

(1)

Spl. Civil Suit No.113/2012 (Jud.)

Received on :- 23.12.2011.

Registered on:- 18.01.2012.

Decided on :- **28.11.2017.**

Duration :- Ys. Ms. Ds.

05 10 16

**IN THE COURT OF 6th ADDL. JUDGE, SMALL CAUSES COURT &
JT. CIVIL JUDGE S.D., PUNE, AT : PUNE.**

(PRESIDED OVER BY S. N. BHOSLE)

SPL.CIVIL SUIT NO.113/2012.

EXH.NO. : 122

- | | | | |
|----|--|---|--------------|
| 1. | Shri. Purushottam Madhav Kulkarni |] | |
| | Age 58 years, Occupation- Business |] | |
| 2. | Shri. Govind Madhav Kulkarni. |] | |
| | Age-62 years, Occupation- Business |] | |
| 3. | Smt. Padmaja Shriniwas Kulkarni |] | |
| | Age-62 years, Occupation- Household |] | |
| 4. | Shri. Gaurav Shriniwas Kulkarni |] | |
| | Age-28 years, Occupation- Business |] | |
| | Nso. 1 to 4 R/at- 751/52, Budhwar Peth |] | |
| | Pune 411 002. |] | |
| 5. | Sou. Swati Yogesh Rane |] | |
| | Age- 31 years, Occupation- Housewife |] | |
| | R/at-Vadgaon Dhairy, Anandnagar, |] | |
| | Pune. |] | ..Plaintiffs |

Versus

- | | | | |
|----|--|---|---------------|
| 1. | Shri. Sunil Anant Naik |] | |
| | Age- 48 years, Occupation- Business |] | |
| 2. | Sou. Sonali Sunil Naik |] | |
| | Age- 39 years, Occupation- Household |] | |
| | Both R/at- Building No.1, Flat No.22, |] | |
| | Ganeshbaug Sahakari Grahachna Sanstha |] | |
| | Maryadit, Vadgaon BK, S. No. 39, Hissa |] | |
| | No. 1A/39/1+1, Sinhagad Road, Pune-51. |] | ..Defendants. |

CLAIM :- SUIT FOR DECLARATION AND INJUNCTION.

Shri. Shri. P. M. Mote, the learned counsel for the plaintiffs.

Shri. G. S. Mate, the learned counsel for the defendants.

J U D G M E N T**(Delivered on 28th of November, 2017)**

This is a suit for declaration and perpetual injunction.

02. **The case of plaintiffs is as under :-**

The land Survey No. 39 Hissa No.1A/39/1+1, Ganaeshbaug Co-operative Housing Society Ltd, Flat No. 22, on third floor, admeasuring 660 sq. ft., i.e. 61.33 sq. mtrs situated at Vadgaon Budruk Taluka Haveli, District Pune. (Hereinafter referred as the “**suit flat**”). The suit flat is specifically described in para No. 1 of the plaint. Suit flat is owned by Venkatesh Madhavrao Kulkarni. He died on 7/12/2008. After the death of Venkatesh Kulkarni, plaintiffs became the owners of the suit flat. The Civil Judge, Senior Division, Pune issued a heirship certificate on the name of plaintiffs. Defendants have good relation with deceased Venkatesh Kulkarni as well as plaintiffs since long time. Deceased Venkatesh Kulkarni decided to sell the suit flat. Defendants have shown their willingness to purchase the suit flat. Defendants were agreed to purchase the suit flat for the consideration of Rs.14,50,000/-. On 2/12/2008 deceased Venkatesh Kulkarni executed a registered agreement to sale in respect of the suit flat in favour of defendants. Defendants have paid the amount of Rs.4,00,000/- and the remaining amount to be paid within one month from the date of

execution of agreement. Defendants have not paid remaining amount and breached the terms and conditions of agreement therefore, the said agreement to sale stands cancelled. As per the terms and conditions of agreement the possession has to be delivered to the defendants after the payment of entire amount, but the defendants illegally by breaking the lock over the door of suit flat obtained the possession of suit flat. On 7/4/2011 plaintiffs went to see the suit flat at that time they came to know that defendants illegally obtained the possession of the suit flat. Plaintiff no.1 requested the defendants to deliver the possession of the suit flat but they have refused. Plaintiffs rushed to the police station but police have not registered the crime against defendants. Hence, plaintiffs have brought the instant suit for declaration, possession and for perpetual injunction. The costs of the suit is also prayed for.

03. Defendants have filed their written statement at Exh.29 and denied all the adverse contentions in the plaint. It is contended that, suit is barred by law of limitation. It is contended that, plaintiffs are the owners of the suit flat. It is contended that, after filing of suit defendants came to know that plaintiffs are the legal heirs of deceased Venkatesh Kulkarni. Defendant no.1 knows to the plaintiff no.1 and Dilip Kulkarni as they are relatives of deceased Venkatesh Kulkarni. It is denied that, deceased Venkatesh Kulkarni knows to the defendants since long time. It is contended that, defendant no.1 came to know about intention to sale the suit flat by deceased Venkatesh Kulkarni from his friend Ramesh Pawar. It is admitted that the agreed price of the suit flat is of Rs.14,50,000/-. It is admitted that on the day of agreement dated 2/12/2008 defendants paid the amount of Rs.4,00,000/- to the Venkatesh Kulkarni. It is denied that, defendants

failed to pay the remaining amount of the suit flat within one month therefore, said agreement to sale was cancelled. It is denied that, plaintiffs demanded remaining amount to the defendants. It is denied that defendants illegally obtained possession of the suit flat in absence of the plaintiffs. It is denied that on 7/4/2011 plaintiffs came to know that defendants illegally obtained the possession of the suit flat. It is contended that, on the day of execution of agreement to sale of the suit flat i.e. on 2/12/2008, the deceased Venkatesh Kulkarni delivered the keys of the suit flat to the defendants and on the same day defendants obtained the possession of the suit flat. It is contended that, deceased Venkatesh Kulkarni knows that defendant no.1 applied for home loan from Bank of Maharashtra, Somwar Peth Branch, Pune. It is contended that, Venkatesh Kulkarni was in process of collecting various original documents and unfortunately he died on 7/12/2008. Defendants were not aware of the said fact. On 8/12/2008 defendant no.1 met to the Purshottam Kulkarni who is brother of deceased Venkatesh Kulkarni. Defendants told him about the transaction of suit flat. Defendants told to the Purshottam Kulkarni that bank will give loan amount to the legal heirs of Venkatesh Kulkarni by cheque and not by cash. It is contended that, defendants told the plaintiff no.1 to get heirship certificate from Court, thereafter, bank will issue the cheque. It is contended that, plaintiff no.1 refused to cooperative to the defendants and threatened for dire consequences. It is contended that, plaintiff no.1 wanted to pay the entire remaining amount to him. It is contended that, defendants do not know except plaintiff no.1 who are other legal heirs of deceased Venkatesh Kulkarni. It is contended that, since 3/12/2008 defendants are lawfully in possession of the suit flat. It is contended that, after the death of Venkatesh Kulkarni plaintiff failed to provide heirship

certificate and original documents to process the bank loan and therefore, the defendants unable to avail the bank loan and make the remaining payment. It is contended that, there was no intention of the defendants not to pay the remaining amount of suit flat. It is contended that, defendant no.1 is now member of Ganeshbaug No.1 Cooperative Society. Defendants are regularly paying the taxes of Corporation, electricity bills etc. It is prayed that, suit be dismissed with costs.

04. In view of the rivals pleadings of the parties, my learned predecessor framed the issues below Exh.31, I have reproduced the same. The issues are reproduced below along with my findings thereon for the reasons thereto are as under :-

Sr. No.	ISSUES	FINDINGS
1.	Do the plaintiffs prove that, the agreement dated 2/12/2008 stands cancelled/ revoked for non payment of consideration of Rs.10,50,000/- ?	...In the affirmative.
2.	Are plaintiffs entitled for the relief of the possession of the suit flat ?	...In the affirmative.
3.	Are plaintiffs entitled for the relief of the permanent injunction restraining defendants from creating third party interests in the suit flat ?	...In the negative.
4.	Are plaintiffs entitled for the relief of mesne profit ?	... In the affirmative.
5.	What order and decree ?	... As per final order.

REASONS

05. The plaintiff has examined one witness i.e. P. W. No.1 Purshottam Madhav Kulkarni is at Exh.21. Defendants have examined

three witnesses i.e. D. W. No.1 Shri. Sunil Anand Naik is at Exh.67, D. W. No. 2 Shri. Ramesh Baburao Pawar is at Exh.102 and D. W. No. 3 Priyadarshan A. Dixit is at Exh. 114.

06. I have heard Shri. P. M. Mote, the learned counsel for plaintiffs and Shri. G. S. Mate, the learned counsel for defendants.

07. The learned counsel for plaintiffs P. M. Mate is also filed written notes of argument at Exh. 121.

08. Plaintiffs have filed some documents on record in support of his case. The death certificate of Venkatesh Kulkarni is filed at Exh. 49. The copy of heirship certificate is at Exh. 50. The copy of agreement to sale dated 2/12/2008 is at Exh. 51. The copy of police complaint dated 3/5/2011 filed by plaintiff no.1 against defendants at Haveli Police Station is at Exh. 52. The copy of share certificate issued by Ganeshbaug no.1 Co-operative society to plaintiff no.1 is at Exh.53.

09. Defendants have filed some documents on record. The copy of notice dated 8/10/2014 is at Exh. 61. The copy of valuation report dated 4/12/2008 is at Exh. 115. Receipts of society charges paid by defendants are at Exh.70 to 78. The copy of municipal Corporation tax letter dated 28/5/2009 is at Exh. 79. The copy of transfer fees receipt is at Exh. 80. The copy of Municipal Corporation tax of the year 2009 is at Exh. 81. The copies of electricity bills of the suit flat on the name of defendant no.1 is at Exh. 82 to 89. The copy of notice reply dated 13/4/2015 is at Exh. 90.

10. It is an admitted fact that, deceased Venkatesh Kulkarni executed agreement for sale dated 2/12/2008 in respect of suit flat in favour of defendants. It is an admitted fact that, Venkatesh Kulkarni died on 7/12/2008.

As to issue no. 1:-

11. Shri. P. M. Mote the learned counsel for plaintiffs submitted that, plaintiffs are the legal heirs of the deceased Venkatesh Kulkarni. He submitted that deceased Venkatesh Kulkarni executed the agreement for sale of suit flat on 2/12/2008 in favour of defendants for the consideration of Rs.14,50,000/-. He submitted that defendants have paid only Rs.4,00,000/- and the remaining amount shall be paid within one month from the date of execution of agreement. He submitted that plaintiffs informed the defendants that they are the legal heirs of deceased Venkatesh Kulkarni and the remaining amount of agreement be paid. He submitted that, defendants breached the terms and conditions of the agreement and did not pay the remaining amount within one month. He submitted that, as per the agreement the possession shall be delivered to the defendants after the payment of entire amount. He submitted that, on 7/4/2011 plaintiff no.1 came to know that defendants illegally obtained the possession of the suit flat. He submitted that, defendants refused to deliver the possession of the suit flat to the plaintiffs. He submitted that, plaintiffs have filed the police complaint against the defendants but the matter is of civil nature therefore, the police did not have taken any action against defendants. He submitted that, defendants have not fulfilled the terms and conditions of the agreement therefore, the said agreement stands cancelled. He submitted that, suit be decreed.

12. On the other hand, Shri. G. S. Mate the learned counsel for defendants submitted that, after filing of this suit defendants came to know that plaintiffs are the legal heirs of the deceased Venkatesh Kulkarni. He submitted that, defendants have no knowledge who are the legal heirs of deceased Venkatesh Kulkarni. He submitted that, deceased Venkatesh Kulkarni knows that defendants residing in a small room therefore, on the day of execution of agreement he delivered the possession of suit flat to defendants. He submitted that, prior to the execution of agreement several meetings held between defendant no.1 and deceased Venkatesh Kulkarni. He submitted that, defendants required several documents for taking the loan from the bank, the deceased Venkatesh Kulkarni was ready to deliver these documents. He submitted that, as per the instructions of bank, defendants got the valuation report of the suit flat. He submitted that, when defendant no.1 was collecting documents at that time Venkatesh Kulkarni unfortunately died on 7/12/2008. He submitted that, on 8/12/2007 defendant no.1 came to know from Dilip Kulkarni that Venkatesh Kulkarni had died. He submitted that defendant no.1 told to the plaintiff no.1 that remaining amount will be paid by him after completing the process in bank. He submitted that, plaintiff no. 1 refused to understand the legal difficulty of defendants to pay the amount of suit flat. He submitted that, plaintiff no.1 refused to cooperate to the defendants. He submitted that, plaintiff no.1 wants that defendant no.1 should pay the entire amount to him by cash. He submitted that, deceased Venkatesh Kulkarni delivered the possession of the suit flat to the plaintiffs on 2/12/2008. He submitted that, plaintiffs failed to provide the heirship certificate and other original documents of the suit flat for the process of bank loan to the defendants, therefore, defendant could not avail

bank loan. He submitted that suit be dismissed.

13. P. W. No.1 Purshottam deposed that, deceased Venkatesh Kulkarni was his brother. He deposed that, he and other plaintiffs are the legal heirs of deceased Venkatesh Kulkarni. He deposed that, on 2/12/2008 agreement to sale in respect of the suit flat executed in between deceased Venkatesh Kulkarni and defendants. He deposed that, defendants paid Rs.4,00,000/- to the deceased Venkatesh Kulkarni and they have to pay remaining amount of Rs.10,50,000/- within one month and thereafter, possession of the suit flat be delivered to the defendants. He deposed that, defendants did not pay the amount of suit flat to the plaintiffs. He deposed that, on 7/4/2011 plaintiffs came to know that defendants illegally obtained the possession of the suit flat. He deposed that, till October 2009 Dilip Kulkarni was residing in the suit flat, therefore, no question to deliver the possession of the suit flat to the defendants by deceased Venkatesh Kulkarni on 2/12/2008. He deposed that, defendants did not follow the terms and conditions of the agreement, therefore, agreement stands cancelled.

14. In the cross examination, he admitted that upto 31/10/2008 deceased Venkatesh Kulkarni received Rs.4,00,000/- from defendants. He deposed that, on 3/5/2011 they have filed the complaint of incident dated 7/4/2011. He deposed that, prior to deceased Venkatesh Kulkarni, 2 to 3 persons were owner of the suit flat. He admitted that due to heart attack, Venkatesh Kulkarni died in the house of Shri. Sanjay Deshpande. He denied that, on 9/12/2008 he asked the amount of Rs.10,50,000/- to the defendant no.1 by cash. He denied that, defendant no.1 told him that he was about to obtain the loan from the bank. He

denied that, bank of defendants was asking the documents in respect of suit flat and heirship certificate for delivering the loan. He admitted that, after 2008 he has not paid the electricity bill and municipal taxes of the suit flat. He admitted that, after obtaining heirship certificate they have not issued any notice to the defendants for demanding the remaining amount of Rs.10,50,000/-. He denied that, after the death of Venkatesh Kulkarni he and other plaintiffs did not provide the documents of the suit flat to the defendants, therefore, the defendants could not get loan from the bank. He admitted that, the price of the suit flat is increased. He has denied all the adverse suggestions.

15. On the other hand, D. W. No.1 Sunil deposed that after the execution of agreement to sale deceased Venkatesh Kulkarni delivered the possession of the suit flat to them as they are residing in only one room at Saneguruji Nagar, Pune. He deposed that, deceased Venkatesh Kulkarni assured for delivering him all the documents of the suit flat for availing loan. He deposed that, deceased Venkatesh Kulkarni met to the earlier owner of the suit flat. He deposed that, he does not know who are the legal heirs of the deceased Venkatesh Kulkarni. He deposed that, plaintiff no.1 told him to pay remaining amount of agreement in cash. He deposed that, he requested the plaintiff no.1 to get the heirship certificate, but he refused to cooperate him. He deposed that, plaintiffs did not tell him about the getting of heirship certificate by them. He deposed that, plaintiffs have knowledge about his possession over the suit flat since 3/12/2008. He deposed that, after the death of Venkatesh Kulkarni, plaintiffs did not provide heirship certificate and other documents of suit flat for obtaining loan from the bank. He deposed that, he is paying the monthly taxes and electricity bill of the suit flat.

16. In the cross exam, he deposed that, he has seen and verified all the documents of the suit flat. He denied that, he has not moved the application for obtaining loan to the Bank of Maharashtra in respect of the suit flat. He admitted the terms and conditions in the agreement for sale Exh. 51. He admitted that, as per the agreement he has to pay the remaining amount within one month from 2/12/2008. He admitted that, there is no condition in the agreement that he will pay the remaining consideration by availing loan from Bank. He deposed that, he did not publish public notice in the newspaper to ascertain the names of legal heirs of deceased Venkatesh Kulkarni. He deposed that, he has not filed suit for specific performance of contract against defendants. He admitted that, he has no documentary evidence to show that plaintiff no.1 demanded remaining amount of agreement by cash. He admitted that, there is no documentary evidence to show that Bank asked him to get the valuation report of the suit flat. He deposed that, share certificate of society was not allotted on his name. He denied that after the death of Venkatesh Kulkarni, he filed false application dated 27/5/2009 in the name of Venkatesh Kulkarni to get enter their names over the suit flat. He denied that, after the death Venkatesh Kulkarni, one Govind Kulkarni was residing in the suit flat till October 2009. He denied that deceased Venkatesh Kulkarni never given possession of the suit flat to him. He denied that he illegally obtained the possession of the suit flat by breaking lock. He denied that, prior to the execution of agreement to sale deceased Venkatesh Kulkarni delivered all the legal documents to him. He denied that, the agreement to sale dated 2/12/2008 is cancelled due to non payment of remaining consideration amount within one month. He has denied all the adverse suggestions.

17. D. W. No. 2 Ramesh deposed that, he has business relations with defendant no.1. He deposed that, from one Radha Banawade he came to know that, Venkatesh Kulkarni was intending to sell the suit flat. He deposed that, on her mediation defendant no.1 met to deceased Venkatesh Kulkarni. He deposed that, he and defendant no. 1 seen the suit flat and defendant no.1 decided to purchase the suit flat. He deposed that, he signed over the agreement as a witness. He deposed that, defendant no.1 requested to the deceased Venkatesh Kulkarni to fasten up the process of obtaining all the previous sale deeds and other documents to make the loan proposal. He deposed that, deceased Venkatesh Kulkarni delivered the keys of the suit flat in his presence to the defendant no.1. He deposed that, on next day defendant no.1 shifted in the suit flat.

18. In the cross examination, he deposed that he has friendly relation with defendant no.1 and he received a business work from defendant no.1. He deposed that, defendants have not shifted in the suit flat in his presence. He deposed that, he do not remember whether defendant no.1 made request to Venkatesh Kulkarni to obtain all the previous sale deeds and other documents. He has denied all the adverse suggestions.

19. D. W. No. 3 Priyadarshan deposed that he is Civil Engineer and gives report of valuation of buildings. He deposed that, on the reference of Bank of Maharashtra, Somwar Peth, Pune Branch, defendant no.1 approached to him for obtaining valuation report in the year 2008. He deposed that, he visited to the suit flat and gave the valuation report Exh.115 on 4/12/2008 for the purpose of obtaining bank loan to the defendant no.1.

20. In the cross examination he admitted that, Bank obtained the valuation report from Government approved valuer. He deposed that, he is not Government approved valuer. He admitted that, Bank of Maharashtra, Somwar Peth, had not issued any letter to him for calling the valuation report of the suit flat. He has denied all the adverse suggestions.

21. The copy of death certificate of Venkatesh Kulkarni is filed below Exh. 49. The copy of heirship certificate granted by Civil Judge, Senior Division, Pune is filed below Exh. 50. As per the said certificate plaintiffs are the legal heirs of deceased Venkatesh Madhav Kulkarni and Vidya Venkatesh Kulkarni. The copy of agreement to sale dated 2/12/2008 is filed below Exh. 51. As per the said agreement the agreed price of the suit flat is Rs.14,50,000/-. The defendant no.1 paid amount of Rs.4,00,000/- to the deceased Venkatesh Kulkarni by cheque. As per the said agreement the remaining amount of Rs.10,50,000/- has to be paid within one month from 2/12/2008. After making the entire payment deceased Venkatesh Kulkarni has to execute the sale deed and deliver the possession of suit flat to the defendants. The copy of complaint filed by plaintiff no.1 against defendant no.1 is filed below Exh. 52. As per the said complaint dated 3/5/2011 defendants illegally obtained the possession of suit flat by breaking the lock. The copy of share certificate given by Ganeshbaug No.1 Co-operative Society Ltd to Sandip Dattakumar Kulkarni is filed below Exh. 53. The said certificate is transferred on the name of plaintiff no.1. The copy of notice issued on behalf of defendants to plaintiffs dated 18/10/2014 is filed below Exh. 61. As per the said notice defendants asked the plaintiffs to produce the previous original sale deeds of the suit flat and other

documents for making application for bank loan. The copy of valuation report of the suit flat is filed below Exh. 115. As per the said report the value of the suit flat is Rs.10,50,000/-. The copies of receipts of society charges are filed below Exh. 70 to 78. In the receipts below Exh. 70 the name of Sandip Kulkarni is mentioned as a owner. In receipt Exh. 71 dated 28/5/2009 the name of Sandip Kulkarni and Naik is mentioned as owner. In receipt Exh. 72 dated 9/6/2009, Exh. 73 dated 4/12/2010, the name of Naik is mentioned as a owner. In receipt Exh.74 dated 16/12/2011, Exh. 75 dated 9/12/2012, Exh. 76 dated 16/12/2013, Exh. 77 dated 21/12/2014 and Exh. 78 dated 7/12/2015 the name of Venkatesh Kulkarni and Sunik Naik is mentioned as owner.

22. The copy of letter issued by PMC dated 28/5/2009 is filed below Exh. 79. As per the said letter the name of defendants is recorded over the suit flat. The copy of transfer fee receipt is filed below Exh. 80. The copy of Tax receipt issued by PMC is filed below Exh. 81. The copy of MSEDCL bill below Exh. 82 dated 5/6/2009 shows the name of Sandip Kulkarni. The copies of MSEDCL bills are filed below Exh. 83 to 89. The said bill of the year 2009 to 2015 is on the name of defendant no.1. The copy of notice reply given by plaintiffs dated 13/4/2005 is filed below Exh. 90. As per the said notice defendants issued a notice dated 18/10/2014 to them afterthought.

23. Now appreciating the evidence on record. Defendants have examined D. W. No. 3 Priyadarshan to prove the valuation report Exh.115. As per the testimony of said witness he issued a valuation report Exh. 115 on the request of defendant no.1. The said witness during the cross examination admitted that he is not a Government

valuer. He admitted that Bank of Maharashtra, Somwar Peth, Pune has not issued any letter to him to submit the valuation report of the suit flat. It is seen that, the said witness is not authorized Government valuer, therefore, the testimony of said witness is not useful to the defendants. Apart from that, the testimony of said witness is not in connection with the transaction between defendants and deceased Venkatesh Kulkarni, therefore, his testimony is not so useful.

24. D.W. 2 Shri. Ramesh during the cross examination admitted that, he is having friendly relations with defendant no.1. He deposed that he does not remember whether defendant no.1 made request to deceased Venkatesh Kulkarni to supply all previous sale deeds and other documents. He admitted that, defendants were not shifted in suit flat in his presence. It is seen that, the above witness is a friend of defendant no.1. He has no knowledge whether defendant no.1 requested deceased Venkatesh Kulkarni to supply all previous sale deeds and other documents. Hence, the testimony of above witness is not useful to the defendants.

25. D. W. No.1 i.e. defendant no.1 told that remaining amount of suit flat be delivered by him after availing loan from the bank. He deposed that, after the execution of agreement to sale Exh. 51 Venkatesh Kulkarni had died. He deposed that, he has no knowledge about the legal heirs of deceased Venkatesh Kulkarni. He deposed that plaintiffs have not supplied the previous sale deeds of the suit flat, heirship certificate and other documents to avail the loan. During cross-examination he admitted the terms and conditions of the agreement to sale Exh. 51. He admitted that, there is no condition in the

agreement that after availing the loan from the bank he will pay the remaining amount. He admitted that, after the death of Venkatesh Kulkarni he has not issued any public notice to ascertain the legal heirs of deceased Venkatesh Kulkarni.

26. On perusal of the agreement Exh. 51 wherein nowhere mentioned that after availing the bank loan defendants will pay the remaining amount of the suit flat. In the agreement it is not mentioned that deceased Venkatesh Kulkarni has to supply all the previous sale deeds and other documents to defendant no.1 for obtaining the loan amount for suit flat. There is no documentary evidence on record that deceased Venkatesh Kulkarni has to supply all the previous sale deeds of the suit flat and other documents to the defendants for availing the loan from the bank. Apart from that, there is no documentary evidence produced by defendants on record to show that Bank of Maharashtra or any other Bank asked the defendants to supply all the previous sale deeds of the suit flat for getting the loan amount.

27. It is the contention of defendants that, plaintiff no.1 demanded the remaining amount by cash. However, except the bare oral testimony of D. W. No.1 there is nothing on record that defendant no.1 demanded the remaining amount by cash. Hence, I do not find any substance in the said contention of defendants.

28. It is the contention of defendants that he was not aware who are the legal heirs of the deceased Venkatesh Kulkarni, therefore, he could not completed the transaction. D. W. No. 1 Sunil admitted that he has not given any paper publication to search that who are the legal

heirs of deceased Venkatesh Kulkarni. This fact shows that, defendants have not taken any efforts to get complete the transaction of sale by making search of the legal heirs of the deceased Venkatesh Kulkarni. Defendants have not clarified that what steps they have taken to search the legal heirs of the deceased Venkatesh Kulkarni and to get execute the sale deed of the suit flat. It was the duty of the defendants to search who are the legal heirs of the deceased Venkatesh Kulkarni and to get execute the sale deed, but defendants failed to do so.

29. It is the contention of the defendants that plaintiffs have not issued any notice to them as they are the legal heirs of the deceased Venkatesh Kulkarni and to get execute the sale deed of the suit flat. However, it is not mandatory on the part of plaintiff to issue any notice to the defendants to get the execute the sale deed of the suit flat. Hence, I do not find any substance in the said contention raised by defendants.

30. The another contention of defendants that after the execution of agreement to sale Exh. 51 deceased Venkatesh Kulkarni delivered the possession of the suit fat to him. There is no documentary evidence produced by defendants on record to show that deceased Venkatesh Kulkarni delivered the possession of the suit flat to them. Hence, there is no substance in the said contention raised by defendants.

31. It is seen that, after the execution of agreement to sale Exh. 51 defendants have not taken any steps to get execute the sale deed of the suit flat within a month. Defendants have not filed the suit for specific performance of contract against the legal heirs of deceased Venkatesh Kulkarni. The evidence of D. W. No.1 is not appears to be

believable. Apart from that, defendants failed to fulfill the terms and conditions of the agreement Exh. 51. The documents which are filed by defendants on record are not useful while considering the real dispute between the parties.

32. The learned counsel for defendants Shri. G. S. Mate in support of his submission placed his reliance on the decision of the Hon'ble Madhya Pradesh High Court, in the case of **Mulla Badruddin V/s. Master Tufail Ahmed, AIR 1963 Madhya Pradesh 31**, wherein it is observed that, contract for sale of land- delay by one party to complete contract- other party cannot cancel without calling him to do so within specified time. It is further held that, it is settled law that without giving a reasonable notice to the other party to complete the contract within a specified time, the contract could not be cancelled at the sweet will of one party.

33. The facts and circumstances in the above authority and in the present suit are different. The above suit was filed by plaintiff for specific performance of contract. The present suit is filed by plaintiffs for declaration that the agreement for sale Exh. 51 stands cancelled. I have already observed that, the present defendants have not filed the suit for specific performance of contract against the plaintiffs. It is seen that after the execution of agreement for sale Exh.51 the defendants have not taken further steps to get execute the sale deed. Hence, the above ratio is not applicable to the present case.

34. On the other hand, the learned counsel for plaintiffs Shri. P. M. Mote in support of his submission placed his reliance on the

decision of the Hon'ble Apex Court, in the case of **Fabril Gasosa – Agenciae Sequeria V/s. Labour Commissioner**, wherein it is observed that, no oral agreement can be pleaded to vary modify or superseed a written statement – A written statement arrived at between the parties cannot be varied except by written modification or by written memorandum duly signed by the parties to the settlement.

35. In the instant case as per agreement for sale Exh. 51 defendants shall pay the remaining amount of suit flat within one month and to get execute sale deed. Defendants failed to comply the terms and conditions of the agreement for sale, therefore, the oral testimony of defendants is not useful. The above authority is applicable to the present case.

36. The learned counsel for plaintiffs Shri. P. M. Mote in support of his submission further placed his reliance on the decision of the Hon'ble Apex Court, in the case of **Electricity Board and another V/s. N. Raju Reddiar and another, AIR 1996 SC 2025**, wherein it is observed that, once a contract is reduced to writing, by operation of section 91 of the Evidence Act it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. Under section 92 of the Evidence Act where the written instrument appears to contain the whole terms of the contract then parties to the contract are not entitled to lead any oral evidence to ascertain the terms of the contract. It is only when the written contract does not contain the whole of the agreement between the parties and there is any ambiguity then oral evidence is permissible to prove other conditions which also must not be inconsistent with the written contract.

37. As per the above ratio the oral evidence of defendants cannot taken into consideration when there is a registered document executed between the parties in respect of the suit flat i.e. agreement for sale Exh. 51. Hence, the above authority is applicable to the present case.

38. The learned counsel for plaintiffs Shri. P. M. Mote in support of his submission further placed his reliance on the decision of the Hon'ble Apex Court, in the case of **Roop Kumar V/s. Mohan Thedani, AIR 2003 SC 2418**, wherein it is observed that, written document – proving contents of writing otherwise than by writing itself is forbidden.

39. I have already observed that, there is a registered document executed between the parties, therefore, oral evidence led by defendants cannot be taken into consideration. Hence, the above authority is applicable to the present case.

40. The learned counsel for plaintiffs Shri. P. M. Mote in support of his submission further placed his reliance on the decision of the Hon'ble Bombay High Court, in the case of **Amarjeet S. Vidhyarthi V/s. Sushiladevi K. Pillani, 2002(2) Bom. C. R. 694** wherein it is observed that, suit for specific performance of agreement for sale of a flat as per written agreement- Agreement showing sale to be for specified amount, but defendant urging that agreement for much higher amount and document was for part of the amount. Evidence contrary to what is written in the document is not admissible.

41. In the present case also it was a defence of defendants that after supplying the sale deeds and other documents by deceased

Venkatesh Kulkarni, defendants will apply and avail the loan from the bank. However, in the agreement for sale Exh. 51 the above things were not mentioned. Hence, in view of the above ratio the oral testimony of defendants cannot be taken into consideration. Hence, the above authority is applicable to the present case.

42. The learned counsel for plaintiffs Shri. P. M. Mote in support of his submission further placed his reliance on the decision of the Hon'ble Gauhati High Court, in the case of **Nibash Ch. Saha and anr. V/s. Champa Lal Ladhar, AIR 2010 Gauhati 137**, wherein it is observed that, oral agreements- Evidence relating to admissibility- Agreement to sale- Terms of agreement having been written and registered under Registration Act – Subsequent oral agreements in this respect would be barred u/s. 92 of the Evidence Act- No evidence of any oral agreement or statement shall be admitted.

43. I have already observed that, oral testimony of defendants cannot be taken into consideration when the registered document executed between the parties. The above authority is applicable to the present case.

44. The learned counsel for plaintiffs Shri. P. M. Mote in support of his submission further placed his reliance on the decision of the Hon'ble Allahabad High Court, in the case of **Smt. Janki and others V/s. Ganesh Ram and other, AIR 1984 Allahabad 219**, wherein it is observed that, oral evidence was inadmissible to vary or contradict terms of document.

45. I have already observed that, oral testimony of defendants cannot be taken into consideration when the registered document

executed between the parties. The above authority is applicable to the present case.

46. The learned counsel for plaintiffs Shri. P. M. Mote in support of his submission further placed his reliance on the decision of the Hon'ble Madras High Court, in the case of *M/s. Concrete Constructons, Chennai V/s. R. Subramaniam, AIR 2016 Madras 200*, wherein it is observed that, oral agreement- When there is written contract between parties, oral understanding between parties is not acceptable.

47. I have already observed that, oral testimony of defendants cannot be taken into consideration when the registered document executed between the parties. Hence, the above authority is applicable to the present case.

48. The learned counsel for plaintiffs Shri. P. M. Mote in support of his submission further placed his reliance on the decision of the Hon'ble Bombay High Court, in the case of *Shriram s/o. Tukaram Avatade V/s. Ramrao Udaji Khadase, 2010(6) Mh. L. J. 653*, wherein it is observed that, plaintiff was and is ready and willing to perform his part of contract- Specific plea raised by the defendant that it is a money lending transaction. There was no evidence enough to override the legal effect of or to overturn the suit for agreement- plaintiff entitled to decree.

49. The facts and circumstances in the above authority and in the present case are different therefore, the above authority is not applicable to the present case.

50. The evidence of P. W. No.1 Purshottam was not at all shattered during the cross-examination. The evidence of P. W. No.1 Purshottam shows that defendants failed to pay the remaining amount of suit flat and to get execute the sale deed within one month from the date of execution of an agreement, therefore, the said agreement for sale Exh. 51 dated 2/12/2008 stands cancelled. I, therefore, answer issue no.1 in the affirmative.

As to issue no. 3 :-

51. Plaintiffs have prayed that, defendants be restrained from alienating the suit flat to third party. However, there is no specific pleading or evidence that defendants are going to alienate the suit flat. Apart from that, defendants are not the owners of the suit flat, therefore, no question to transfer the suit flat by them. In absence of pleadings or evidence plaintiffs are not entitled for the relief of perpetual injunction as prayed. I, therefore, answer issue no.3 in the negative.

As to issue no. 4:-

52. It is the contention of plaintiffs that, defendants illegally obtained the possession of the suit flat on 7/4/2011 by breaking lock over the suit flat. However, there is no cogent evidence brought on record that defendants obtained the possession of the suit flat by breaking lock.

53. On the other hand, defendants have filed the receipts of society charges paid below Exh. 71 to 78. The receipt Exh. 71 is of

dated 28/5/2009 and the receipt Exh. 78 is of dated 7/12/2015. The copy of PMC tax receipt dated 26/4/2010 is filed below Exh. 81. The said receipt is on the name of defendant no.1. The copies of MSEDCL bills of the suit flat from 16/4/2009 to 8/11/2015 are filed below Exh. 82 to 89. The above documents show that defendants were residing in the suit flat since the year 2009.

54. Admittedly, prior to the execution of agreement for sale Exh. 51 dated 2/12/2008 deceased Venkatesh Kulkarni was in possession of the suit flat. There is no cogent evidence on record that, deceased Venkatesh Kulkarni delivered the possession of suit flat to defendants on the day of execution of agreement for sale exh. 51. There is no cogent evidence produced by plaintiffs on record that, defendants obtained the possession of suit flat by breaking the lock. But, after the execution of agreement for sale Exh. 51 defendants without following the due procedure of law obtained the possession of suit flat. It means that, defendants are in wrongful possession of suit flat. Prior to the filing of the suit plaintiffs asked the possession of the suit flat to the defendants, but defendants refused to deliver, therefore, defendants are liable to pay mesne profits for their wrongful possession over the suit flat to the plaintiffs from the date of filing of suit.

55. In these facts and circumstances, it is thus clear that plaintiffs are entitled for mesne profits for use and occupation of suit flat by defendants. I, therefore, answer issue No.4 in the affirmative.

As to issue no. 2 :

56. In view of my answer to the issues no.1 in the affirmative, the plaintiffs are entitled for the relief of possession of suit flat. I, therefore, answer issue no. 2 in the affirmative.

As to point no. 5 :-

57. In view of my answer to the issues no.1, 2 and 4 in the affirmative, the suit is deserved to be partly decreed. Considering the facts and circumstances of the case, defendants do pay the costs of the suit to the plaintiffs. In the result, in answer to issue no. 5, I proceed to pass the following order :-

ORDER

- 1] Suit is partly decreed with costs.
- 2] It is hereby declared that, the agreement for sale dated 2/12/2008 stands cancelled.
- 3] Defendants are directed to handover vacant possession of suit flat (specifically described in para no.1 of the plaint) to the plaintiffs within one month from today.
- 4] Separate inquiry for mesne profit be initiated under Order 20 Rule 12(1)(c) of Code of the Civil Procedure, from the date of filing of suit to till delivery of possession of suit flat to plaintiffs.
- 5] The Sub-Registrar, Haveli No.10, Pune shall take the entry in respect of cancellation of agreement for sale dated 02/12/2008 bearing No. 9684/2008 in the concerned register.
- 6] Copy of decree be sent to the Sub-Registrar, Haveli No.10, Pune for necessary action.
- 7] Decree be drawn up accordingly.

Pune.
Date:28.11.2017.

(S. N. Bhosle)
6th Addl. Judge, S. C. Court
& Jt. Civil Judge S. D.Pune.

CERTIFICATE

I affirm that the contents of this PDF file Judgment are same word for word as per original Judgment.

Name of Steno : Shivaji N. Patil Steno H.G.
Court Name : Shri. S.N. Bhosle.
6Th Add. Judge, S. C. Court
& Jt. Civil Judge S. D.Pune.

Date of Judgment : 28.11.2017

Judgment signed by presiding officer on : 02.12.2017

Judgment uploaded on : 02.12.2017