

attention to the grounds taken in the application and submitted that, in a proceeding filed by the husband, convenience of the wife should be looked into. Learned Counsel in support of his aforesaid contention placed reliance on the judgment of this Court in the case of *Savita w/o Vijay Mahajan vs. Vijay s/o Bajirao Mahajan* reported in 2008(6) Mh.L.J. 263 = 2008 B.C.I. 210 and unreported judgment of this Court in the case of *Yogita @ Swati Anil Somwanshi vs. Anil Rameshwar Somwanshi in Miscellaneous Civil Application No. 35 of 2010 dated 20-6-2011* (Coram : S. S. Shinde, J.). Therefore, it is prayed that, this application may be allowed.

5. On the other hand, learned Counsel appearing for the respondent vehemently opposed the application and submitted that, this Court may not interfere in the impugned order. Learned Counsel also invited my attention to the averments in the affidavit in reply and submitted that, divorce petition before the Civil Judge, Senior Division, Akola is in civil nature and the application filed by the applicant is in criminal nature and therefore, the application filed by the applicant for transfer may not be entertained.

6. I have given due consideration to the rival submissions. It is not in dispute that, the applicant and also the respondent are residing at Aurangabad. It is true that, the applicant being a lady and having no source of income, will not be able to travel 300 kms. from Aurangabad to Akola on every date of hearing. The Hon'ble Supreme Court held that, in a proceeding filed by the husband, convenience of the wife in such proceeding should be looked into.

7. Therefore, in the light of discussion hereinabove, the application is allowed in terms of prayer clause (A). The Record and Proceedings of Hindu Marriage Petition No. 232 of 2010 filed by the respondent hereinbefore the Court of the Civil Judge, Senior Division, Akola under section 13 of the Hindu Marriage Act against the present applicant stands transferred to the Court of the Civil Judge, Senior Division, Aurangabad. The concerned Court to take appropriate steps to transfer the said proceedings within one week from the receipt of the copy of the order of this Court.

8. Rule made absolute on the above terms. Misc. Civil Application is allowed to the above extent and stands disposed of.

*Rule made absolute.*

SPECIFIC RELIEF ACT, SECTIONS 20 AND 16

(*D. K. Deshmukh and Anoop V. Mohta, JJ.*)

JAMNADAS MATHURADAS

*Appellant.*

vs.

BAF HIRA BUILDERS PVT. LTD. and others

*Respondents.*

(a) **Specific Relief Act (47 of 1963), SS. 20 and 16** — *Suit for specific performance — Plaintiff claiming relief on basis of alleged acknowledgment of receipt of earnest money — There was no specific agreement executed between parties except the acknowledgement of earnest money — Defendant had never commenced construction of flats — Third party rights had been created — Decree of specific performance cannot be granted.*

Appeal No. 211 of 2009 in Suit No. 3353 of 1986 decided on 13-12-2011.  
(O.O.C.J., Bombay)

The appellant alleged to have booked flat as advertised by respondents 1 to 3. A suit for specific performance was filed by him on failure to execute sale deed. By agreement dated 24 August, 1984, respondent No. 4 purchased the property from respondents 1 to 3. Admittedly the construction was commenced by respondent No. 4 with whom there was no agreement of the appellant of any kind. The third party rights have been created even thereafter. Respondents 1 to 3 were not in a position to execute and/or give the possession of the alleged flat as the premises itself was sold to Respondent No. 4. There was no agreement and/or challenge raised within limitation and no interim relief sought at the appropriate stage, Respondent No. 4 was also not in a position to give possession of the flat as there was no specific agreement executed between the Appellant and Respondent No. 4, specially when Respondent No. 4 was a bona fide purchaser of the building. In totality, therefore, the dismissal of the Suit by the Judge cannot be faulted with. The suit was filed in the year 1986. The appellant's claim, therefore to grant a decree as prayed for specific performance declaring the agreement/acknowledgment of the year 1979 valid and binding, also cannot be granted. As the suit itself is barred by the limitation, there was no question of granting any compensation for the breach as alleged, except refund of earnest money. (Paras 10 and 13)

**(b) Specific Performance — Suit for — Court cannot pass a judgment or decree which is unexecutable.** (Para 9)

For appellant : *Amar Talreja*

For respondents : *Gaurav Joshi* instructed by  
*M/s Vivek Kantawala and Co.*

**List of cases referred :**

1. *Motilal Jain vs. Ramdasi Devi*, 2000 (4) Civil L.J. 524 (SC) : (Para 7)  
(2000) 6 SCC 420
2. *N. P. Thirugnanam vs. Dr. R. Jagan Mohan Rao*, (1995) 5 SCC 115 (Para 9)

**JUDGMENT**

**ANOOP V. MOHTA, J. :—** The Appellant (the Plaintiff) has challenged the judgment and decree dated 24 October, 2008 whereby his Suit for specific performance against all the Respondents has been dismissed in toto.

2. The Appellant attracted by Respondents 1 to 3's advertisement dated 1 July, 1979 alleged to have booked a two room kitchen flat bearing Flat No. 20A, on the 4th floor of Building No. 5 at Baf-Hira Nagar, Marve Road, Malad (West), Mumbai and paid the earnest money by a cheque on 2 July, 1979 of Rs. 5,500/- in favour of Respondent No. 1 and paid cash to one M/s Laxmi Housing Agency, alleged sole agent. The same were duly acknowledged.

3. On 3 November, 1979 the Appellant enquired about the agreement and the commencement of construction date. That was followed by a communication of another letter dated 17 November, 1981. On a communication from M/s Laxmi Agency, the Plaintiff visited the office also on 19 February, 1981. As alleged an assurance was again given by Respondents 1 to 3 that building's construction would commence by 15 April, 1981 and the work would be completed in 18 to 20 months. The Appellant communicated on 23 August, 1981 to the Respondents that they were bound by the original contract terms and conditions, therefor not willing to modify the terms and conditions of payment and consideration as

informed in the meeting dated 14 August, 1981 by Respondents 1 to 3. The construction work never commenced as stated by the Respondents. Advocate's notice dated 18 October, 1982 was sent by the Plaintiff to execute the agreement. The Plaintiff thereafter also relied upon oral assurances as contented, till July 1986. Respondents 1 to 3 had conveyed by an agreement the property in favour of Respondent No. 4 who had commenced the construction on the site.

4. As noted Respondent No. 4 was carrying out construction of the building on the said plot, the Plaintiff, therefore, called upon Respondent No. 2 by notice dated 8 August, 1986 to execute the agreement. Respondent No. 4 by Advocate's reply dated 4 September, 1986 denied the knowledge of their agreement.

5. The Plaintiff insisted and claimed the right, based upon the offer brochures by notice dated 15 September, 1986 and ultimately filed the Suit on 19 November, 1986. There was no ad interim order and/or any protection and/or during the pendency of the Suit till its decision. By the reasoned judgment and order, the learned Single Judge on 24-10-2008, after considering all the 14 issues together, dismissed the Suit with costs and has held as under :

(a) The Plaintiff failed to prove that Defendant No. 1 has advertised to sell the flats at BAF-HIRA Nagar, Marve Road, Malad (West), Mumbai 400064 on 1-7-1979; (b) The Plaintiff failed to prove that he had agreed to purchase one flat bearing No. 75/A/20, two room kitchen area about 450 sq.ft on 4th floor, building No. 5, "A" Wing at Bafna Nagar, Malad (West), Mumbai or any other such number as per the advertisement given by defendant No. 1; and is ready and willing to pay the balance amount of price fixed for the flat by defendant Nos. 1 to 3; (c) The Plaintiff failed to prove that in pursuance to the contract to sell the flat as per advertisement, the defendant No. 1 accepted part of the sale price of Rs. 5,500/- from the plaintiff on 3-7-1979; (d) The plaintiff is not entitled to decree for possession of the flat and for specific performance of the contract/agreement of sale to him by defendants 1 to 3; (e) The Plaintiff is not entitled to in lieu of decree for specific performance as loss and damages for the breach of agreement committed by the defendants 1 to 3 for sale in favour of Plaintiff; (f) Defendant No. 4 proved that he was a bona fide purchaser of the building which was sold by Defendant No. 1 and (g) The Plaintiff failed to prove that the Suit is within limitation and is bad for non-joinder of necessary parties.

6. After hearing both the parties and going through the documents and considering the rival submissions so made and even after revisiting the issues so raised, we have to see whether case is made out by the Appellant to interfere with the reasoned judgment and order passed by the learned Single Judge by exercising the judicial discretion, while dismissing the Suit for specific performance of the contract.

7. First and foremost issue is about the limitation in view of Article 54 of the Limitation Act, 1963. Admittedly, the alleged acknowledgment/agreement was entered into on 2 July, 1979. The amount of Rs. 5,500/- was paid by a cheque to Respondent No. 1 towards the earnest money through M/s Laxmi Housing Agency, alleged to be the sole agent. There was no details and description of the flat as there was no constructed building. There was no specific agreement entered into at any point of time. The building construction was never

commenced and/or completed by Respondent No. 1. After 3 November, 1979 another letter was addressed by the Appellant/Plaintiff on 17 January, 1981 and a copy was also sent to M/s Laxmi Housing Agency referring to several telephonic conversations. From January, 1981 upto 14 August, 1981 various meetings, took place as alleged. By referring to letter dated 14 August, 1981 and the meeting, the Appellant by telegram dated 23 August, 1981, refused to accept the modification of the terms with regard to cost and consideration of the flat and insisted for original terms and conditions only. The Respondents 1 to 3 and M/s Laxmi Housing Agency never accepted and/or agreed to proceed on the original terms and conditions at any point of time. The Appellant by a notice dated 18 October, 1982 again requested to execute the agreement as per the original offer. Admittedly, no legal proceedings were initiated by the Appellant except filing of the suit on 19 November, 1986, after exchanges of the legal notices between the parties. If the Appellant agreed for the terms and conditions which provide that the possession would be given within two years and later on refused to accept the modified terms and conditions as admittedly opposed by the communication/telegram and still waited for more than three years and filed the suit in the year 1986, in our view, is not entitled for any relief in such suit merely on the basis of alleged oral assurances and communications. Once the agreement is in writing, oral communication and/or modification, even if any, needs to be substantiated by the parties one who wants to rely upon such oral communication/agreement. The Appellant failed to prove the same. The contention that the time was not fixed for performance and there was no notice of refusal from the Respondents side, is unacceptable in the facts and circumstances of the case specifically when there was no specific agreement executed between the parties except the payment/acknowledgment of earnest money based upon the offer. The legal notice dated 18 October, 1982 was sent by the Appellant to the Respondents. Therefore even the last notice of 8 August, 1986 could not save the limitation. The Suit as filed and as observed by the learned Single Judge was time barred. The learned Judge by giving detailed reasons rightly relied upon the material on record including the telegram whereby the Appellant/plaintiff has insisted to execute the agreement, based upon the original offer and even threatened to take action for damages. The contents of the said telegram are not in dispute. The Appellant had knowledge about the intention of the Respondents, if any, not to perform their part of the contract based upon offer conditions. There is no force in the contention that the Suit as filed within a year from the last notice dated 8 August, 1986 on the basis of *Motilal Jain vs. Ramdasi Devi*, 2000 (4) Civil L.J. 524 (SC) : (2000) 6 SCC 420 is maintainable. The facts are totally different and distinct and distinguishable. Merely because the Appellant had chosen to issue notice asking the Respondents to execute the sale deed in the year 1986, in our view no way save the Suit as filed on 19 November, 1986.

8. Importantly, the specific performance can be granted of immovable property based upon the clear terms and conditions along with the description of the property. In the present case, there was no specific agreement between the parties except the alleged acknowledgment of receipt of the earnest money. There was no specific agreement executed at any point of time. There is sufficient material on record to show that the Respondent never commenced the

construction immediately. Therefore, there was no occasion to fix further price of flat and/or its instalment, if any. Therefore, there was no final agreement for consideration of the flat. The construction never took place within a span of two years. As noted, the Appellant even failed to agree for modified terms and conditions including the payment so proposed. The building No. 5 was never constructed at any point of time. As noted, the acknowledgment refers to flat in building No. 5. In view of this matter, as there is clear lacking of terms and conditions as well as description of the property and as there exists no such building No. 5, apart from delay, and as there was no interim order or protection operating in favour of the Appellant, at any point of time and Respondent No. 4 being subsequent purchaser, completed the construction and third party rights have already been created and there exists no such flat No. 20 in building No. 5, "A" Wing as claimed and if the specific performance as claimed, even if any just cannot be granted and as the leaned Judge has exercised the discretion, we also see no reason to interfere with the judgment and order so passed.

**9.** The Court cannot pass a judgment or decree which is unexecutable specially in a Suit for specific performance. Therefore, whether there was valid and/or binding contract as the Appellant based upon the offer/brochures made the payment through the exclusive agent, which is also not proved, is also loses its importance in the present facts and circumstances of the case. The readiness and willingness which is also basic element of such Suit for specific performance, as rightly observed by the leaned Single Judge, by giving reason and; we also confirm, after going through the material and documents on record that the Appellant failed to prove that he was ready and willing continuously before filing of the Suit and even thereafter. The leaned Judge has rightly relied on *N. P. Thirugnanam vs. Dr. R. Jagan Mohan Rao, (1995) 5 SCC 115*. The issue with regard to readiness and willingness is always on the foundation of valid and clear executable agreement. If there is no clear terms agreed with regard to description of the property and also of consideration, the submission with regard to the willingness and readiness is also unacceptable.

**10.** Admittedly the construction was commenced by Respondent No. 4 with whom there was no agreement of the Appellant of any kind. By agreement dated 24 August, 1984, Respondent No. 4 purchased the property from Respondents 1 to 3. The third party rights have been created even thereafter. The Suit was filed in the year 1986. The Appellant's claim, therefore to grant a decree as prayed of specific performance declaring the agreement/acknowledgment of the year 1979 valid and binding, in our view also cannot be granted.

**11.** Respondents 1 to 3, in view of above, was not in a position to execute and/or give the possession of the alleged flat as the premises itself was sold to Respondent No. 4. There was no agreement and/or challenge raised within limitation and no interim relief sought at the appropriate stage, Respondent No. 4 was also not in a position to give possession of the flat as there was no specific agreement executed between the Appellant and Respondent No. 4, specially when Respondent No. 4, as noted above, was a bona fide purchaser of the building. In totality, therefore, the dismissal of the Suit by the learned Judge cannot be faulted with.

**12.** Once it is held that the Appellant/plaintiff is not entitled to decree for possession of the flat and for specific performance of the agreement of sale, the learned Judge, as the Appellant/plaintiff failed to prove, by placing the material evidence in support of his alleged loss and damages for the breach of the agreement by Defendants 1 to 3 and thereby rightly dismissed the claim of damages also.

**13.** Having once observed above that the Appellant/plaintiff failed to prove his case and as not entitled for any decree for possession on the basis of the agreement, and as the Suit itself is barred by the limitation, there was no question of granting any compensation for the breach as alleged, except refund of earnest money. There is no question of any direction by invoking section 151 of Code of Civil Procedure (CPC) to provide any flat based upon the agreement between the parties. The Appellant's readiness and willingness, as relied, as was not continued at the relevant time, the same cannot be accepted now at this appellate stage of the proceedings basically when the Suit of specific performance as filed itself is dismissed by the learned Judge with reasoned order.

**14.** Having once observed above, in our view also, based upon the Ready Reckoner, the claimed compensation cannot be awarded. Here, there is no question of denial of right to the Appellant on the basis of alleged mere price rise, but in view of above reasoning itself. The Appellant failed to prove the agreement dated 24 August, 1984 was bogus or sham document to defraud his claim and/or it was created with mala fide intention. The Appellant/plaintiff did not examine any other witness in support of his allegations except his own testimony. The Appellant also failed to prove that the Respondents have no better title of the property. The Appellant was not entitled for specific performance based upon vague, unclear agreement, specifically with regard to the description of the property. Respondent No. 4's reply with whom never executed any agreement by the Appellant, the denial, even if any, cannot bring the Suit within limitation based upon the agreement of the year 1979 executed between the Appellant and Respondents 1 to 3.

**15.** In view of above reasoning and as facts and circumstances are distinct and distinguishable, the other citation so relied upon by the Appellant, in our view also no way assist the Appellant to set aside the judgment and decree passed by the learned Judge.

**16.** However, the learned counsel for Respondents, on instructions, without prejudice to their rights and contentions expressed their willingness to pay a lump sum amount of Rs. 1,67,500/- towards damages as prayed in prayer (e) and further ready to pay an interest on the said amount from the date of the order, if any. The statement is also made to make the payment of earnest amount of Rs. 5,500/- as prayed in prayer clause (d) with 10% interest per annum from 3 July, 1979. The Appellant denied this offer. In our opinion, however, in view of the statement, made on behalf of the Defendants-Respondents, reliefs in terms of prayer clauses (d) and (e) of the plaint can be granted to the Appellant. The appeal is dismissed. However, in view of the statement made on behalf of the Defendants-Respondents, the Defendants are directed to pay an amount of Rs. 1,67,500/- with interest at the rate of 10% per annum from the date of this order till realisation. The Defendants-Respondents are also directed to pay Rs. 5,500/-

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with interest at the rate of 10% per annum from 3-7-1979 till the date of payment. The payment be made within a period of four weeks from today.

17. The Appeal is disposed of in the above terms. There shall be no order as to costs.

*Order accordingly.*

CLAIM OF TENANCY : HAS TO BE PROVED BY THE TENANT

(G. S. Godbole, J.)

RAJARAM HIRALAL BHOI since deceased through his

LRs. SMT. GOPABAI RAJARAM BHOI and others

*Petitioners.*

vs.

CHINTAMAN WAMAN SATHE since deceased

through his LR. PRAKASH CHINTAMAN SATHE

and others

*Respondents.*

**Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 70(b) —**  
*Claim of tenancy — Burden of proof is on the tenant.*

No tenancy agreement has been produced by the petitioners. Earlier tenancy application filed by the petitioners in the year 1973 was unconditionally withdrawn. Thus, the claim of tenancy which was made in the year 1973 having been given up unconditionally, it was not open for the petitioners to file fresh application in the year 1980. Such a fresh application is clearly barred. Apart from these, two nokarnamas on record clearly show that the relationship of landlord and tenant did not exist between the parties but relationship was of owner and servant. There is absolutely no explanation about the said nokarnamas and merely because nokarnamas were not executed for the subsequent years, it could not have been held that the petitioners became tenants. Petitioners have miserably failed in proving their claims of tenancy and the Additional Collector and the MRT were justified in holding that the petitioners have failed to prove their claims. (Para 9)

For petitioners : *Shrishail Sakhare*

For respondent Nos. 1(C to I) and 2(A to C) : *Akshay Shinde* instructed by  
*A. M. Kulkarni*

**JUDGMENT** :— Heard Mr. Sakhare, Advocate for Petitioners and Shri Shinde Advocate for Respondents.

2. Petitioners are original Applicants in Tenancy Case No. 108 of 1984 filed before the Additional Tahasildar and ALT, South Solapur under section 70(b) of the Bombay Tenancy and Agricultural Lands Act, 1948. The Petitioners had earlier filed a similar application in the year 1973 which was withdrawn by them. There were also proceedings under section 145, Criminal Procedure Code in which Magistrate had held that the Respondents landlords were entitled to physical possession. That Suit was also filed in which the Petitioners were unable to prove their physical possession and get injunction. The Petitioners examined themselves and two other witnesses and did not produce any other documentary evidence in the form of a tenancy agreement or any rent receipt. In the cross-examination the Petitioners admitted that no rent receipts were available with

W. P. No. 3856 of 1988 decided on 6-1-2012. (Bombay)