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2025:GUJHC:41807

Reserved On: 23/06/2025
Pronounced On : 25/07/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SECOND APPEAL NO. 171 of 2009

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE SANJEEV J.THAKER Sd/-

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Approved for Reporting	Yes	No
	YES	

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RAJKOT MUNICIPAL CORPORATION
Versus
USUF ALI JIVAJI & ORS.

==========

Appearance:
MR NISHANT LALAKIYA(5511) for the Appellant(s) No. 1
DECEASED LITIGANT THROUGH LEGAL HEIRS/ REPRESTENTATIVES for the Respondent(s) No. 1
MR HARESH H PATEL(611) for the Respondent(s) No. 1.1,2

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CORAM:**HONOURABLE MR.JUSTICE SANJEEV J.THAKER**

CAV JUDGMENT

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1. The present Second Appeal has been filed under Section 100 of the Code of Civil Procedure, 1908 ('CPC', for short) challenging the judgment and decree dated 23.01.2009 passed by the Presiding Officer Fast Track Court No.6, Rajkot in First Appeal No.198 of 1983 [renumbered as Regular Civil Appeal No.111 of 2005] confirming the judgment and decree dated 25.11.1982 passed by the 2nd Joint Civil Judge, Senior Division, Rajkot in Special Civil Suit No.68 of 1981.

2. For the sake of convenience, the parties are referred to as per their original status referred in the suit.

BRIEF FACTUAL MATRIX

3. The brief facts arising in the present Appeal are that, the Defendant issued public advertisement on 28.01.1979, for auction of various properties including suit property. The said public advertisement is produced vide Exhibit 25. The offer of the Plaintiff was accepted and thereafter there were correspondences between the Plaintiff and Defendant and as Plaintiff failed to deposit the amount within stipulated period as stated in the terms and conditions of the auction, the bid amount of 10% was forfeited by the Defendant and the offer was cancelled by the Defendant and, therefore, the Plaintiff filed suit for specific performance being Civil Suit No.68 of 1981 and the trial Court having decreed the said suit, the Defendant challenged the same by filing Appeal No.198 of 1983 [Renumbered as **???** 111 of 2005] and the first appellate Court dismissed the said Appeal and confirmed the judgment and decree of the trial Court. Hence, the present Second Appeal.

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4. By an Order dated 15.07.2009, the Coordinate Bench of this Court has admitted the present second Appeal and framed the following substantial questions of law:

> *" (1) Whether, in the facts and circumstances of the case, both the lower courts have misread the conditions therefore, of auction and have, erred in law in granting the discretionary relief of specific performance in favour of the Plaintiff ?*
>
> *(2) Whether, in the facts and circumstances the case, interpret both the courts vital documentary have failed to evidence produced at Exhs. 29,31, 32, 33, 34, 35 and 46 in right perspective, resulting in arriving at the perverse finding ? "*

SUBMISSIONS OF THE APPELLANT / DEFENDANT:

5. Learned Senior Advocate Shri P. K. Jani for the Defendant has mainly argued that vide Exhibit 25, Rajkot Municipal Corporation issued public advertisement dated 28.01.1979, for the auction of various properties including the suit property. The terms and conditions of the auction which are produced vide Exhibit 47, stipulated that 10% of the bid amount was to be deposited at the time of auction and balance 90% amount was to be paid by the Plaintiff within 45 days from the date of acceptance of the offer. It is the case of the Defendant that time was the essence in the said agreement entered into between the Plaintiff and Defendant.

6. On 01.02.1979, the Plaintiff's offer was accepted through a Resolution passed by the Standing Committee of the Defendant which is produced vide Exhibit (s) 27 and 48 and the same was subject to terms and conditions of the auction produced at Exhibit 47

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and the Plaintiff was required to deposit remaining amount of Rs.35, 982.25 by 17.03.1979.

7. Learned Senior Advocate for the Defendant has further stated that Plaintiff failed to deposit the said amount within stipulated period and just a day prior to expiry of 45 days demanded title from the Defendant which is on record vide Exhibit 29. The Defendant thereafter not only furnished desired information in relation to with the suit property, by their letter produced vide Exhibit 31, but also extended the dead-line on three occasions i.e. (i) on 07.05.1979 for 8 days [Exhibit 32], (ii) on 24.07.1979 for 8 days [Exhibit 33] and (iii) finally on 29.11.1980 [Exhibit-34] allowing the Plaintiff to pay remaining amount of sale consideration by four days i.e., till 03.12.1980.

8. Thereafter also, the Plaintiff did not deposit the balance amount and kept on writing letters to the Defendant with request to furnish title of the land which are produced at Exhibit 35. Thereafter it is the case of the Defendant that on 16.01.1981 i.e., after 44 days from the last extension of time, the Plaintiff's Advocate forwarded the cheque of Rs.35,982.25, along with its notice which is produced vide Exhibit 38 and the said cheque has not been deposited by the Defendant due to lapse of the dead-line that the Plaintiff had to comply with. On 19.03.1981 the Standing Committee of the Defendant passed the resolution cancelling prior acceptance of the Plaintiff's offer due to failure of time, which is produced vide Exhibit 49 and the said decision was communicated to the Plaintiff on 26.03.1981.

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9. Therefore, Civil Suit No. 68 of 1981 has been filed by the Plaintiff on 15.05.1981 i.e., after 164 days from the last extension of time seeking a direction for execution of the sale-deed, but if the reliefs that have been sought in the plaint are perused, the Plaintiff has not challenged the cancellation of offer which is produced vide Exhibit 49 and communicated to the petitioner on 26.03.1981, which is produced vide Exhibit 42.

10. Learned senior Advocate for the Defendant has mainly argued that Plaintiff having not entered the witness box and having not proved the documents, by mere accepting the documents, trial Court and appellate Court could not have come to conclusion that the Plaintiff has shown readiness and willingness at the time of filing the suit and at the time when civil suit went for trial.

11. Learned senior Advocate for the Defendant has further argued that under the provisions of Section 16(c) of the Specific Relief Act, the Plaintiff has to show his readiness and willingness from the date of agreement, till the time the decree is passed and in the present case, the Plaintiff having not entered the witness box and having not given opportunity to the Defendant to cross-examine the Plaintiff on the point of the Plaintiff proving readiness and willingness, the trial Court and the appellate Court could not have passed the judgment and decree of specific performance against the Defendant.

12. Learned senior Advocate has also argued that only contention that the Plaintiff has taken to show his readiness and willingness is that of handing over the cheque no. 4093 dated 16.01.1981 for an amount of Rs.35,982.25 of Citizen Cooperative Bank Limited,

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Rajkot. However, it has been argued that even at the time of framing of issues and at the time when evidence was led, there was nothing on record to show that Plaintiff was ready and willing to abide by terms and conditions of the agreement by depositing the remaining amount of Rs.35,982.25.

13. Moreover, it has also been argued that in view of the fact that Plaintiff having not entered the witness box, both the Courts below could not have come to the conclusion that Plaintiff was ready and willing to abide by the terms and conditions of the contract.

14. To substantiate his argument, learned senior Advocate has relied upon the judgment reported in the case of ***Vidhyadhar vs. Manikkrao*** reported in AIR 1999 SC 1441 wherein it has been held that if the party does not enter witness box, adverse inference has to be drawn against the said party.

15. Learned senior Advocate for the Defendant has also relied on judgment reported in the case of ***H.G.Krishna Reddy vs. V.M.M. Thimmiah and another*** reported in **AIR 1983 Madras 169**, wherein it has been held that it was the duty of the party to have gone into witness box and given evidence to prove his readiness and willingness to perform his part of contract and, therefore, in view of the fact that the Plaintiff has not entered witness box, the decree of specific performance could not have been passed.

16. With respect to the fact that the Plaintiff has relied on only on documentary evidence and has not led any oral evidence, learned senior Advocate for the Defendant has relied on judgment reported in the case of ***Sardar Sarovar Narmada Nigam Limited vs.***

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Rupdevsinhji Dolatsinhji Gohil-decd. reported in **2012 (4) GLR 3361** wherein it has been held that documents marked at Exhibit were not produced as per law and mere Exhibiting the said documents, does not amount to proof and in view of the said fact, even if the said documents are Exhibited, the Plaintiff had to prove the said document and unless and until said documents are proved, the Plaintiff cannot rely on the said documents and therefore also it has been argued that the Plaintiff has been miserably failed in proving that, he is entitled for seeking relief of specific performance.

17. With respect to the Resolution dated 19.03.1981, the Standing Committee had cancelled the prior acceptance of the Plaintiff's offer and the same was communicated to the Plaintiff by letter of the Defendant on 26.03.1981, which is produced at Exhibit 42 and the said contention was also taken in the written statement filed by vide Exhibit-12, the plaintiff has not sought any relief to challenge the said cancellation of allotment and in view of the said fact the Plaintiff is not entitled for relief of specific performance.

18. The Defendant relied upon judgment reported in **AIR 1922 SC 3361** in the case of ***U.N.Krishnamurthy (since deceased) Thro Lh. vs. A. M. Krishnamurthy*** **and** in case of ***Janardan Das & Ors. vs. Durga Prasad Agarwalla & Ors***. reported in **2024 (0) INSC 778,** and in view of the said fact it has been argued that both the trial court and the appellate court have misread the condition of auction and, therefore, have erred in granting discretionary relief of specific performance in favour of Plaintiff and that both the Courts have failed to interpret vital documentary evidence produced at Exhibits:-29, 31 to 35 and 46 in right perspective and in that view of the

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matter, present Second Appeal is required to be allowed and the judgment and decree passed in First Appeal No.198 of 1983 [renumbered as Regular Civil Appeal No.111 of 2005] confirming the judgment and decree dated 25.11.1982 passed in Special Civil Suit No.68 of 1981 passed by the 2nd Joint Civil Judge, Senior Division, Rajkot are required to be quashed and set aside.

SUBMISSIONS OF THE PLAINTIFF

19. *Per Contra*, the Learned Advocate for the original Plaintiff has argued that, the Document produced vide Exhibit 27 i.e., the Resolution passed by the Defendant and the terms and conditions of auction more particularly produced vide Exhibit-47, states that remaining amount of sale consideration has to be paid within period of 45 days and the fourth condition in the said terms and condition of the auction only permits the Defendant to forfeit the 10% deposit which was paid at the time of offer, but does not give any right to Defendant to cancel said offer and, therefore, plaintiff could not have cancelled the said offer by Resolution dated 19.03.1981.

20. Learned Advocate for the Plaintiff has also argued that after the Resolution of the Defendant, whereby, the offer of the Plaintiff was accepted, the Plaintiff has written letters to the Defendant more particularly letter at Exhibit-29, demanding title of the suit property. The fact that the Defendant has extended the period of payment of remaining sale consideration that itself shows that time was not essence of the contract and by virtue of the fact that the Defendant had himself extended the period shows that, there was no intention of either of the parties to execute document within period of 45 days.

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21. Learned Advocate for the Plaintiff has further argued that if the Notice dated 16.01.1981, produced at Exhibit 38, is perused, the same clearly states that in furtherance to the letter written by Defendant, dated 29.11.1980 (produced vide Exhibit 34), whereby four days extension was given to Plaintiff to deposit the amount, it is the Plaintiff's case in the notice produced at Exhibit 38 that the Plaintiff had personally gone to the Defendant's office with cheque No. 70447 dated 20.12.1980 for an amount of Rs.35,982.25 of Citizen Cooperative Bank Ltd. Rajkot and the Defendant had stated that as the Defendant had to take legal advice they are not in any position to accept the said cheque.

22. However, on the very same day, the Plaintiff had sent a cheque dated 16.01.1981 and the fact that the Defendants were taking legal opinion can easily be proved by the Resolution dated 29.03.1981, produced vide Exhibit 49, wherein also the Defendant has stated that they had taken opinion from the legal adviser.

23. In view of the aforesaid facts, it has also been argued that as there are concurrent findings of fact, the present Second Appeal is required to be dismissed.

24. With respect to Plaintiff's readiness and willingness to perform essential terms of the contract which are to be performed by the Plaintiff i.e., payment of remaining amount of sale consideration to the tune of Rs.35,982.25, learned Advocate for the Plaintiff has argued that it is an admitted position that the Plaintiff has already handed over cheque to the tune of Rs.35,982.25 on 16.01.1981 and the suit for specific performance was filed on 15.05.1981. Therefore,

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on the date when the civil suit was filed, the said cheque was valid and, therefore, there is no question of Plaintiff having not proved readiness and willingness to perform the agreement.

25. With respect to the judgments relied on by the Plaintiff, the learned Advocate for the Plaintiff has argued that, when the documents were produced the Defendant had not taken any objection with respect to the contents of the said document and the endorsement that was made on Exhibit-4 i.e., on the list of document produced by the Plaintiff, that the Defendant had only stated that he has no objection if the said documents are Exhibited and, therefore, question of proving the said document in view of the fact that contents of the said document having not been denied by Defendant does not arise.

26. In view of the said fact, it has been argued that it cannot be said that merely because the said documents have not been objected against, the Plaintiff has not proved the contents of the said document and, therefore, it has been argued that judgment relied upon by Defendant in the case of *Sardar Sarovar Narmda Nigam* (supra) will not be applicable to the facts of the present case as in that case only tentative Exhibits were given by the Court and, therefore, the Court while deciding the facts of the said case had taken view that the said documents are required to be proved and the said documents having not been proved and the same being already Exhibited, cannot be considered.

27. With respect to the fact that Plaintiff has not challenged the cancellation of the agreement it has been argued that the said document has not been raised either in the written statement and,

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therefore, said fact cannot be looked into in the Second Appeal and, therefore, it has been argued that present Second Appeal is required to be dismissed and the trial Court and the appellate Court have rightly granted discretionary relief of specific performance in favour of Plaintiff vide Exhibit 29,31 to 35 and 46 in the right perspective and, therefore, present Second Appeal is required to be dismissed.

ANALYSIS :

28. Having heard learned Advocates for the respective parties and having gone through the documents, following facts are admittedly not in dispute:

Sr No.	Date	Particulars of document	Exhibit
1	28.01.1979	Public Advertisement for auction	25
2		Terms and conditions of the auction	47
3	01.02.1979	Plaintiff's offer being accepted	27 and 48
4	16.03.1979	Plaintiff's letter to the Defendant seeking title clearance and draft sale-deed	29
5	04.04.1979	Defendant's letter giving details of the suit property	31
6	05/07.05. 1979	Defendant's letter giving extension of 8 days in depositing the sale consideration	32
7	29.11.1980	Defendant's letter giving extension of four days in depositing remaining sale consideration	34
8	09.12.1980	Plaintiff's letter for showing willingness to deposit remaining amount of sale consideration	35

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9	16.01.1981	Plaintiff's notice along with cheque for an amount of Rs.35,982.25 ps.	38
10	19.03.1981	Resolution of the Defendant cancelling offer to sell by the Plaintiff and forfeiting the amount deposited by the Plaintiff	49
11	15.05.1981	Civil Suit No.68 of 181	01

29. Given the aforesaid arguments and facts, this Court will proceed in the present Second Appeal on basis of the two Substantial Questions of law which have been the basis of admitting the present Second Appeal.

Time as essence of the Contract v. Readiness and Willingness

30. An important aspect which has to be dealt with as regards the condition of the Resolution and other documents is that whether or not time was of essence for performance of the said Contract.

31. It cannot be disputed by either side that there was an understanding between the parties that the remaining amount of sale consideration has to be paid by the Plaintiff within 45 days.

32. However, a look at the documentary evidence in the present case would show that, there are letters to suggest that the Plaintiff had sought details with respect to suit property and those letters were also replied by the Defendant and along with the said reply given by the Defendant, the Defendant had also extended the period of depositing remaining amount of sale consideration and, therefore, in view of the fact that the Defendant himself had extended the period of deposit of sale consideration, the Defendant cannot come forward with the case that time is essence of the contract.

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33. This need to be examined from one more point of view. Hon'ble Apex Court has laid down that in matters pertaining to immovable property, time can seldom be essence of the Contract. However, this principle has to be applied in the context of the surrounding facts and circumstances. In ***Gomathinayagam Pillai v. Palaniswami Nadar*, 1966 SCC OnLine SC 65 : (1967) 1 SCR 227**, the Hon'ble Apex Court held as follows:

> ***4.*** *The facts which have a material bearing on the first question have already been set out. Section 55 of the Contract Act which deals with the consequences of failure to perform an executory contract at or before the stipulated time provides by the first paragraph:*
>
> *"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract."*
>
> *It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable : it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the*

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> *express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property**, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence**. In Jamshed Khodaram Irani v. Burjorji Dhunjibhai [ILR 40 Bom 289] the Judicial Committee of the Privy Council observed that the principle underlying Section 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed ...”*

34. This position of law has thereafter been confirmed by the Hon’ble Apex Court in ***Chand Rani v. Kamal Rani*, (1993) 1 SCC 519**

> ***19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract**. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.*

35. However, in the said case, in view of the surrounding circumstances, it was held that the time was of essence in the said facts.

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36. Looking at the present facts and the surrounding circumstances, it appears that the Plaintiff as well as the Defendant were mutually extending the time which was agreed for performance of the Contract. Once the Defendant has itself extended the said Contract and further when from a perusal of the documents, it is clear that the Defendant did not intend to make the time as a precondition for performance of the contract, it cannot be held that time was of the essence.

37. In fact, there was a continuous correspondence between the Plaintiff and Defendant with respect to title of the suit property and, therefore, it cannot be said that the Plaintiff had abandoned its right to purchase the suit property. Moreover, the Plaintiff has also stated in the Plaint / Evidence that he had gone to Defendant's office with a cheque no. 70447 of Citizen Cooperative Bank Limited Rajkot dated 20.12.1980 to pay the remaining amount of sale consideration and that the said cheque was not accepted by the Defendant on the ground that they are seeking legal advice and the fact that Plaintiff had also deposited the cheque for an amount of Rs.35,982.25/- along with the notice dated 16.01.1981.

38. Therefore, all throughout till 16.01.1981 the Plaintiff had shown his willingness to pay the said amount and execute the sale deed.

39. In the facts of the present case, in view of the fact that after period of 45 days, the extension was given by the Defendant first for the period of 8 days and then for a period of 4 days, it cannot be said that time was essence of the contract and Plaintiff was supposed to pay the remaining amount within period of 45 days from the date of

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acceptance of the offer cannot be accepted and the said argument of learned Advocate for the Defendant cannot be accepted.

40. Moreover, as the law has been clearly explained by the Hon'ble Apex Court, in the case of ***Gomathinayagam*** *supra*, specific performance of a contract can be awarded even when there is a default during the period provided in the contract if, by virtue of surrounding circumstances, etc., it seems equitable to grant the relief of specific performance.

41. Therefore, a clause in the contract may not be sufficient to hold that time was of essence in the set contract. In fact, a perusal of the aforesaid facts, would show that time was never treated by either party, including the Defendant, as of essence for performance of the contract.

Issue regarding Documentary Evidence and its relevance

42. An issue which has been raised by the Advocate for the Defendant in the present proceedings (and which pertains to the second substantial question raised by this Court) is whether the Trial Court was justified in relying upon the documents produced by the Plaintiff, which were though exhibited, but not proved in the eye of law.

43. Further, the Ld. Senior Advocate for the Defendant has argued that merely because the documents have been exhibited, the Trial Court and the Appellate Court could not have relied upon the said documents without the Plaintiff having proved the said documents. Therefore, as entire case of the Plaintiff is based on those documentary evidence, decree of specific performance could not

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have been passed by the trial Court and confirmed by the appellate Court.

44. Before proceeding on with further issues, it will be important to elaborate on the issue of 'proof' and 'documentary evidence'. Often, there is severe misunderstanding which arises as far as the proof of such documentary evidence is concerned.

Documentary Evidence and its proof

45. Some legal questions loom large before the Courts of this country for several years and they continue doing so. Naturally. Factual context of every matter makes the application of law thereto different than the previous one. However, the underlying principles of law do not alter. Issues relating to documentary evidence, proof thereof, mode of proof, etc. is one such contentious issue in my opinion.

46. Being the focal point of (almost) every trial on a daily basis, issues relating to 'proof', 'fact', 'fact in issue', 'oral evidence', 'documentary evidence', proof of its contents, admissibility, objections to exhibition and marking of those documents, etc. have been widely discussed by the Hon'ble Courts of this country. Since the present matter (and substantial question of law) pertains to a dispute on the Documentary evidence in question, I shall restrict my analysis to the provisions of law relating to the same.

47. **A caveat before proceeding further.** Since the present matter would be governed by the principles of the Indian Evidence Act, 1872, ("**IEA**") I am referring to and dealing with provisions of the said Act.

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Definitions under the Indian Evidence Act, 1872

48. The issue of documentary evidence and its proof, has been laid down by the Indian Evidence Act, 1872 (now, the Bhartiya Sakshya Adhiniyam, 2023) and has equally been well settled by several judgements of the Hon'ble Apex Court. However, due to misreading of these judgments as well as muddling of several issues together, Courts face certain arguments repeatedly, though having repeatedly been turned down by the Hon'ble Apex Court.

49. Hence, in order to put the same into perspective, I shall proceed to deal with the issue from the basics.

Section 3: Interpretation Clause

50. 'Interpretation Clause' of the IEA 1872 provides the definitions of several important terms. However, presently being concerned with the definitions of *fact*, *fact in issue* and *Documentary Evidence*, I am reproducing the same hereinbelow for convenience.

> ***"Fact". —"****Fact" means and includes—(1) anything, state of things, or relation of things, capable of being perceived by the senses; (2) any mental condition of which any person is conscious.*
>
> ***"Relevant".*** *— One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.*
>
> ***"Facts in issue"****.— The expression "facts in issue" means and includes— any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily*

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follows.

51. A document (as noted below) is any matter expressed upon any substance by means of letters, figures, or marks, etc. As is clear from the scheme of the IEA, evidence of a *fact* or a *fact in issue* can be given by way of either oral or documentary evidence.

Section 5 – Evidence of Fact in issue and relevant fact only

52. Section 5 of the IEA therefore assumes importance. Evidence can be given **only** of a fact or a fact in issue and of none other.

> ***5.*** *Evidence may be given of facts in issue and relevant facts. —Evidence may be given in any suit or proceeding of the existence of non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant,* ***and of no others****.*

53. Therefore, if either party has to give evidence on any issue, it has to be either (i) fact in issue or (ii) a relevant fact. Hence, unless the fact is in issue or is relevant, no evidence thereon is admissible.

54. Having noticed the aforesaid position, it is apposite at this juncture to refer to the method in which evidence can be given, which is either oral or documentary. Chapter IV of the IEA deals with Oral Evidence, whereas Chapter V deals with Documentary Evidence. In the present case, the contention raised by the Ld. Senior Counsel as well as the substantial question of law pertains to the Documentary evidence (since no oral evidence was led). Therefore, I am proceeding to deal with the issues pertaining to the same.

55. A document is defined under the Act as follows:

> ***"Document".*** *—"Document" means any matter expressed*

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or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

56. Therefore, any matter expressed by means of letters, figures, marks, etcetera is a document. However, while examining a document as a piece of evidence and its evidentiary value, three aspects primarily have to be examined.

    1. *Relevance* (since no evidence can be given if the fact is not relevant or in issue)

    2. *Admissibility* (the permissibility of an evidence being taken)

    3. *Probative value* – the weight which the piece of evidence will have to be given.

57. The aforesaid principles have been explained by the Hon'ble Apex Court in the case of ***Ram Bihari Yadav v. State of Bihar and Ors.*****, (1998) 4 SCC 517** (see para 6).

58. In a document however, four things can be in question:

    i. Existence of the document;

    ii. Genuineness of the document;

    iii. Contents of the document;

    iv. Truth of the contents of the document.

59. For instance, if there is a sale-deed, following questions naturally arise: (i) Is there a sale deed? (ii) Is the sale deed a genuine document / validly executed? (iii) What are the contents of the sale deed (iv) Whether the contents of the said document are true or not.

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Evidence to be led depends on the plea put forth

60. Before I venture into the further aspects of documentary evidence and its law, it is required to be noted that evidence is a subjective matter. In other words, what evidence is required to be led in a matter will depend on the pleas of the parties taken in that matter. For instance, on some occasions, existence of the contents of a particular document may be in question. However, other times the existence of the documents may not be a bone of contention or dispute between the parties, but the truth of such contents may be.

61. Hence, everything will depend on what is the matter in issue *for which* the evidence is being led. Difference in this aspect can change the entire focal point of a trial. This has been elaborated by the Hon'ble Apex Court in ***Rao Saheb v. Rangnath Gopalrao Kawathekar and ors.*, (1972) 4 SCC 181** in the following manner:

> ***5.*** *Now coming to the question whether the suit properties fell to the share of the first defendant or the second defendant, it was pleaded in the plaint that the second defendant had specifically admitted in a document executed by him on January 12, 1952 that the suit properties were of the exclusive ownership of his brother and that he had no right on the same. In his written statement, the second defendant had pleaded that the deed in question is a forgery and that he had not executed it. The trial court came to the conclusion that the said deed was executed by the second defendant. The first appellate court also did not accept the contention of the second defendant that he did not execute that deed. On the other hand, the first appellate court held that the same was obtained on misrepresentation.* ***No plea of misrepresentation was taken in the written statement. No issue as to whether the said***

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> ***deed was obtained by misrepresentation was raised. Therefore, it was not open to the first appellate court to consider whether the deed in question was invalid on the ground that it was obtained by misrepresentation***. *The only plea put forward by the second defendant was that the deed was a forgery. Both the trial court as well as the first appellate court have rejected that plea. Mr Sanghi, the learned Counsel for the appellant contended that when the execution of a document is denied, the party seeking to prove that document must not only prove that the alleged executant has signed that deed, but he must also prove that the executant had signed the same with the knowledge of its contents.* ***What facts and circumstances have to be established to prove the execution of a document depend on the pleas put forward. If the only plea taken is that the executant has not signed the document and that the document is a forgery, the party seeking to prove the execution of a document need not adduce evidence to show that the party who signed the document knew the contents of the document***. *Ordinarily no one is expected to sign a document without knowing its contents but if it is pleaded that the party who signed the document did not know the contents of the document then it may in certain circumstances be necessary for the party seeking to prove the document to place material before the Court to satisfy it that the party who signed the document had the knowledge of its contents.*

62. Therefore, it is on the basis of the pleas put forth by the parties that this Court is analyzing the said judgments.

Law relating to proof of contents of a document

63. The contents of a documentary evidence under the IEA can be proven by primary or secondary evidence. The following sections assume importance while discussing this aspect of the law.

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> ***59. Proof of facts by oral evidence***. — *All facts, except the contents of documents or electronic records], may be proved by oral evidence.*

> ***61. Proof of contents of documents***. — *The* ***contents of documents*** *may be proved either by primary or by secondary evidence.*

64. It is pertinent to note that under the IEA, existence and contents of the document can be in question at once. This is because, there is a difference between '*contents of the document*' and '*truth of the contents of the document*'. For the said purposes, it is important to note the meaning and intent of the term '*contents of the document*' as used in the IEA.

"Contents of a Document"

65. Once a document has been admitted in evidence, contents of the document are also admitted in evidence. However, the truth of the contents of the probative value thereof, will have to be examined independently, if the same is in issue. In ***Neeraj Dutta v. State (NCT of Delhi)*****, (2023) 4 SCC 731**, Hon'ble Apex Court has held as follows:

> ***62.*** *Section 64 of the Evidence Act states that documents must be proved by primary evidence except in certain cases mentioned above.* ***Once a document is admitted, the contents of that document are also admitted in evidence, though those contents may not be conclusive evidence****. Moreover, once certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence. There is a prohibition for*

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> *any other evidence to be led which may detract from the conclusiveness of that evidence and the court has no option to hold the existence of the fact otherwise when such evidence is made conclusive.* ***Thus, once a document has been properly admitted, the contents of the documents would stand admitted in evidence, and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence of such a document, no such objection could be allowed to be raised at any later stage of the case or in appeal*** *vide Amarjit Singh v. State (Delhi Admn.) [Amarjit Singh v. State (Delhi Admn.), 1994 SCC OnLine Del 739 : 1995 Cri LJ 1623 (Del)] ("Amarjit Singh"). But the documents can be impeached in any other manner, though the admissibility cannot be challenged subsequently when the document is bound in evidence.*

66. This position was also laid down by the Hon'ble Apex Court in ***P. C. Purshottama Reddiar v. S.*** **Perumal, (1972) 1 SCC 9** (at para 20). Therefore, the contents of the document are also considered admitted in evidence. However, there is a distinction between the phrase contents of the documents and the truthfulness of such content.

67. Even a Division Bench of the Madras High Court in ***A. V. S. Perumal v. Vadivelu Asari,*** **AIR 1986 Mad 341**, (***see*** Para 5) after considering the judgment of the Hon'ble Apex Court in ***PC Purshottama*** (supra) and two other Division Bench judgments held that admission of a document in evidence is also the prima facie proof of the contents (however, not the truth of those contents).

Truth of the contents of a document

68. It is important to note that the phrase '*contents of the document'*

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would refer to only what the documents states and nothing on the factum or truth of the said contents. This position becomes clear from the judgment of the Hon'ble Apex Court in the case of ***Bishwanath Rai v. Sachhidanand Singh*, (1972) 4 SCC 707** in the following terms:

> "*7. ... The contents of this letter were proved by the evidence of Ram Chandra Sharma who stated that he knew the handwriting of Swamiji with whom he had correspondence even earlier. His evidence, thus, was sufficient to prove that Swamiji wrote this letter to Ram Chandra Sharma, and that the statements contained in the letter were made by Swamiji himself.* ***It is true that, in the absence of examination of Swamiji, the correctness of those statements cannot be held to be proved. Thus, the evidence of Ram Chandra Sharma proves the contents of the letter, but not the correctness of those contents****. The letter was, therefore,* ***admissible to the extent to which the fact that Swamiji wrote such a letter to Ram Chandra Sharma with its contents has bearing on the issues involved in this case****. To that extent, the letter was relevant and admissible. ...*"

69. This position becomes further clear when we observe the usage of the term 'contents of the document' in the Act. Noticing the aforesaid position of law as laid down in ***Bishwanath* (supra)**, the Bombay High Court in ***Om Prakash Berlia v. Unit Trust of India*, 1982 SCC Online Bom 148** held as follows:

> "*Maxwell on the Interpretation of Statutes, 12th edition, states (at p. 278) that it is reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act.*
>
> *Section 63 states that secondary evidence includes an oral*

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> *account of the contents of a document given by some person who has seen it.* ***That person does not give evidence of the truth of the contents of the document merely by reason of having seen it, but of what he saw***. ***In S. 63, therefore, the expression "the contents of a document". must mean only what the document states***. *Section 61 provides that the contents of a document may be proved either by primary or by secondary evidence.* ***The expression in S. 61 must, therefore, also mean what the document states, and not the truth of what the document states***."

70. Therefore, the contents of the document may be proved by way of primary or secondary evidence. However, the position as regards the truth of such contents of the documents remains to be clarified. It is pertinent to be noted that IEA clearly stipulates that the contents of a document (existence thereof) cannot be proved by any oral evidence (***see***: Section 59 and 91 of the IEA).

Proof of truth of the contents of the document

71. However, there is no bar on the truth of the contents of the documents being proved by way of evidence. In fact, such truth of the contents will have to be proved like a relevant fact. Hon'ble Apex Court has clarified that whenever the fact of **truth of the contents of the document** is in issue, the same will have to be proved by a person who can vouchsafe the truthfulness of the contents of the said document.

72. In ***Ramji Dayawala & Sons (P) Ltd. v. Invest Import*****, (1981) 1 SCC 80** the Hon'ble Apex Court held as follows:

> *The question was whether in the absence of any*

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> *independent evidence about the testamentary capacity of the testatrix the contents of the letter could be utilised to prove want of testamentary capacity. Obviously, in these circumstances the Privy Council observed that the fact that a letter and two telegrams were sent by itself would not prove the truth of the contents of the letter and, therefore, the contents of the letter bearing on the question of lack of testamentary capacity would not be substantive evidence. Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document.* ***If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue****.*

73. Therefore, the position of law insofar as the contents on the documents is concerned, it is clear that the truth of the contents of the document must be proved separately if the same is in issue. This principle has been accepted and laid down even by this Court in its judgement of ***John Mithalal Desai v. Dineshbhai K. Vora*****, 1997 SCC OnLine Guj 156**

> *When the truth of the facts or contents stated in the document is in issue, the same are required to be proved by admissible evidence, i.e.* ***by the evidence of those persons who can vouchsafe for the truth of the facts in issue for mere proof of execution and handwriting would show that particular contents are there but not the truth thereof.*** *It may however be noted that mode of formal proof being a question of procedure may be waived by the party against whom the document is sought to be proved by giving*

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> *consent as the 'consent' means opposite party waives his right to have the document proved by formal proof,* ***but in that case also it should be remembered that by consent although the contents are proved, the truth thereof cannot be said to have been proved or admitted if the truth of the facts stated in the document is in issue****.*

74. This principle that for the truth of the contents, it can only be proved by the person who can vouchsafe the truth of the contents was also laid down in absolute clear and unambiguous terms in the judgment of ***Om Prakash Berlia*** (supra) by the Bombay High Court.

75. Hence, the principle of law that if the truth of the contents of the document are in question, then the same can be proved only by evidence of a person who can vouchsafe for the truth of the said contents of the documents is firmly established.

Exhibition and marking of documents

76. I now proceed to record as to what is the position of law when the other party (against whom such evidence is being produced) does not object to the production of the said documents and the same are exhibited.

77. It is required to be borne in mind that documents are exhibited for the purpose of ease of identification. By itself, such exhibition and/or marking does not assume or presume proof of the said documents or their admissibility. In ***Narbada Devi Gupta v. Birendra Kumar Jaiswal and Anr.*****, (2003) 8 SCC 745** the Hon'ble Apex Court held as follows:

> **"*16.*** *Reliance is heavily placed on behalf of the appellant on the case of Ramji Dayawala & Sons (P) Ltd. [(1981) 1*

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SCC 80] ***The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue"****. The situation is, however, different where the documents are produced, they are admitted by the opposite party, signatures on them are also admitted and they are marked thereafter as exhibits by the court. We find no force in the argument advanced on behalf of the appellant that as the mark of exhibits has been put on the back portions of the rent receipts near the place where the admitted signatures of the plaintiff appear, the rent receipts as a whole cannot be treated to have been exhibited as admitted documents.*"

78. However, this marking of exhibit on a document is contentious. Admitting a document as evidence happens when the Court rules on the said document and allows it to be admitted in evidence. This usually is done at the time when the document is produced. However, in order to avoid delay, etc. the Hon'ble Apex Court also laid down the law relating to tentative exhibit. In any case, usually such determination must be done at the time when the documents are tendered.

Order XIII – Admission of Documents by the Court

79. While such Order is being passed admitting the said documents, the other party has a chance to raise their objections. Basis which, eventually the Court gives a determination under **Order XIII Rule 4**:

4. ***Endorsements on documents admitted in evidence****.—(1) Subject to the provisions of the next following sub-rule,*

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> *there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:— (a) the number and title of the suit, (b) the name of the person producing the document, (c) the date on which it was produced, and (d) a statement of its having been so admitted, and the endorsement shall be signed or initialled by the Judge*

Objections to exhibition and admission of a document

80. Therefore, only after this determination of admissibility, does a document get admitted in evidence. At this juncture, the Opponent is permitted to take two modes of objections (i) being that the document is inherently inadmissible (ii) the mode of proof of the evidence is either inadequate or irregular. Hon'ble Supreme Court has laid down that though the former objection can be taken at any stage (since it goes to the root of the matter), the latter, is an objection of procedure and hence, must be taken at that time itself, or is considered waived. In ***R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752*** the Hon'ble Court held as under:

> ***20.*** *The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of*

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documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and ***once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit****. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice*

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and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.

81. This principle was further affirmed by the Hon'ble Court in ***Smt. Dayamathi Bai v. K.M. Shaffi,*** **(2004) 7 SCC 107**.

82. Further, even the Bombay High Court in ***Vimlabai Bhayyalalsing Rajput v. Anil Dadarao Waghmare*****, 2017 SCC OnLine Bom 9922**

> ***10.*** *It is true that mere exhibiting of a document cannot take the place of proof of a document. But, when the document is exhibited and admitted in evidence, its proof and reliability would depend on the kind of objection taken and the stage at which it is taken. In the cases of R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple, (2003) 8 SCC 752 and Smt. Dayamathi Bai v. K.M. Shaffi, (2004) 7 SCC 107 : AIR 2004 SC 4082, the Hon'ble Apex Court held that when the objection is that document itself is inadmissible in evidence, as for example, an unregistered sale-deed of valuable land or unattested Will, it does not matter that objection is not taken when the document is exhibited and admitted in evidence and in such a case mere exhibiting of the document would not be a proof of such document, but this will not be so when the objection is directed towards mode of proof alleging it to be irregular or insufficient. In the latter case, the objection must be taken when the evidence is tendered and once the document is admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence and marked as an exhibit, cannot be allowed to be*

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raised at any stage subsequent to the marking of the document as an exhibit. (See also : Hemendra Rasiklal Ghia v. Subodh Mody, 2008 (6) Mh.L.J. 886). Here is the document, a salary certificate vide Exhibit-44, in respect of which the objection is not that basically it is inadmissible in evidence, but is about its mode of proof. It is nobody's case that this document does not bear signature of the authorised representative of the employer or that it is not issued by the employer and is issued by some person other than an authorized representative of the employer. ***The objection is that the signatory to the document was not examined. Such an objection is about irregular mode of tendering proof of the document and, therefore, the objection ought to have been taken at the time when this document was admitted in evidence, but it was not taken***. *It is also significant to note here that the cross-examination taken on behalf of respondent No. 2 of P.W. 1 shows that even contents of this document were never disputed nor any suggestion was given to P.W. 1 that it was a forged document. The cross-examination further shows that no suggestion whatsoever about the salary of the deceased being fixed salary having no future prospects attached to it, was also given. Absence of any such objection and the requisite suggestions would only show that respondent No. 2 gave up its right to raise objection to the salary certificate; dispute its contents and also prove the fact that the salary earned by the deceased carried with it no future prospects regarding its hike. So, I am of the view that raising of all these objections as regards salary certificate (Exh. 44) at this appeal stage, is of no avail to respondent No. 2 nor is it permissible in law. Therefore, the salary certificate (Exh. 44) can safely be read in evidence for what it discloses.*

83. This Court is bound by the judgements of the Hon'ble Apex Court and I find myself in respectful agreement with this position of law as

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laid down by the Bombay High Court in ***Vimlabai*** (supra).

84. Across the board, therefore, the principle regarding objections seems to have been cleared. It is that only when the objection regarding inherent inadmissibility of a document is taken, it can be permitted to be taken at a later stage, however, in the other cases where objection pertains to the irregularity or insufficiency of the mode of proof, it must be only be taken at the threshold. Else, it is considered to be waived.

Conclusion and Principles

85. In essence, the following principles of law emerge relating to the production, proof and admissibility of Documentary evidence:

i. Evidence which required to be led in a matter will depend on basis of the pleas put forth by the parties. What is required to be proved will depend on what is in issue between the parties. [See: ***Rao Saheb*** (supra].

ii. Evidence can be given of either a *relevant fact* or a *fact in issue* and none other. [**see**: Section 5 of the IEA].

iii. This evidence (of a relevant fact or fact in issue), can be given by two modes – Oral or Documentary. [Chapter IV and V of the IEA].

iv. As far as Documentary Evidence is concerned, it can either be a public document or a private document. [Section 74 and 75 of the IEA]. Public document is governed by its respective provisions from S. 76 to 78.

v. For a private document, *primarily*, three things can be in

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question before a Court (i) contents (ii) genuineness (iii) truth of the contents.

vi. If the document is signed or handwritten, its genuineness can be proved in accordance with Section 67 of the IEA.

vii. If the document is a Will or any other document required to be attested, its mode of proof is provided for in Sections 68 to 72 of the IEA.

viii. "*Contents of a document*" mean the **existence** of the contents and **not the truth of such contents.** [***see**: **Om Prakash Berlia*** (supra).]

ix. *Contents of a document* can be proved in accordance with Section 59 and 61 of the IEA, i.e., by producing either primary or secondary evidence. This will **only** mean that such contents exist.

x. **However, if the truth of the contents is <u>also in issue</u>,** such *truth* of the *Contents of a document* can be proved only by leading evidence of a person who can vouchsafe the existence of the truth of the contents. [see: ***Biswanath Rai*** (supra)**,** ***Ramji Dayawala*** (supra)**,** ***John Mithalal Desai*** (supra)**,** ***Om Prakash Berlia*** (supra)]

xi. This Document needs to be admitted in evidence in accordance with Order XIII of the CPC. Before admitting such document in evidence, Court must pass a determination on admissibility of the document. [See: ***Order XIII Rule 4***]

xii. There can be two kinds of objections raised to the

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admissibility of such a document. (i) That it is inherently inadmissible and (ii) That the mode of proof of the document is irregular or insufficient.

xiii. Ordinarily, all objections regarding the admissibility of the document need to be taken and decided at this stage itself. [see: ***R.V.E. Venkatachala Gounder*** (supra).]

xiv. The Opponent may, still be permitted to raise an objection that the document was inherently inadmissible at a later stage.

xv. However, in no case, can the Opponent be permitted to take an objection that mode of proof of the document was inadequate at a later stage.

[For Points xi to xiv – see: ***R.V.E. Venkatachala Gounder*** (supra), ***Smt. Dayamathi Bai*** (supra) and ***Vimlabai*** (supra)**]**

xvi. Therefore, when a document is admitted, though it is subject to its further proof [see: ***Narbada devi*** (supra)], however, the *contents of the document* (not the truth of such contents) are also prima facie considered to be admitted in evidence. [see: ***Neeraj Dutta*** (supra), ***P. C. Purshottama Reddiar*** (supra) and ***AVS Perumal*** (supra)].

86. In the present case, the Defendant had raised no objection to the mode of proof of a document while the same was exhibited. In fact, the Defendant endorsed no objection to the exhibition. Pursuant to such an endorsement, the Ld. Trial Court exhibited the documents after its determination under Order XIII Rule 4. The Defendant did not object to such admission and in fact, consented to it. Therefore,

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it cannot now lie in the mouth of the Defendant to say that since the mode of proof of the documents was not adequate, i.e., the author of the document did not give evidence on the contents of the document. This particularly will stand good because the objection of the Defendant even today, is not that either of the document was inherently inadmissible. It is only that the mode of proof was insufficient. Hence, in view of the judgments of the Hon'ble Apex Court as stated above, such an objection cannot be taken at a belated stage, much less in an Appeal.

87. Reliance of the Ld. Senior Advocate on the case of ***Sardar Sarovar*** (supra) is misplaced as in that case, the documents that were produced were only given tentative Exhibits with the understanding that trial Court would consider the admissibility and relevancy of such document at the final hearing of the suit. In the said case, all documents were xerox copies and were secondary evidence and, therefore, tentative Exhibits were given by the trial Court and the said Order specifically stated that evidentiary value of the same will be considered at the time of final hearing. Hence, the said case can have no application to the present one at hand.

88. Therefore, this contention of the Defendant must fail and is accordingly turned down.

Readiness And Willingness to Perform Essential Term Of Contract

89. It is undisputed that the facts of the present case, the Plaintiff himself has not entered witness box and has not led any oral evidence to prove that at the time of filing the suit and till time the decree was passed, the Plaintiff was ready and willing to perform

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essential term of the contract.

90. Moreover, there is no documentary evidence led on that front that the Plaintiff was ready and willing to perform the Contract. The Plaintiff only alleges that a cheque was given by it to the Defendant. However, this alone cannot constitute readiness and willingness to perform the Contract.

91. By law, the Plaintiff is enjoined with the obligation of entering the witness box and give oral evidence to the fact that the Plaintiff is ready and willing to perform his part of the contract. He must also subject himself to cross examination thereof. Failing this, the Ld. Trial and Appellate Court could not have come to the conclusion that the Plaintiff has thus discharged his burden in law. Hence, the Plaintiff was not entitled to a decree of specific relief.

92. The Plaintiff has only tried to rely on cheque that has been issued by the Plaintiff dated 16.01.1981. A Cheque is not a document that would speak for itself. The Contents of the document are neither such that it can be assumed that such payment (that too in part) arose and sprung from the readiness and willingness on part of the Plaintiff. Therefore, the Plaintiff has to prove that the he is ready and willing to pay the said amount of sale consideration at the time of filing the suit, and even thereafter till hearing of the suit. [See: ***Sangita Sinha v. Bhawna Bharadwaj and ors.,*** **Civil Appeal 4972 of 2025, 2025 INSC 450]**

93. This could have been done by entering the witness box and proving the said facts. It is a settled law that in a suit for specific performance, the Plaintiff should not only plead and prove the terms

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of agreement but also should plead and prove his readiness and willingness to perform his obligation under the contract in terms of the contract. Unless readiness and willingness is shown in continuum, no specific performance can be granted. The Plaintiff has not shown that it is ready and willing to perform the Contract today. This alone, is enough to disentitle the Plaintiff from obtaining a relief of specific performance.

94. If the most important precondition for decree of specific performance was not met with, the Ld. Courts ought not have granted specific performance. Every Court must analyze the facts and circumstances in which the decree is prayed for. When the Plaintiff does not enter the witness box and show readiness and willingness as on date, can a decree of specific performance be granted? The answer to the said question is strictly in negative.

95. In the case of ***Vidhyadhar vs. Manek Rao*** (supra), *it has been held that "whether a party to suit does not appear in the witness box and state his own case on oath and does not himself be examined by other side, the presumption would arise that the case set-up by him is not correct"*.

96. Therefore, had the Plaintiff wanted a decree specific performance, the following preconditions have to be met with

    i. Plaintiff has to show a valid agreement of sale was entered by the Defendant in his favour

    ii. It must also be shown that Defendant had committed breach of the contract and

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iii. Plaintiff is always ready and willing to perform his part of obligation in terms of the contract.

97. Hence, in this context, it is important for the Plaintiff to prove that he was always ready and willing to perform his part of contract by stepping into witness box and giving evidence that he has all along been ready and willing to perform his part of contract and subject himself for cross-examination on that issue.

98. In light of the above facts in view of the fact that Plaintiff has failed to enter the witness box and subject himself to be cross-examined, the trial Court could not have granted decree of specific performance. Moreover, the Plaintiff had to show continuous readiness and willingness to seek a relief for specific purpose, the said readiness and willingness would be right from the date of execution, till the date of decree and the Plaintiff had to prove that he was ready and has always been willing to perform his part of contract and in the present case there is no proof of readiness and willingness either at the time of filing of the suit or during the pendency of suit and without proof of continuous readiness and willingness, the Plaintiff is not entitled for specific performance of contract.

99. In the present case, Plaintiff has merely made averment in the plaint that Plaintiff is ready and willing to perform his part of agreement, the same will not be sufficient as the said plea has to be proved by adducing evidence in that regard. It is true that mere in absence of Plaintiff coming in the witness box that itself may not be factor to conclude that he is not ready and willing in a given case. In the

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present case, not only has the Plaintiff not come in the witness box, but after filing of the suit there is no communication or notice to the Defendant about his willingness to perform his part of contract. In fact, there is no evidence led to prove the same. Hence, on what basis could the Court have come to the conclusion that even otherwise till date the Plaintiff is ready and willing to perform his part of the Contract. In absence to an answer to this, no specific performance can be granted.

100. The judgment relied upon by learned Advocate for the Defendant in case of ***U.N. Krishnamurthy ((supra)***, more particularly para:46, reads as under:

> *"46. It is settled law that for relief of specific performance, the Plaintiff has to prove that all along and till the final decision of the suit, he was ready and willing to perform his part of the contract. It is the bounden duty of the Plaintiff to prove his readiness and willingness by adducing evidence. This crucial facet has to be determined by considering all circumstances including availability of funds and mere statement or averment in plaint of readiness and willingness, would not suffice.*
>
> *47. In this case, the Respondent Plaintiff has failed to discharge his duty to prove his readiness as well as willingness to perform his part of the contract, by adducing cogent evidence. Acceptable evidence has not been placed on record to prove his readiness and willingness. Further, it is clear from the Respondent Plaintiff's balance sheet that he did not have sufficient funds to discharge his part of contract in March 2003. Making subsequent deposit of balance consideration after lapse of seven years would not establish the Respondent Plaintiff's readiness to discharge his part of contract. Reliance may be placed on Umabai v. Nilkanth Dhondiba Chavan (supra) where this Court speaking through Justice SB Sinha held that deposit of amount in court is not enough to arrive at conclusion that*

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Plaintiff was ready and willing to perform his part of contract. Deposit in court would not establish Plaintiff's readiness and willingness within meaning of section 16(c) of Specific Relief Act. The relevant part of the judgment is reproduced below: -

"45. ...Deposit of any amount in the court at the appellate stage by the Plaintiffs by itself would not establish their readiness and willingness to perform their part of the contract within the meaning of Section 16(c) of the Specific Relief Act..."

101. Learned Advocate for the Defendant has also relied upon the judgment rendered in the case of ***Janardan Das & Ors***. **(supra)**, more particularly paras:8 and 14, which read as under:

"8. Section 16(c) of the Specific Relief Act, 1963, mandates that a Plaintiff seeking specific performance of a contract must aver and prove that they have performed or have always been ready and willing to perform the essential terms of the contract which are to be performed by them. This requirement is a condition precedent and must be established by the Plaintiff throughout the proceedings. The readiness and willingness of the Plaintiff are to be determined from their conduct prior to and subsequent to the filing of the suit, as well as from the terms of the agreement and surrounding circumstances. The rationale behind this provision is to ensure that a party seeking equitable relief has acted equitably themselves. Specific performance is a discretionary relief, and the Plaintiff must come to the court with clean hands, demonstrating sincerity and earnestness in fulfilling their contractual obligations. Any laxity, indifference, or failure to perform their part of the contract can be a ground to deny such relief. The importance of readiness and willingness for enforcement of specific performance has been summarized by this Court in U.N. Krishnamurthy v. A.M.

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Krishnamurthy1, as follows:

"23. Section 16 (c) of the Specific Relief Act, 1963 bars the relief of specific performance of a contract in favour of a person, who fails to aver and prove his readiness and willingness to perform his part of contract. In view of Explanation (i) to clause (c) of Section 16, it may not be essential for the Plaintiff to actually tender money to the Defendant or to deposit money in court, except when so directed by the Court, to prove readiness and willingness to perform the essential terms of a contract, which involves payment of money. However, Explanation (ii) says the Plaintiff must aver performance or readiness and willingness to perform the contract according to its true construction.

24. To aver and prove readiness and willingness to perform an obligation to pay money, in terms of a (2023) 1 SCC 775 contract, the Plaintiff would have to make specific statements in the plaint and adduce evidence to show availability of funds to make payment in terms of the contract in time. In other words, the Plaintiff would have to plead that the Plaintiff had sufficient funds or was in a position to raise funds in time to discharge his obligation under the contract. If the Plaintiff does not have sufficient funds with him to discharge his obligations in terms of a contract, which requires payment of money, the Plaintiff would have to specifically plead how the funds would be available to him. To cite an example, the Plaintiff may aver and prove, by adducing evidence, an arrangement with a financier for disbursement of adequate funds for timely compliance with the terms and conditions of a contract involving payment of money.

…

45. It is settled law that for relief of specific performance,

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> *the Plaintiff has to prove that all along and till the final decision of the suit, he was ready and willing to perform his part of the contract. It is the bounden duty of the Plaintiff to prove his readiness and willingness by adducing evidence. This crucial facet has to be determined by considering all circumstances including availability of funds and mere statement or averment in plaint of readiness and willingness, would not suffice."*
>
> *14. In contracts involving multiple owners of property, it is imperative that all co-owners either personally execute the agreement to sell or duly authorize an agent to act on their behalf through a valid and subsisting power of attorney. An agent's authority must be clear and unambiguous, and any limitations or revocations of such authority must be duly considered. Without proper authority, an agent cannot bind the principals to a contract of sale."*

102. Both the above judgments will be squarely applicable to the facts of the present case. In the present case also the Plaintiff has failed to show that at the time when issues were framed and till the time decree was passed the Plaintiff was ready and willing to perform the part of his contract. Hence, this prayer of the Plaintiff cannot be granted and hence, is turned down.

Specific Performance in context of absence of declaratory relief

103. One of the conditions for seeking specific performance of an agreement is that a valid agreement must exist in the eye of law. It is right law that unless and until there is an agreement which is valid in the eyes of law, there can be no specific performance of the same.

104. When, the Plaintiff was admittedly informed by the Defendant that

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the resolution was already cancelled, the same had become non-existent in the eye of law. An agreement that is cancelled, is a non-est agreement. Therefore, unless it was for seeking declaration that the said cancellation was bad in law, could specific performance of the said agreement be granted? The answer to the said question is in the strict negative.

105. It is pertinent to be noted at the juncture that this issue was not framed by the Ld. trial Court. However, since it is a plea, which goes to the root of the matter, the same can be considered at any stage as the issue in question is a legal one, and not factual. Moreover, there would be no jurisdiction of a Court to grant specific performance of an Agreement, which was non-existent. Hence, the said issue will go to the root of the matter. This being a jurisdictional issue, it goes to the root of the matter, and the Court could not have assumed to specific performance, unless and until there was a valid agreement between the parties, or at least cancellation thereof was sought for.

106. In any case, even on other counts as noted above, specific performance of the Contract ought not be granted.

107. The learned Advocate for the Plaintiff has relied on the judgment reported in ***2025 LiveLaw SC 378*** in the case of ***Sangita Singh vs. Bhavana Bhardwaj*** and others wherein also the Apex Court has held that in view of the fact that the agreement to sale was cancelled, the same constituted a jurisdiction fact as till the said agreement is set aside, the respondent is not entitled to relief for specific performance.

108. The learned Advocate for the Plaintiff has relied on the judgment

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reported in ***2001 (4) SCC P.137*** in the case of ***R.K.Saxena vs. D.D.O.*** wherein it has been held that the letter of cancellation was quashed, but the facts of the said case were different, in view of the fact that, in the said case even when the payment were made beyond time, the same was accepted and Defendant had paid the entire amount payable in respect of the said plot and after receiving the entire amount the allotment was cancelled. Therefore, the court was considering the fact that as the entire amount was accepted after the accepted beyond the time there is a deemed extension of time. Further, the Court in that case was considering this in a Writ Petition. In the present case however, neither the Plaintiff has shown readiness and willingness, nor the Defendant has accepted the amounts after extended period.

109. The learned Advocate for the Plaintiff has also relied on the judgment reported in ***2017 LawSuit SC 176 A.Kantamani v. Nasrin*** Ahmed but the fact remain that in the said judgment the court has not been addressed on the effect of non-existence of a jurisdictional fact and therefore the facts of the said case will not applicable to the present case.

Answer to substantial questions of law raised

110. In view of the aforesaid finding that the Plaintiff has not shown his readiness and willingness to perform his part of the contract that is to pay the remaining amount of sale consideration and the fact that the Plaintiff has not sought for a relief of challenging the cancellation of the agreement between the Plaintiff and Defendant the substantial question of law that have been framed, vide Order

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dated 15.07.2009 has to be answered as follows:

> *" (1) Whether, in the facts and circumstances of the case, both the lower courts have misread the conditions therefore, of auction and have, erred in law in granting the discretionary relief of specific performance in favour of the Plaintiff ?*
>
> ***In the Affirmative.***
>
> *(2) Whether, in the facts and circumstances the case, interpret both the courts vital documentary have failed to evidence produced at Exhs. 29,31, 32, 33, 34, 35 and 46 in right perspective, resulting in arriving at the perverse finding ? "*
>
> ***In the Affirmative***.

Conclusion

111. In view of the discussion above, both the Ld. Trial Court and the Appellate Court have erred the granting relief in favor of the Plaintiff, the Plaintiff has miserably failed to perform his part of the contract and the Plaintiff having not challenged the cancellation of the agreement the trial court and Appellate Court could not have granted specific performance.

112. Further, the Ld. Trial Court and the Appellate Court have failed to interpret vital document Exhs. 39 32, 33, 34 35 and 46 in view of the same the observation and conclusion made by the trial Court and confirmed the appellate Court are perverse and arbitrary so as to

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warrant interference in the present second Appeal.

113. In peculiar facts of this case, findings of fact are against the provision of law and hence, the judgment and decree requires to be interfered as the finding are erroneous and being contrary to law and settled position on the basis of pronouncement by the Appellate Court.

114. In conclusion, the present Second Appeal merits and warrants interference by this Court is thus allowed. Judgment and decree passed in Civil Suit as confirmed by first Appellate Court are thereby quashed and set aside.

(SANJEEV J.THAKER,J)

115. After pronouncement of the judgment, learned advocate for the respondent has prayed for stay of the present order in view of the fact that respondent intents to challenge the same. In view of the request made by learned advocate for the respondent, that stay is granted upto four weeks.

(SANJEEV J.THAKER,J)

MISHRA AMIT V.