(2014) 10 BOM CK 0151

In the Bombay High Court

Case No : Second Appeal No. 620 of 1991

Balu Karbhari Dhikale and Others APPELLANT

Vs

Kisan Deoram Jadhav and Others RESPONDENT

Date of Decision : 14-10-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 62

Citation : (2014) 10 BOM CK 0151

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : A.Y. Sakhare, Senior Advocate instructed by P.N. Joshi, Advocates for the Appellant

Judgement

A.B. Chaudhari, J.—Being aggrieved by the judgment and decree dated 26th July 1991 passed by the Additional District Judge, Nashik in Regular Civil Appeal No. 330 of 1987 by which the lower Appellate Court reversed the judgment and decree dated 29th October 1986 made by the Trial Court in Regular Civil Suit No. 100 of 1983, the present second appeal was filed by the unsuccessful Plaintiffs in this court.

FACTS:

2. The Appellants are the original Plaintiffs who had filed suit for specific performance of contract against the Respondents on the basis of agreement of sale dated 23rd July 1971 Exh. 29 and another agreement dated 3rd April 1972 Exh. 51. In the suit, the Plaintiffs stated that the suit land gut No. 384 situated at Mauje Lakhalgaon, admeasuring 8H 28R of all the Defendants was agreed to be sold to the Plaintiffs for total consideration of Rs. 14000/- out of which the Plaintiffs had paid Rs. 9000/- as earnest amount on the date of agreement dated 23rd July 1971 and that the balance was to be paid after getting necessary permission. The Defendants thereafter needed some more amount and the Plaintiffs paid Rs. 4000/- and obtained another document dated 3rd April 1974

evidencing the payment of Rs. 4000/-. Lastly, the Plaintiffs had paid Rs. 1000/- to the Defendants. Thus total consideration was paid. The Plaintiffs had already received possession under the agreement dated 23rd August 1971 and continued to be in possession and also got their names entered into the revenue record but when they asked the Defendants to execute a registered sale deed the Defendants avoided to do so. Hence, the suit was filed. The Plaintiffs even thereafter paid Rs. 2369.96 towards bonding charges since the suit land was encumbered. The plaintiffs improved the land. The balance of convenience is in favour of the Plaintiffs and the Defendants would not be put to any hardship.

3. The Defendants appeared in response to the suit summons and filed their written statement and also set up a counter claim for possession of the suit property. It was the case of the Defendants that the agreement of sale was a nominal transaction, never to be acted upon and the Defendants only received Rs. 9000/- on 23rd July 1971 Exh. 29 and nothing more and the document was executed by way of collateral security. No other document was thereafter executed nor any thumb impression was put thereon. The transaction being in the nature of money lending; the Plaintiffs were not entitled to any the decree for specific performance. The Defendants do not have any land except the suit land. The prices of the suit land at the relevant time was quite high and the Plaintiffs should not be allowed to be in possession of the land. The suit of the Plaintiffs should be dismissed and the counter claim for possession made by the Defendants should be decreed.

4. The learned Trial Judge had framed as many as 10 issues and thereafter the parties went on trial. The learned Trial Judge, after hearing the parties, decreed the suit of the Plaintiffs for specific performance of contract and directed the Defendants to execute the sale deed in favour of the Plaintiffs and dismissed the counter claim as a consequence by the judgment and decree dated 29th October 1986.

5. The Respondents preferred appeal before the Additional District Judge, Nasik being Regular Civil Appeal No. 330 of 1987. The learned lower Appellate Court framed as many as seven points for determination and held that the suit transaction was a loan transaction, and the agreement document Exh. 29 was a nominal document not to be acted upon, the Plaintiffs were not ready and willing to perform their part of contract, the suit was not within limitation and finally that the Defendants were entitled to possession from the Plaintiffs. Thus, the lower Appellate Court allowed the appeal and dismissed the suit filed by the Appellants/Plaintiffs and decreed the counter claim for possession filed by the Defendants by judgment and decree dated 26th July 1991.

ARGUMENTS:

6. In support of the appeal, Mr. A.Y. Sakhare, learned senior counsel with Mr. P.N. Joshi, Advocate made the following submissions:

a) The learned lower Appellate Court committed a serious error in law in holding that the suit transaction was a loan transaction and the reasons given by the lower Appellate Court are fully faulty. The said finding recorded by the lower Appellate Court in answer to point No. 1 is wholly perverse and contrary to the pleadings and evidence on record and is required to be set aside.

b) The lower Appellate Court has held that the suit agreement Exh. 29 was a nominal document not to be acted upon, when as a matter of act there was absolutely no evidence to that effect nor the reasons recorded by the lower Appellate Court for that purpose are at all germane and to say the least, the finding is perverse.

c) The lower Appellate Court committed a serious error in holding that the Plaintiffs were not ready and willing to perform their part of contract clearly ignoring the fact that there was credible and trustworthy evidence on record that the entire amount of Rs. 14000/- was paid and the Appellants have been in possession, admittedly since the date of agreement Exh. 29 which is a registered document. Perusal of Exh. 29 does not show any whisper about loan transaction. On the contrary, the recitals of Exh. 29 which is a registered document unequivocally show that having received major amount of Rs. 9000/- on that day the possession of the suit property was delivered to the Appellants. Not only that, after possession was delivered and agreement was registered, the Respondents executed another agreement Exh. 51 when an additional amount of Rs. 4000/- was paid and the essence of time which was mentioned in Exh. 29 was referred in the sense that the sale deed was then required to be executed as per the choice of the Appellants Plaintiffs and as per his desire and demand therefor. In other words, by the document Exh. 51, upon receipt of Rs. 4000/-, the condition of time as the essence of contract was removed by unequivocal consent of the Respondents. According to Mr. Sakhare, the lower Appellate Court, thus made an error in ignoring all these important aspects of the matter in recording answer to point No. 3 about the readiness and willingness.

d) The lower Appellate Court committed an error in holding that the suit was barred by limitation. It is well settled legal position that the time is not essence of contract in respect of the immovable properties. That apart, in the instant case, though Exh. 29 mentioned the time of six months for completion of sale deed, the same stood extended on receipt of Rs. 4000/- as per the consent of the Defendants themselves as clearly recited in Exh. 51. The Appellants Plaintiffs got the cause of action to file the suit for specific performance of contract only when after more than 10 years or rather a decade having allowed the Appellants to be in possession of the suit property, suddenly the Respondents demanded possession and refused to perform their part of the contract, though the entire amount was received by the Defendants. That was the reason and cause of action, and hence, the suit was well within limitation.

e) The lower Appellate Court committed an error as a sequel in decreeing the counter claim filed by the Respondents Defendants for possession of the suit property. The judgment and decree made by the lower Appellate Court is thus illegal.

f) Mr. Sakhare, the learned senior counsel then submitted that the document Exh. 51, in the first place cannot be termed as a "Novation" contemplated by section 62 of the Indian Contract Act. Even assuming it to be so, the fact remains that Exh. 51 has been executed by all the Defendants ratifying or agreeing the terms mentioned therein and therefore even otherwise the terms and conditions mentioned in Exh. 51 were made with clear cut consent of the Respondents Defendants. The counsel for the Appellants finally submitted that the judgment and decree made by the lower Appellate Court is required to be set aside.

7. Per contra, Mr. A.V. Anturkar, the learned senior counsel with Mr. S.B. Deshmukh supported the impugned judgment and decree and made the following submissions:

a) The document Exh. 51 is in the nature of "novation" for which there is absolutely no pleading. In fact there was no execution of Execution Exh. 51 which was denied. What is pleaded in the plaint is receipt of Rs. 4000/- by the Respondents recorded in Exh. 51 and nothing more. In the absence of any pleading about "novation" and in view of paragraph 14 of the deposition of P.W. 1 Barku, it will have to be concluded that the law as to "novation" clearly destroyed the case of the Appellants.

b) The Plaintiffs'' witness admitted that Exh. 51 was never shown to the Advocate when the plaint was drafted which clearly means that the same was not in existence but was brought in existence with a view to bring the suit within limitation. The document Exh. 51 was therefore rightly rejected by the lower Appellate Court and if document Exh. 51 is seen, the period of six months had already lapsed and since the time was essence of contract the suit was clearly barred by limitation.

c) The contract between the parties by Exh. 29 was arrived amongst them in which there was mention about the period of six months for completion of contract. Admittedly, the sale deed was not executed within six months and therefore the suit was clearly barred by limitation. The finding recorded by the lower Appellate Court about the readiness and willingness and that the Plaintiffs should have performed their part of the contract is legal, correct and proper and it is based on evidence. It is only after the demand for possession was made by legal notice, the suit came to be filed by the Appellants/Plaintiffs who had kept quiet for a decade. That clearly indicated that they were not ready and willing to perform their part of the contract and that is why for 10 years they did not file the suit which was obviously barred by the law of limitation.

d) The cause of action obviously arose before 29th August 1978 and therefore, the suit that was filed on 1st February 1983 was hopelessly barred by law of limitation. The theory propounded by the Appellants Plaintiffs that the amount of Rs. 1000/- was paid has been held by the lower Appellate Court to be false. That being so, the Plaintiffs who went to the court with a false plea, was not entitled to discretionary and equitable relief of specific performance of contract and therefore, the lower Appellate Court was right in dismissing the suit.

e) The question whether there was a novation of the agreement is a mixed question of law and fact and cannot take shape of substantial question of law as required under section 100 of the Code of Civil Procedure, 1908. The Plaintiffs, in paragraph 14 of his cross-examination, clearly admitted about their failure to show readiness and willingness. In support of his submission, he relied on the following decisions:

(i) Syed and Company & ors...vs.. State of Jammu & Kashmir & ors.; 1995 Supp (4) SCC 422.

(ii) Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others, .

(iii) Lata Construction and Others Vs. Dr. Rameshchandra Ramniklal Shah and Another, .

(iv) Purbanchal Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Another, .

(v) J.P. Builders and Another Vs. A. Ramadas Rao and Another, .

CONSIDERATION:

8. Upon hearing learned counsel for the rival parties, I reframe the following substantial questions of law:

(i) Whether the finding recorded by the lower appellate court that the suit transaction under agreement Exh.-29 was loan transaction, not to be acted upon, is perverse?

Answer: Yes.

(ii) Whether the lower appellate Court committed an error in holding that the appellant was not ready and willing to perform his part of the contract on the ground that there was no documentary proof for payment of Rs. 1,000/-?

Answer: Yes.

(iii) Whether the lower appellate court committed error in rejecting document Exh.-51 dated 03.04.1972 under which the amount of Rs. 4,000/- was paid by the appellant and no specific time for performance of the contract was fixed?

Answer: Yes.

(iv) Whether Exh.-51 dated 03.04.1972 is in the nature of "novation of contract" within the meaning of Section 62 of the Contract Act?

Answer: No.

(v) Whether the lower appellate court committed error in holding that the suit filed by the appellant was barred by limitation?

Answer:-Yes, suit was within limitation.

(vi) Whether the lower appellate court committed error in ordering restoration of possession of the suit land from the appellant to the respondent?

Answer: Yes.

(vii) What order?

Answer: Second Appeal is allowed.

9. As to question no. (i):

There is no dispute that the suit agreement Exh.-29, a registered agreement was executed for sale of suit land for total consideration of Rs. 14,000/- to the appellant by the respondent and that an amount of Rs. 9,000/- was paid on the very day as earnest amount. It is also not in dispute that the appellant-plaintiff was duly placed in possession of the suit land upon registration of the agreement Exh.-29 and accordingly, from the date of agreement namely; 23.08.1971, the appellant-plaintiff is in possession of the suit land. Thus, the execution of Exh.-29 is admitted by the respondent. The trial Court found that the defence raised by respondent about the said transaction under Exh.-29 as loan transaction could not be accepted and the defence was clearly after thought. The lower appellate court, in order to hold that the transaction was one of loan transaction, recorded the following reasons, which I quote from paragraph 11 of his judgment:

"11. .....It appears from the record that both the parties have not even applied for the necessary permission for the suit transaction though it is clearly mentioned in the agreement Exh. 29 that necessary permission is to be sought by both the parties for the sale and purchase of the suit land. It is to note that 7/12 extract of the suit Gat No. 384 is at Exh. 30. It shows that area of Gat No. 384 is 7 Hectares 75 R plus pot-Kharab 7 R. Exh. 30 shows that the entire area of Gat No. 384 is 7 Hectares and 83 R land, which is apparently more than the land mentioned in 7/12 extract Exh. 30. The Plaintiff Barku stated in his cross-examination that he had seen the 7/12 extract at the time of writing of the suit document i.e. Exh. 29 but he could not explain as to why there is a difference in actual area of the suit land mentioned in 7/12 extract Exh. 30 and agreement Exh. 29. Had it been the real transaction of sale and purchase between the Plaintiffs and defendants, then the Plaintiffs would have taken proper care to verify the exact area of the land by going through the 7/12 extract of the suit land and also mentioned the correct area of the suit gat number in agreement Exh. 29. The intending purchaser ought to have taken care to verify the documents, area and other details before entering into any agreement and then mentioned the same correctly in the document. Further, the Plaintiffs would have insisted the Defendants and they would have jointly applied for necessary permission to the competent authority for the suit transaction. The Plaintiffs would have taken care to verify whether there is any loan charged on the suit land and if it is so, the same ought to have mentioned in the agreement Exh. 29.

There is nothing on record to show that the Plaintiffs have verified the correct area of the suit land and also any loan charged on the suit land. They have also not applied for necessary permission. There is nothing on record to show that the Plaintiffs have made any attempt to obtain the sale-deed of the suit from the Defendants within seven months from the date of agreement Exh. 29. All these taken together leads me to the only conclusion that the suit transaction was not out and soul sale and purchase transaction...."

10. Looking to the above reasons, it is clear that;

(i) The lower appellate court has held that the transaction should be termed as loan transaction because the appellant did not take proper care to verify the exact area of the land by going through 7/12 extract of the suit land compared with the area mentioned in Exh.-29.

(ii) The appellant should have taken care to verify document, area and other details before entering into agreement Exh.-29.

(iii) Further, the plaintiff should have insisted the defendant for jointly applying for necessary permission to the competent authority.

(iv) The plaintiff should have taken care to verify whether there is loan charge on the suit land.

(v) There is nothing on record to show that the plaintiff made an attempt to obtain sale deeds of the suit land within seven moths from the date of agreement Exh.-29.

11. These are the only reasons given for holding that the transaction was the loan transaction. In my opinion, all the above reasons are absurd and have no relevance whatsoever to find out whether a particular transaction is loan transaction or not. The trial court, on the contrary, gave following reasons in para 17 and 19, which I quote as under:

"17. When the Defendants want to come out with the case that the suit transaction is the monetary transaction and the document was executed nominally, it was necessary for them to examine any of the attesting witnesses or the scribe to prove their case. Surprisingly enough, the Defendants have opted not to examine any witness. In the present case, the execution of the document is admitted position. It is also not disputed that the possession of the suit land has been handed over the Plaintiffs in persuasion of the documents and the natural conclusion would be that the document was acted upon. We find from the evidence on record and more particularly the 7/12 extract show that even the transaction itself was got mutated in the revenue record and the same of the Plaintiffs were mutated in the revenue record and the transaction was shown as illegal transaction for want of necessary permission under the Bombay Prevention of the Fragmentation and Consolidation of Holdings Act, (briefly referred to as the B.P.F. & C.H. Act). Plaintiffs have produced voluminous evidence to show that the terms of the document were acted upon and he was put into the possession of the suit land and it is pertinent to note that the Defendants have come out with the case in the written statement that he was advanced only Rs. 9,000 under the suit document Exh. 29 and he handed over the possession of the suit land to the Plaintiffs. It is further his case that the payments of this amount was to be adjusted the possession of the suit land was to be given to the Defendants. In fact, there is no evidence from the side of the Defendants except his oral evidence from the side of the Defendants except his oral interested words to show that any such condition was agreed between the parties but besides this there appears to be contrary suggestions to the Plaintiff in his cross examination when the Plaintiff Barku was cross examined it has been suggested to him in para 13 of his cross examination that the agreement between the party was that the Plaintiff would not charge any interest on the amount advanced and in lieu of that the Plaintiff should take income from the land and it is further suggested that after the return of the amount, the Plaintiff was to return the possession of the suit land to the Defendants. In my view this suggestion itself shows that the Defendants themselves are not definite as to what exactly they want to say and plead about the suit document. The very fact that 2 different versions have been suggested so far as the execution of the document is concerned, would go to show that the Defendants'' theory is rather after thought.

18 .....

19. On the other hand, we find that the suit document was executed to be the Defendants with open eyes and they were under the obligation to execute the sale deed in favour of the Plaintiffs. It is to be noted that the Defendants have admitted in the cross examination that prior to and after the execution of the suit document they have sold out some of the lands and so they were very well aware of the fact of execution of the sale deed. Under these circumstances, I find that the Plaintiff have proved that the Defendants have agreed to sell the suit land to them for Rs. 14,000 and they have paid Rs. 9,000 to the Defendants have failed to prove that the suit transaction is the money lending transaction."

12. The reasons given by the trial Court in the last part of para 17 may not go well but the earlier part of the reasons in para 17 and the reasons in para 19 are good enough to hold that the transaction in question was not a loan transaction. That apart, there are additional reasons, which I find upon going through the pleadings and evidence of the parties to support the inference that the transaction in question was not loan transaction. The agreement Exh.-29 was executed on 23.08.1971 and the notice to demand possession was issued for the first time by the defendant on 28.12.1982 Exh.-66 i.e. more than 11 years. While saying about loan transaction in the evidence, it is stated by the defendant that within a period of 7-8 years, the entire amount could be said to have been repaid from the income from the suit land reaped by the appellant-plaintiff. He further stated in the evidence that the net income i.e. excluding the expenses from the suit land admeasuring 8 Hectares 28 R could not be less than Rs. 3000/- per annum. Considering this evidence, it is clear that the amount of Rs. 9,000/-

admittedly received, would stand repaid within the period of maximum 3-4 years from 23.08.1971 i.e. by 23.08.1975. Had the transaction really being of the nature of loan transaction, in the light of the said evidence, the defendant would not have waited asking the possession back for the first time in the year 1982. The defendant very well knew that the transaction of agreement was made by a registered document before the Sub Registrar. That apart, the defendant did not examine any of the attesting witnesses or any corroborative evidence on Exh.-29 to create even a remote doubt about nature of transaction. The defence was that Rs. 9,000/- was received on the date of agreement Exh.-29 for the marriage of defendant no. 1''s daughter. But there are absolutely no details anywhere in the pleadings or evidence about the marriage of which daughter, when the marriage took place and so on so forth. In Maharashtra, in the normal course in villages, the marriages used to take place in the summer season, in the Seventies/ Eighties, particularly, in the case of the agriculturists, while Rs. 9000/- was said to have been received in the rainy season in the month of August, 1971. Thereafter, Exh.-51 is the document under which Rs. 4,000/- is said to have been paid by the appellant to the defendant. Exh.-51 is dated 03.04.1972 and the evidence is that Rs. 4,000/- was received for household expenses (not for marriage expenses). Therefore, in the absence of necessary details about the purpose for which the money was received, the lower appellate court was not justified at all in holding that the transaction was a loan transaction. If it were the loan transaction, it was necessary to have the pleadings and the evidence as to what were the terms and conditions of the loan, interest and the period of repayment etc. Thus, the defence was clearly afterthought. Hence, question no. 1 will have to be answered in the affirmative.

13. As to question nos. 2 & 3:

It is an admitted position that under the registered agreement Exh.-29 in respect of the suit property, the respondent-defendant had received Rs. 9,000/- out of total agreed consideration of Rs. 14,000/-. However, there is a dispute about the receipt of Rs. 4,000/- under Exh.-51 on 03.04.1972 i.e. eight months after execution of Exh.-29-agreement. Mr. Anturkar, learned Senior Counsel vehemently submitted that, the claim that an amount of Rs. 4,000/- and of Rs. 1,000/- has been paid by the appellants was not proved and, therefore, according to him, the trial court made an error in holding that the same was paid. It clearly indicated that there was no readiness and willingness. The trial Court in paragraph 23 has discussed the said evidence and accepted both payments i.e. payment of Rs. 4,000/- under Exh.-51 and payment of Rs. 1,000/- proved through oral evidence. Para 23 of the judgment of the trial court reads thus:

"23. Issue No. 4:-So far as readiness and willingness on the part of the Plaintiff is concerned and find that after the execution of the suit document Exh. 29, the Plaintiffs have advanced Rs. 4,000 on one occasion and Rs. 1,000 on other occasion to the Defendants. So far as the advanced of Rs. 4,000 is concerned, there is document Exh. 51. Thus document has been executed by the Defendants. The witness Dagadu Shabaji has supported contents of this document and though it has been suggested by the Defendants in the Written Statement that they did not execute any such document or they did not give any thumb impression on the documents. Defendant Ramnath has come out with the case in his evidence that their thumb impressions were obtained on this document when it was blank and the contents were subsequently written. It is no doubt true that this document has not been written in proper form but it has come in the evidence that the said document has not been written by professional scribe but it was written by some layman. It is to be noted that this document Exh. 51 was purchased by Kisan Deoram. No excuse has been put forth as to why the stamp was purchased and as to why the Defendants have put their thumb impression on it. Under these circumstances, I hold that the Plaintiffs have proved that execution of the document Exh. 51 and the advancement of amount under it. So far as the advancement as such, I feel that the Plaintiffs should be believed on this count when the version are supported by the evidence on record. We find that the Defendants have come out with totally unacceptable case and I do not wish to accept their evidence when they say that they did not receive any amount of Rs. 1,000 from the Plaintiffs. So I find that the Plaintiffs have proved the total advancement of Rs. 14,000 to the Defendants. I find that the advancement of amount from time to time is an indication of the readiness and willingness on the part of the Plaintiffs to complete the transaction. I also find that the act on the part of the plaintiff to get mutated their names in the record of rights is also act which shows that the Plaintiffs were interested in getting specific performance."

The lower appellate Court has discarded the document Exh.-51 for the reasons which appear in paragraph 13 of its judgment. The relevant portion of the reasons from paragraph 13 reads thus:

"13. .....If we peruse the document Exh. 51 dated 3rd April, 1972, it creates doubt whether it was first scribed and thereafter signatures and/or thumb impression of the Defendants were obtained or the signatures and thumb impressions were obtained first and thereafter, the contents were scribed. It is the defence of the Defendants that the thumb impressions and signatures were obtained in the field by representing them that the document was needed for getting the permission of canal water. In document Exh. 51, some scoring without any attestation appears. Further in the last line after the word the following sentence appears to be, is added. and immediately below the above sentence, thumb impression appears and there is a mention that it is thumb impression of Kisan Deoram Jadhav. If we read the document Exh. 51, the above Marathi sentence in the lines of the document Exh. 51 clearly indicates that it was added by somebody afterwards. It supports the defence of the Defendants that their thumb impressions and signatures were obtained in their field on the blank stamp paper. Further in Exh. 51 there is no mention about the time to execute the sale-deed. "

14. The next submission made by Mr. Anturkar, learned Senior Counsel, that the appellants admitted that the document Exh.-51 was never shown to his Advocate while drafting the plaint and, therefore, the document was rightly rejected by the lower appellate Court does not appeal to me. It may be true that there was no mention about document Exh.-51 in the plaint but then payment of Rs. 4,000/- on 03.04.1972 (as mentioned in Exh.-51) was certainly mentioned in the plaint and also stated in reply notice dated 10.01.1983 Exh.-49. So also, there was mention about Rs. 1,000/- therein. It was, therefore, not necessary that the appellants should have pleaded the document Exh. 51 in the plaint. The document Exh.-51 has been independently proved in evidence by the appellants. In support of the evidence about payment of Rs. 1,000/-, the appellants examined Dagadu Jadhav (PW2) to prove the payment of Rs. 4,000/- as well as Rs. 1,000/- so also Exh.-51. Perusal of his cross-examination, to my mind, does not show anything to disbelieve the evidence of payment of Rs. 4,000/- so also of Rs. 1,000/-.

15. Again, the reasons recorded by lower appellate court, to my mind, are perverse. Exh.-51 has been rejected by him, inter alia, about some scoring therein without any attestation for insertion of the words, "Delivery of possession on 04.08.1971 and confirmation thereof." This is absolutely irrelevant because the respondents themselves have admitted that possession was delivered on 23.08.1971 (Exh.-29) when the said registered agreement was executed and it is not the case of the defendants that the possession was taken back by them at any point of time. Therefore, even assuming that there was scoring etc. in Exh.-51 that too in relation to possession, the same did not make any difference and at any rate, the respondents did not examine any person to disprove Exh.-51 because Exh.-51 was duly proved as can be seen from the evidence discussed by the trial court. This being the only reason for discarding Exh.-51, I hold that the finding is perverse for rejecting Exh.-51 and consequently that amount of Rs. 4,000/- was received by defendants making the total payment of Rs. 13,000/-. Insofar as the balance amount of Rs. 1,000/- is concerned, it is true that there is no document to show the payment of Rs. 1,000/- but then it is not necessary that there should have been a document for payment of Rs. 1,000/-, particularly when the oral evidence of the witness is trustworthy in that behalf. The trial Court accepted the oral evidence. The lower appellate court has not given any good reason for rejecting the said oral evidence accepted by the trial Court. I have checked up the oral evidence. The following evidence of the plaintiff-Barku has not at all been shattered in the cross-examination by defendants.

"3. .....Thereafter the deft. Demanded Rs. 1000/- I told them to execute the sale deed. But they told us that they are going to extend the time and there will be no harm in advancing the amount. The debts . wanted this amount of Rs. 1000/- for the installation of mother pump. I paid the same to the defendant at Lakhalgaon. At that time Dagadu Shaba Jadhav and the defendants were present. No document was paid in respect of this payment. Accordingly Rs. 14000/- were paid to the defendants. The amounts were advanced from time to time as they were in need of amounts."

16. To conclude, in my opinion, the trial court rightly held that the entire amount of Rs. 14,000/- was paid as per the agreement, which was the total consideration agreed and nothing remained to be done thereafter. Merely because the appellants did not ask for specific performance of contract till they received the notice from the respondents, in the above facts and circumstances namely; the entire consideration of Rs. 14,000/- was paid and appellants were in possession of the suit property from the day one, the inference drawn by lower appellate Court that they were not ready and willing to perform their part of contract is illegal. It is held in the case of Hamzabi and Others Vs. Syed Karimuddin and Others, , in which the apex Court referred to a decision in Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons, , wherein in paragraph, it is held thus:

"The defendant and his predecessor in interest were willing to perform their part of the contract. As a matter of fact, they have performed the whole of it. All that remains to be done is the execution of a lease deed by the lessor in favour of the lessee and of getting it registered."

I, thus, find that the entire amount of consideration stood paid to the respondents and that is why they had no reason whatsoever to demand possession but suddenly after 11 years, the respondents woke up and issued notice demanding the possession, instead of showing readiness and willing to execute the sale deed. For these reasons, therefore, question nos. 2 and 3 will have to be answered in the affirmative.

17. As to question no. 4:

Mr. Anturkar, learned Senior Advocate has raised the question with reference to document Exh.-51 dated 03.04.1972 that there was novation of contract within the meaning of Section 62 of the Contract Act and, therefore, he relied on the decisions relevant thereto. He, then submitted that the said question is a mixed question of fact and law and cannot be agitated by the appellants. At the outset, I find that the theory of novation of contract was never pleaded in the written statement or counterclaim that was made by respondents nor there was any issue in the trial court nor any arguments were advanced or point for determination before the lower appellate court. It is for the first time Mr. Anturkar, learned Senior Counsel has raised the point about "novation" before this Court. I do not think that such a point of mixed question of law and fact can be allowed to be raised for the first time in the second appellate jurisdiction. Even otherwise, what I find from the record i.e. Exh.-51, in respect of which argument about novation has been made that the same was executed with conscious consent of the respondents. That apart, there is no material change by Exh.-51 to Exh.-29. The parties themselves agreed under Exh.-51 not to have the time as the essence of the contract. Therefore, in any case, section 62 of the Contract Act is not attracted and as such I answer question no. 4 in the negative.

18. As to question no. 5:

The question about limitation namely; the suit was not filed within limitation has been argued by learned counsel for the respondents contending that the objection for limitation was taken in the written statement and was persuaded further. Mr. Anturkar, learned Senior Counsel, invited my attention to paragraphs 3 and 4 of the evidence of PW1-Barku which I quote hereunder:

"3. .....Thereafter the deft. Demanded Rs. 1000/- I told them to execute the sale deed. But they told us that they are going to extend the time and there will be no harm in advancing the amount. The debts. wanted this amount of Rs. 1000/- for the installation of mother pump. I paid the same to the defendant at Lakhalgaon. At that time Dagadu Shaba Jadhav and the defendants were present. No document was paid in respect of this payment. Accordingly Rs. 14000/- were paid to the defendants. The amounts were advanced from time to time as they were in need of amounts.

4. Thereafter I asked the defendant to get executed the sale deed. But they did not execute the same. We were always ready and willing to perform our part of contract to get executed the sale deed. But the defendants did not execute. We are still ready and willing to perform our part of the contract and to get executed the sale deed."

On the basis of the said evidence, he argued that Barku (PW1) clearly knew that after payment of Rs. 1,000/- lastly, for which there was no receipt, the defendants did not execute the sale deed though he had asked for and that the incident occurred sometime in the year 1972 when the payment of Rs. 1,000/- was made and, therefore, the suit was barred by limitation having been filed in the year 1983.

With due respect, I am unable to accept this submission. The written statement does not contain a word about plea of limitation set up in the above manner. Perusal of written statement nowhere shows that the suit was barred by limitation because the defendants had demanded Rs. 1,000/- which they received in the year 1972 and at that time they refused to execute the sale deed and, therefore the suit was barred by limitation. Plea of limitation in that case was required to be set up in this mode and manner. Therefore, in the wake of Exh. 51, which does not provide for any time for execution of sale deed, the suit will have to be held to be within limitation when the entire amount of Rs. 14,000/- was paid to the defendants and the plaintiffs have been in possession of the suit property. Hence, this question will have be answered in the affirmative and the suit will have to be held to be within limitation.

19. As to question no. 6:

As a sequel to the answers to above questions and having held that the lower appellate court committed error in passing the impugned judgment, this question will have to be answered in the affirmative.

20. In the result, I pass the following order:

ORDER

(i) Second Appeal No. 620/1991 is allowed.

(ii) Judgment and order dated 26.07.1991 in Regular Civil Appeal No. 330/1987, passed by 2nd Additional District Judge, Nasik is set aside and judgment and order dated 29.10.1986 in Regular Civil Suit No. 100/1983 passed by 2nd Jt. Civil Judge Jr. Division, Nasik is restored.

No order as to costs.

