire amount. Though the Plaintiff was present before the Office of the concerned Sub-Registrar for executing the sale-deed on 20.08.2008, the Defendants failed to come before the said authority and execute the sale-deed. The Plaintiff approached the Defendants No.2 and 3 on the given address informing them his readiness and willingness to perform his part of contract and requested them to complete the said transaction *vide* issuing the 'Samaj Patra'. The Plaintiff also contacted the Defendant No.1 *via* internet calling who was in the United States of America at the relevant time. He further submitted that, despite the subsistence of the

Agreement to Sell (Exh.65) between the parties, Defendant No.2 entered into another Development Agreement with the third party on 02.09.2008. As the Defendants were not performing their part of Agreement, the Plaintiff issued legal notice to them requesting to execute the sale-deed. The Defendants never tried to return the earnest money which they had accepted at the time of the Agreement. The Plaintiff was not required to deposit the entire amount in the Court as per Section 16 of the Specific Relief Act, 1963. The Power of Attorney Holder of the Plaintiff / PW1 - Syed Gulam Rasul Yasin had complete knowledge of the Agreement to Sell (Exh.65) and about the transaction between the Plaintiff and the Defendants in respect of the Suit Property and so, he deposed on behalf of the Plaintiff. Learned Trial Court did not consider the above aspects and the findings recorded against the issue Nos. 3, 5, 6 and 7 'in Negative' was contrary to the evidence on record. In support of his submissions, he cited the following Judgments of the Hon'ble Supreme Court of India :

1. **Nadiminti Suryanarayan Murthy (Dead) Through Legal Representatives vs. Kothurthi Krishna Bhaskara Rao and Others, (2017) 9 SCC 622**
2. **Zarina Siddiqui vs. A. Ramalingam Alias R. Amarnathan, (2015) 1 SCC 705**
3. **P. Daivasigamani vs. S. Sambandan, (2022) 14 SCC 793**
4. **Gaddipati Divija and Another vs. Pathuri Samrajyam and Others, 2023 SCC OnLine SC 442**

5. **Basavaraj vs. Padmavathi and Another, (2023) 4 SCC 239**

21. It is submitted by learned Advocate for the Defendant No.1 and learned Senior Advocate for Defendant No.2 that the evidence on record show that the Plaintiff failed to prove that he was ready and willing to perform his part of contract. Time was the essence of contract. The period of six (6) months was given in the agreement to complete the transactions as, the Suit Property was in a good locality and there was increase in the price day by day. The communication dated 26.06.2008 which according to the Plaintiff was sent to the Defendants, was in fact never served on the Defendants No.1 and 2. The Defendant No.3 was in collusion with the Plaintiff. Though the suit was filed within the period of limitation, the Plaintiff did nothing for a period of more than 2 years and filed the suit when the expiry of limitation was nearing. The Power of Attorney Holder of the Plaintiff namely Syed Gulam Rasul Yasin who was examined by the Plaintiff as the PW1 was neither named in the Agreement nor in the plaint. The said Power of Attorney Holder did not disclose in his affidavit that he was intending to purchase the Suit Property and was covered by the terms mentioned in the Agreement. The pleadings of the Plaintiff and the averments in the evidence affidavit of PW1 – Syed Gulam Rasul Yasin were vague. Some of the contents of the evidence affidavit of the GPA / PW1 – Syed Gulam Rasul Yasin were not the part of pleadings in the plaint. They further submitted that, the evidence of

General Power of Attorney Holder / PW1 – Syed Gulam Rasul Yasin nowhere show that he was present with the Plaintiff in the Sub-Registrar office. If at all the Plaintiff was not able to give his evidence in the suit, his evidence could have been recorded by way of commission as provided under the Code of Civil Procedure. The credentials of the GPA / PW1 – Syed Gulam Rasul Yasin were doubtful. The ‘Samaj Patra’ which was never served on the Defendants No. 1 and 2 nowhere states that the Plaintiff had come with money and the stamp papers and draft sale-deed to the office of Sub-Registrar. In the normal course, a prudent man would have intimated the parties one or two days before completing the transaction. The said ‘Samaj Patra’ is created evidence. The relief prayed by the Plaintiff in the Appeal for execution of sale-deed was an equitable relief and the evidence available on record show that he was not entitled for the relief as prayed for and the Appeal be dismissed. In support of his contention, he relied on the following Judgments of the Hon’ble Supreme Court of India:

1. **Man Kaur (Dead) By LRs vs. Hartar Singh Sangha, (2010) 10 SCC 512**
2. **B. K. Sri Harsha (Dead) By LR and Another, (2008) 4 SCC 48**
3. **Chand Rani (Smt) (Dead) by LRs vs. Kamal Rani (Smt) (Dead) by LRs, (1993) 1 SCC 519**
4. **Acharya Swami Ganesh Dassji vs. Sita Ram Thapar, (1996) 4 SCC 526**
5. **Azhar Sultana vs. B. Rajamani and Others, (2009) 17 SCC 27**
6. **S. Kesari Hanuman Goud vs. Anjum Jehan and Others, (2013) 12 SCC 64**

22. Learned Advocate for the Defendants No.3 submits that the Defendant No.3 was ready and still ready to execute his part of contract in favour of the Plaintiff to the extent of his undivided share in the Suit Property. He submits that the Defendants No.1 and 2 have not come with the clean hands. The Defendant No.1 though filed Written-statement, did not enter the witness box. There was dearth of action on the part of Defendants No.1 and 2 in performing their part of contract. The Plaintiff had discharged his burden by examining his GPA / PW1 – Syed Gulam Rasul Yasin. No credence can be given to the dishonest party. The Plaintiff was entitled for decree of Specific performance and the Appeal be allowed. In support of his submissions, he relied on the following Judgments:

- (a) **Dalip Singh vs. State of Uttar Pradesh and Others, (2010) 2 SCC 114**
- (b) **Vidhyadhar vs. Manikrao and Another, (1999) 3 SCC 573**
- (c) **Kaushik Premkumar Mishra and Anr vs. Kanji Ravaria@ Kanji & Anr by Hon'ble Supreme Court of India in Civil Appeal No.1573 of 2023 decided on April 19, 2024.**

23. On perusal of the above referred Judgments relied upon by the parties, the following Legal Principles emerges:

- “(a) *The remedy for specific performance is an equitable remedy. The Court while granting decree of specific performance exercises its discretionary jurisdiction.*

Discretion must be exercised in accordance with sound and reasonable judicial principles.

- (b) *The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty.*
- (c) *While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party.*
- (d) *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.*
- (e) *Subsequent rise in price will not be treated as a hardship entailing refusal of the decree for specific*

performance. Rise in price is a normal change of circumstances and, therefore, on that ground a decree for specific performance cannot be reversed.

- (f) *The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance.*
- (g) *The Specific Performance of the Contract, may in the discretion of the court, be enforced, when the act agreed to be done, was such that compensation in money for its non-performance would not afford adequate relief, and that the breach of a contract to transfer immovable property could not be adequately relieved by compensation in money. It also emerges that specific performance of a contract could not be enforced in favour of a person, who failed to aver and prove that he had performed or had always been ready and willing to perform the essential terms of the contract, which were to be performed by him. It could also not be enforced in favour of a person who failed to aver in the plaint the performance of, or readiness and willingness to perform the contract according to its true construction.*

- (h) *Readiness and willingness are not one, but two separate elements. Readiness means the capacity of the plaintiff to perform the contract, which would include the financial position to pay the purchase price. Willingness refers to the intention of the plaintiff as a purchaser to perform his part of the contract. Willingness is inferred by scrutinizing the conduct of the plaintiff/purchaser, including attending circumstances. Continuous readiness and willingness on the part of the plaintiff/purchaser from the date the balance sale consideration was payable in terms of the agreement to sell, till the decision of the suit, is a condition precedent for grant of relief of specific performance.*
- (i) *Time is not the essence of the contract in the case of immovable properties, unless there are grounds to hold to the contrary.*
- (j) *That the 2018 amendment was not a mere procedural enactment, but it had substantive principles built into its working, and as such, the said amendment was perspective in nature and cannot apply to those transactions which took place prior to its enforcement.*
- (k) *An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of*
- (l) *If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney*

granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

- (m) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.*
- (n) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.*
- (o) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.*
- (p) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those*

different stages, all the attorney-holders will have to be examined.

- (q) Where the law requires or contemplates the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney-holder.*
- (r) The discretion to decree specific performance should be exercised by the court and in some cases, whether the suit was barred by limitation and even if not, whether the plaintiff has been guilty of negligence or laches disentitling him to a decree for specific performance. These questions, by and large, may not be questions of law of general importance. But they cannot also be considered to be pure questions of fact based on an appreciation of the evidence in the case. They are questions which have to be adjudicated upon, in the context of the relevant provisions of the Specific Relief Act and the Limitation Act (if the question of limitation is involved).*
- (s) There is distinction between 'readiness' to perform the contract and 'willingness' to perform the contract. By readiness may be meant the capacity of the Plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of contract, the conduct has to be properly scrutinized.*
- (t) The factor of readiness and willingness to perform Plaintiff's part of the contract is to be adjudged with*

reference to the conduct of the party and attending circumstances.

- (u) *It is a settled legal proposition that the power-of-attorney-holder cannot depose in place of the principal. Provisions of Order III, Rules 1 and 2 CPC empower the holder of the power of attorney to “act” on behalf of the principal. The word “acts” employed therein is confined only to “acts” done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term “acts”, would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any “acts” in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled (sic liable) to be cross-examined.*
- (v) *The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the*

conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract.”

- (w) The contract, being a creature of an agreement between two or more parties, is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however, if the parties have not made it themselves.*
- (x) The Court cannot rewrite or create a new contract between the parties and has to simply apply the terms and conditions of the agreement as agreed between the parties.*
- (y) The explicit terms of the contract are always the final word with regard to the intention of the parties.*
- (z) The litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice*

with tainted hands, is not entitled to any relief, interim or final.

(z1) Where a party to a suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct.”

24. Admittedly, in the case on hand the agreement was dated 20.02.2008, the suit was filed in August-2011, the impugned Judgment and Order was passed in November – 2013. The transactions between the parties was undisputedly before the Specific Relief (Amendment) Act, 2018. The matter therefore would be governed by the provisions of the Specific Relief Act, 1963 which stood on the date of agreement. Section 16 of the Act as it stood at the relevant time i.e. before the amendment of 2018 is as follows:

“16. Personal bars to relief.— Specific performance of a contract cannot be enforced in favour of a person -

[(a) who has obtained substituted performance of contract under section 20; or]

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

*Explanation.—*For the purposes of clause (c),—

- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;
- (ii) the plaintiff [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction.”

25. The terms and conditions of the Agreement to Sell (Exh.65) entered between the Plaintiff and the Defendants are reproduced below for better understanding of the matter.

“1. The Purchasers have agreed to purchase and the Vendors have agreed to sell the property which is comprised in pink colour in the map annexed to this agreement, which forms a part and parcel of this deed, for a consideration of Rs.21,52,50,000/- subject to the area affected under road widening and the area available for sale.

2. The Purchasers have paid an amount of Rs.50,00,000/- in cash to the Vendors, which the Vendors do hereby acknowledge to have received, towards earnest money, hence no separate receipt is necessary to be passed in the names of the Purchasers.

3. The Purchasers have agreed and accepted to pay the remaining amount of consideration after determining the final amount of consideration upon calculating the area available for sale, as a part thereof is likely to be affected in road widening.

4. The Purchasers have agreed to perform their part of the contract within 6 months of the date of these presents and will not postpone the performance on any guise or pretext, beyond the time granted, time being the essence of the contract.

5. The Vendors hereby agree that upon the acceptance of the total amount of the consideration as agreed upon, the Vendors will execute the Sale Deed in favour of the Purchasers and / or anyone in whose favour, the Purchasers may direct them to execute the sale deed and will also part with the vacant and peaceful possession of the property under sale to the Purchasers and / or anyone as they may direct, free from all encumbrances and will divest their right, title, interest, ownership and possession of the said property to such Purchaser/s.

6. That the Vendors shall deliver to the Purchasers all the title deeds and documents in their power, possession and control

and relating to the said immovable property at the time of the execution of the Sale Deed in favour of the Purchasers.

7. The Vendors will discharge and pay all the taxes, outgoings and liabilities in respect of the property under sale till the date of sale and will give the receipts thereof to the Purchaser before the execution of the Deed of Sale.

8. The Vendors hereby assure the Purchasers that no notice from the Government or any Statutory Body, local authority under the provisions of any law for the time being in force, has been received by them or served upon them, in respect of the property under sale.

9. That as agreed by the parties, Time will be essence of Contract and both the parties will be under obligation to discharge their respective duties stipulated herein and that if the sale is not completed within the stipulated time, the Vendors will have a right to forfeit the amount of the earnest money paid by the Purchasers and rescind the contract and will be free to sell the property under sale to any other party and in such an event, the Purchasers will have no right and/or cause to take up the claim with the court of law.

10. It is further agreed by the Purchasers that all the enquiries relating to the property under sale expected to be acquired for road widening will completed by them within the time of the contract and will also perform their part of paying the remaining amount of consideration to the Vendors within the said time. The Purchasers will also have a right to give a paper publication, calling upon the objections, if any from the interested parties, before completing the sale.

11. The Vendors assure that upon the payment of the remaining amount of consideration by the Purchasers, they will be liable to perform their part of the contract by executing a registered sale deed in favour of the Purchaser, without postponing it on any count and by taking a registered power of attorney of Vendor No.1, who is residing in USA, if need be.

12. The stamp duty and registration charges for the purpose of registration of the sale deed and the out of pocket expenses shall be borne by the Purchasers.”

26. Admittedly, the Plaintiff did not enter the witness box. On his behalf his GPA / PW1 – Syed Gulam Rasul Yasin adduced the evidence by filing the evidence affidavit at Exh.59. From his cross-

examination, it is clear that the Plaintiff was present in the Court at the time of his evidence. Though the evidence of GPA/PW1 – Syed Gulam Rasul Yasin show that the Plaintiff had undergone bypass surgery in 2010, his evidence show that the Plaintiff travelled in the car to the Court. No reason is forthcoming from the evidence on record as to what made the Plaintiff not to enter the witness box. It is further clear from evidence of GPA / PW1 – Syed Gulam Rasul Yasin that the General Power of Attorney was executed during pendency of the suit. Admittedly, he was not the signatory to the agreement.

27. The evidence of GPA / PW1 – Syed Gulam Rasul Yasin show that he was not aware about the financial capacity of the Plaintiff. He showed his ignorance about the monthly income of the Plaintiff and went on to say that the Plaintiff himself can say about his monthly income. He further showed his ignorance about the credit balance in the bank account of the Plaintiff. Though it has come in his evidence that the Plaintiff had kept some amount in the Fixed Deposit, he was not aware of the extent of amount which was kept in the Fixed Deposit. His cross-examination further go to indicate that they were not possessing the balance amount which was Rs.21,00,00,000/- readily with them as he deposed that they can deposit the said amount in the Court within a span of one (1) or two (2) months.

28. In his cross-examination he accepted that as per the agreement the Plaintiff was required to perform his part of contract within six (6) months. He deposed that they had not paid the amount of Rs.21,00,00,000/- to the Defendants within six (6) months. He was unable to state whether since the date of the agreement till the date of his deposition they were having the amount of Rs.21,00,00,000/- in their bank accounts. He further was unable to depose whether during the period of six (6) months they were having Rs.21,00,00,000/- in their bank account.

29. Undisputedly, in the Written-statement the Defendant No.1 raised specific pleading calling the Plaintiff to show funds standing at his credit by producing cogent documentary evidence. The evidence available on record do not show that the Plaintiff met the said averment by bringing on record the required documents to show his financial capacity.

30. The GPA / PW1 – Syed Gulam Rasul Yasin admitted in his cross-examination that there was no mention in the General Power of Attorney that he would appear in the suit whenever he would like to do so. He did not remember whether there was talk between the parties about the area and size of the disputed property. He was unable to state the length or width or the other portion of the disputed property. With reference to his evidence that they went to the Sub-Registrar's Office at

Aurangabad on 20.08.2008, it has come in his cross-examination that on that day they were not prepared with stamp papers for registration of the sale-deed and they were not having the draft sale-deed with them. Though it has come that on that day they were having an amount of Rs.21,00,00,000/- with them in cash which were brought from Ahmednagar and Kalyan, he was unaware as to from whom the said amount was collected and where the said amount had gone when the sale-deed was not executed.

31. Further, his cross-examination show that, except the transaction in question, they had not entered in any other transaction of such huge amount of Rs.21 Crore. The previous transactions, which they have dealt with were to the extent of Rs.2 to Rs.2.5 Crore. This also throw light on the financial capacity of Plaintiff.

32. Though the document in the nature of 'Samaj Patra' is brought in evidence at Exh.66, admittedly, the same was not served on the Defendants No.1 and 2, for the obvious reason that Defendant No.1 was residing in the USA. Shri. Katneshwarkar, learned Advocate for the Defendant No.1 has rightly submitted that the said document is completely silent that the Plaintiff had come with the money on that day i.e. 20.08.2008, to the office of Sub-Registrar to execute the sale-deed. He further rightly submitted that there is nothing on record to show that the Plaintiff had on previous occasion intimated the Defendants that he was coming on that day for executing the sale-deed to the office of the

Sub-Registrar. It would be the natural conduct of the party who wants to execute the sale-deed with such huge amount to inform the other side well in advance. The averment in the evidence affidavit of GPA / PW1 – Syed Gulam Rasul Yasin that as per the assurance given by the Defendants, the Plaintiff went to the office of Sub-Registrar, Aurangabad, is without any foundation and without any specification as to when and in what manner the assurance was given by the Defendants.

33. Though the Plaintiff pleaded and in the evidence the GPA / PW1 – Syed Gulam Rasul Yasin deposed that the plaintiff asked the Defendants to execute the sale-deed and was continuously pursuing the matter with the Defendants, the same is vague. The pleadings and evidence lacks specific dates on which the Plaintiff contacted and asked the Defendants to execute the sale-deed. Though the Plaintiff has relied on the communication dated 26.06.2008 whereby all the Defendants were requested to execute the sale-deed before 20.08.2008, the said document is not brought in evidence and not exhibited. Therefore, strictly speaking it cannot be read. However, during the course of argument, the learned Advocate for the Plaintiff heavily relied on it. Undisputedly, there is nothing to show that the same was served on Defendants No.1 and 2. Learned Advocate for Defendant No.1 has rightly submitted that when, from the pleadings of the Plaintiff and evidence led by him, it was clear that Defendant No.1 was residing in

USA, why his place of residence was shown at Aurangabad. Service of the said communication / letter on Defendant No.3 will not be service on the Defendants No. 1 and 2.

34. Though the evidence of GPA / PW1 – Syed Gulam Rasul Yasin show that he had sent the legal notices dated 31.01.2009 and 21.11.2009 to the Defendants through Advocate in respect of the subject matter, undisputedly the same are much after the expiry of six (6) months period as mentioned in the Agreement to Sell (Exh.65). This show complete lull on the part of the Plaintiff in pursuing the subject matter. As regards first legal notice dated 31.01.2009, it is the Plaintiff's own case that there was no positive record of service of the said notice on Defendants No.1 and 2. Further, from the evidence on record it is seen that after the Agreement to Sell (Exh.65) the Defendant No.1 went to USA, however the postal receipts show that the notice at Exh.67 dated 31.01.2009 was dispatched at Aurangabad address.

35. In the plaint and in the evidence affidavit of GPA / PW1 – Syed Gulam Rasul Yasin, it is pleaded and stated more than once that after the execution of the Agreement to Sell (Exh.65), the Plaintiff repeatedly, from time to time contacted the Defendants for execution of the sale deed, however every time the Defendants assured the execution of the sale-deed. The said pleadings are general in nature and vague.

There is complete absence of particulars / specifications as to when the Plaintiff contacted the Defendants and by what mode. Such vague and general pleadings and avernments in the affidavit without any specification are not sufficient to establish willingness to perform the part of the contract.

36. Learned Advocate for the Plaintiff further stressed on the communication dated 26.06.2008 issued by the Defendant No.3 to the Plaintiff. Undisputedly, the said communication is also not exhibited and therefore not the part of the evidence. Learned Advocate for the Defendants No.1 and 2 have rightly submitted that even if it is read in evidence, the said communication by Defendant No.3 will not bind the Defendants No.1 and 2.

37. Perusal of the pleadings in the plaint and the contents of the evidence affidavit of the General Power of Attorney of the Plaintiff, makes it clear that certain statements in the evidence affidavit were not supported by the pleadings in the plaint. It is needless to state that no evidence can be led in the absence of foundational pleadings.

38. The case of the Plaintiff that he was present in the Sub-Registrar's Office on 20.08.2008 on the assurance given by the Defendants falls down as it is the evidence of the GPA / PW1 – Syed Gulam Rasul Yasin that, they were aware that Defendant No.1 was not present at Aurangabad and it was not possible to get the sale-deed

executed and registered on that day. As regards Plaintiff's case of telephonic talk with the Defendant No.1 at America, GPA / PW1 - Syed Gulam Rasul Yasin in his evidence deposed that according to him minimum charge for phone call to America from India was Rs.30 to 32 and the copy of receipt at Exh.86 show that Rs.2/- was paid towards charges for the call to Defendant No.1 at America. If that is so, it is not possible to accept the Plaintiff's contention that talk had taken place between him and Defendant No.1 on the aforesaid date.

39. Even in the present Appeal, which is the continuation of the civil suit and being the Appellate Court this Court is having the same powers as are conferred by the Code of Civil Procedure on the Courts of original jurisdiction in respect of the suits instituted therein, the learned Advocate for the Plaintiff was unable to state as to within what time the Plaintiff could arrange for the remaining consideration required to execute the sale-deed. PW2 – Mirza Parvez Ali Baig examined by the Plaintiff *vide* Exh.88, in no uncertain terms deposed that it was agreed between the parties that the Plaintiff should pay total consideration amount within 6 (six) months to the Defendants and on receiving the consideration amount, the Defendants should execute the sale-deed in favour of the Plaintiff. As per the Agreement to Sell (Exh.65) the Plaintiff had agreed to perform his part of contract within six (6) months and he was required to perform his part of obligation within the stipulated period, one of which was that he was required to pay the

remaining amount of consideration to the Defendants within the stipulated time. It is also clear from the cross-examination of the GPA / PW1 – Syed Gulam Rasul Yasin that six (6) months time was fixed for payment of remaining consideration.

40. From the above discussion, it is established that the Plaintiff was neither ready nor willing to perform his part of contract. In view of the above discussion, it is more than clear that the Plaintiff miserably failed to establish his continued readiness and willingness to perform his part of contract and therefore, Point No.3 is answered accordingly.

AS TO POINT NO.4 :

41. As seen from the above referred rulings of the Hon'ble Supreme Court of India and the settled position under the law, time is not the essence of the contract in the case of immovable properties, unless there are grounds to hold to the contrary. In the case on hand, as is clear from the pleadings and evidence on record the Suit Property is a plot comprising area of 70000 Sq. Ft. situated in the Aurangabad city. The GPA / PW1 – Syed Gulam Rasul Yasin in his cross-examination accepted that the prices of landed property prevailing in the year 2008 had escalated. Even there is pleading in Written-statement of the Defendant No.1 that the rates of the Suit Property had sky rocketed. It is also clear that some of the portion of CTS No.20719 of which the Suit

Property is also a part, was acquired by the Maharashtra Housing and Area Development Authority (MHADA).

42. The Plaintiff in his pleadings and evidence have averred and stated that the sale-deed was to be completed on or before 20.08.2008 within a period of 6 (six) months from the date of agreement. Defendants No.1 and 2 in their Written-statements have categorically averred that time was the essence of the contract.

43. Thus, in view of above undisputed factual aspects it is clear that the parties were on one page that the transaction was to be completed within the time stipulated in the Agreement to Sell (Exh.65), which establishes that the time was essence of the contract and thus, Point No.4 is answered accordingly.

AS TO POINT NO.5 :

44. It is submitted by learned Advocate for the Plaintiff that Defendant No.3 has accepted the case of the Plaintiff and therefore, the partial decree to the extent of Defendant No.3 be passed in favour of the Plaintiffs by modifying the Trial Court's Judgment.

45. As discussed earlier while considering the Point No.1 the Defendants have entered into Agreement to Sell (Exh.65) with the Plaintiff. Undisputely, the Defendant No.3 sided with the Plaintiff. In his Written-statement he admitted the Plaintiff's claim or pleadings in

the plaint. Categorical averment is made in the Written-statement by Defendant No.3 that he was ready and willing to perform his part of contract and to execute the sale-deed in favour of the Plaintiff. In his Written-statement he averred that necessary orders be passed. Further, Defendant No.3 declined to cross-examine the GPA / PW1 – Syed Gulam Rasul Yasin and PW2 – Mirza Parvez Ali Baig examined by the Plaintiff. For this point, the relevant provision is Order-XII, Rule-6 of the C.P.C. which reads as under :

“6. Judgment on admissions. -

(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.”

46. The evidence on record goes to show and there is no dispute on the aspect that the three Defendants are real brothers and having their undivided 1/3rd share each, in the Suit Property. The evidence on record goes to show and on which there is no dispute between the parties that, Defendant No.2 had preferred the Spl. Civil Suit No.293 of 2006 for partition in the properties left behind by his father, including the Suit Property and all the Defendants had entered into the compromise in the

said civil suit. The said compromise is brought on record at Exh.126 in the evidence of the Defendant No.3. The said compromise is not disputed by any of the party.

47. It has come in the evidence of DW1 – Shaikh Majidullah Shaikh Barkatullah that as per the said compromise dated 20.02.2008 in the said Civil Suit it was agreed that they all three brothers (Defendants No.1 to 3) should sell the Suit Property jointly and terms and conditions were also decided amongst them as to how to sell the Suit Property. As seen from the cross-examination of Defendant No. 3 done by DW1 – Shaikh Majidullah Shaikh Barkatullah and DW2 – Sk. Khalilullah Sk. Barkatullah it is their case that Defendant No. 3 had put forward the Plaintiff and wanted to grab the Suit Property with the help of brother-in-law - Mr. Parvez. This material on record go to show that the terms between the Defendant No. 3 on one hand and Defendants No. 1 and 2 on the other hand were not cordial. What is gathered from the pleading and evidence on record is that the Defendant No. 3 – Shaikh Majidulla Sk. Barkatulla and the Plaintiff – Gulam Ali s/o. Ismail Khan joined hands and were trying to put spoke in the matters relating to the Suit Property. As discussed earlier, the Suit Property was a big land within the city. The Defendant No.3 - Shaikh Majidulla Sk. Barkatulla could have executed the sale-deed to the extent of his 1/3rd undivided share in favour of the Plaintiff, if at all he was ready. He can even do it today or tomorrow. However, he did not do so. This lends credence to the

above contention of Defendants No. 1 and 2 in respect of Plaintiff and Defendant No.3. The relief in the nature of Judgment on Admissions is discretionary and cannot be claimed as of right as held by the Hon'ble Supreme Court of India in **S.M. Asif vs Virender Kumar Bajaj, (2015) 9 SCC 287** and **Hari Steel And General Industries Limited and Another vs Daljit Singh and Others, (2019) 20 SCC 425**. Thus, in the facts and circumstances of the matter, we consider it more appropriate not to exercise the powers under Order-XII, Rule-6 of the C.P.C. and hence, Point No.5 is answered accordingly.

AS TO POINT NO.6 :

48. As discussed earlier, it is established from the evidence on record that the Plaintiff had paid Rs.50,00,000/- as the earnest money in respect of the transaction at the time of executing the above referred Agreement to Sell (Exh.65). The terms and conditions of the said Agreement, which are reproduced above in Paragraph no.25 show that, it provides for right to the Vendors of forfeiture of the earnest money. There is no clause in the said Agreement providing automatic forfeiture of the earnest money. Thus, unless the said right is exercised, the earnest money will not get forfeited.

49. There is nothing to show that after the expiry of the six (6) months period which was agreed to complete the transaction, the Defendants exercised their right of forfeiture of the earnest money by

informing the Plaintiff regarding the same. As the forfeiture was not automatic on the expiry of stipulated period, unless the Defendants expressly exercise their right of forfeiture by their act, the earnest money won't get forfeited. As there is no exercise of the said right by the Defendants, the earnest as referred in the Agreement to Sell (Exh.65) will have to be refunded by the Defendants to the Plaintiff. There is alternate prayer in the plaint for refund of earnest money with Interest @ 18% per annum.

50. The evidence on record show that the Plaintiff was dealing in the business of purchase and sale of landed property. The evidence of the GPA of the Plaintiff / PW1 – Syed Gulam Rasul Yasin show that the Plaintiff intended to commercially develop the Suit Property after it was purchased. The Development Agreement entered by Defendant No.2 with the third party was also the commercial transaction. Section 34 of the C.P.C. is in respect of the Interest. It provides for interest more than 6% per annum in case of commercial transactions. There is nothing to show that the interest rate was agreed upon by the parties in case of refund of the earnest money. It is needless to state that the interest rate for lending money by the Nationalized Bank in relation to commercial transactions keep on fluctuating. Keeping this and the fact that the earnest money were paid in the year 2008, in view, we consider the Interest at the rate of 7.5% per annum, on the earnest money, from the date of institution of Suit till its realization to be paid by the Defendants

jointly and severally to the Plaintiff along with Rs.50,00,000/- i.e. earnest money.

51. It is clear from the Agreement to Sell (Exh.65) that it was for the Plaintiff to initially perform his part of contract by paying the balance consideration amount within the stipulated period and thereafter it was for the Defendants to execute the sale-deed. There is no dispute on this aspect. There is no evidence to show that there was any breach of Agreement to Sell (Exh.65) by the Defendants. Therefore, the Plaintiff would not be entitled for any compensation. Hence, Point No.6 is answered accordingly.

AS TO POINT NO.7 :

52. We have perused the impugned Judgment and Order. On reappraisal of the evidence on record, we do not see that the learned Trial Court has committed any error by dismissing the suit on the ground of readiness and willingness of Plaintiff to perform his part of contract and not awarding compensation. However, in view of our finding on Point No.6, impugned Judgment and Order / Decree requires modification.

53. The record show that the Civil Application No.1244 of 2024 was preferred by the Plaintiff/Applicant to implead the third parties with whom the Defendant No.2 had entered Development Agreement. By Order dated 21.02.2024 the parties agreed that the Application be

considered at the time of final hearing. However, no arguments were advanced by the learned Advocates for the Parties on this Application. Even otherwise, in view of the above discussion, nothing survives in the Application.

54. In view of above, we pass the following order :

ORDER

- (i) The First Appeal is partly allowed.
- (ii) The Plaintiff is entitled for refund of the earnest money of Rs.50,00,000/- (Rs. Fifty Lakh) with interest @ 7.5% Per Annum from the Defendants jointly and severally, from the date of institution of Suit till its realization.
- (iii) The impugned Judgment and Order / Decree stands modified to that effect.
- (iv) Decree be drawn up accordingly.
- (v) Pending Civil Application Nos.1244 of 2024 and 5366 of 2014 stand disposed of.
- (vi) Record and Proceedings be sent back to the learned Civil Court.

(NEERAJ P DHOTE, J.)

(R. G. AVACHAT, J.)