

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.295 OF 2016

Appellants : 1] Smt. Bajabai w/o Ramkrishana Warrarkar (Dead),
Lrs of Applicant No.1 Bajabai w/o Ramkrishna Warrarkar

Amendment
carried out as
per Court's
order dated
04/10/2017.

1) Pandurang Ramkrushna Warrarkar,
Aged about 55 years.

2) Govinda Ramkrushna Warrarkar,
Aged about 54 years.

3) Mangala Keshav Kalekar,
Aged about 53 years.

4) Jyoti Namdeo Khamankar,
Aged about 55 years.

All r/o Ward No.27, Wani, Dist. Yavatmal

2] Smt. Manda wd/o Pandhari Warrarkar,
Aged 35 years, Occupation : Nil.

3] Ku. Ranjana d/o Pandhari Warrarkar,
Aged 18 years, Minor.

4] Manisha d/o Pandhari Warrarkar,
Aged about 18 years, Minor.

5] Vithalrao s/o Pandhari Warrarkar,
Aged 8 years, Minor.

6] Anjana d/o Pandhari Warrarkar,
Aged 12 years, Minor.

Deft. Nos. 3 to 6 Minor through natural
guardian mother Deft. No.2.

All r/o Chikhalgaon, Tq. Wani,
District Yavatmal.

-- Versus --

Respondent : **Sunil Damodhar Potdukhe,**
Aged 40 years, Occupation : Business,
R/o Ward No.27, Wani, District Yavatmal.

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Mrs. Vijaya P. Thakre, Advocate for the Appellants.
Shri Anand Deshpande, Advocate for the Respondent.

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CORAM : **S.M. MODAK, J.**
RESERVED ON : **6th AUGUST, 2021.**
PRONOUNCED ON : **6th SEPTEMBER, 2021.**

J U D G M E N T :-

Heard Mrs. Vijaya Thakre, learned Advocate for the appellants-original defendants and Shri Anand Deshpande, learned Advocate for the respondent-original plaintiff. While condoning the delay, the Hon'ble Supreme Court has expedited the hearing of the appeal. While admitting the appeal, this Court has framed the substantial questions of law on 03/12/2018. They are reproduced as under :

(i) In view of the finding of fact recorded that

the suit property was the self acquired and independent property of deceased Pandhari

and

in view of the admitted position on record that the suit for specific performance is instituted against the minor son and daughters of Pandhari,

- (ii) Whether the decree of specific performance could have been granted?
- (iii) Whether in the absence of permission under Section 8(2) of the Hindu Minority and Guardianship Act, 1856, the agreement of sale is capable of being specifically enforced?
- (iv) Whether in view of the evidence on record, the respondent is entitled to specific performance?

BACKGROUND OF THE LITIGATION

02] One Pandhari Ramkrushna Warrarkar was the owner of an agricultural land (converted into non-agricultural land) bearing Survey No.51/3, admeasuring 1 hectare 42 ares, situated at Village Wadgon Teep, Tahsil Wani, District Yavatmal. It was his exclusive property. He expired in the month of August, 1995. Prior to his death, he agreed to sell the suit land to the plaintiff for consideration of Rs.30,000/- (his legal representatives claims the consideration is an inadequate). Rs.20,000/- was paid on the date of the agreement, whereas, Rs.10,000/- was agreed to be paid on the date of execution of sale-deed. The sale-deed was to be executed on 26/02/1996. The agreement to that effect was executed by deceased-Pandhari on 26/07/1995.

03] The property devolved on heirs of deceased Pandhari after his death. The details are as follows :

1	Smt. Bajabai w/o Ramkrushna Warrarkar	Mother
2	Smt. Manda wd/o Pandhari Warrarkar	Wife
3	Ku. Ranjana d/o Pandhari Warrarkar	Daughter
4	Manisha d/o Pandhari Warrarkar	Daughter
5	Vithalrao Pandhari Warrarkar	Son
6	Anjana d/o Pandhari Warrarkar	Daughter

04] The plaintiff informed to the heirs to execute a sale-deed by issuing notice. As they have failed, the suit for specific performance and for possession was filed before the Yavatmal Court.

SUIT

05] As described above, defendant Nos.3 to 5 are the minor children of deceased Pandhari. They were described in the title cause of the plaint as minors represented through the natural guardian, defendant No.2-mother. They have filed a written statement thereby denying execution of the agreement by Pandhari and also expressing ignorance about the said transaction. They have pleaded the consideration was inadequate considering the location of the land and its use. They have also objected for selling of the land without permission of the Court as defendant Nos.3 to 5

are minors. The objection on the ground of non appointment of guardian for defendant Nos.3 to 5 was also taken. Defendant No.6 was served separately through the mother. She has not filed separate written statement.

06] The plaintiff gave evidence and also examined

- Namdeo Aswale (attesting witness to the agreement),
- Scriber of the agreement Jaideo Atram.

Whereas, defendant No.2 Manda also entered into the witness box. The trial Court was pleased to decree the suit on 31/03/2000 and directed the defendants to execute the sale-deed on payment of balance consideration of Rs.10,000/-.

APPEAL

07] The original-defendants took the matter to the first appellate Court by filing the first appeal. They failed there and that is how, the present appeal is filed. The findings of the trial Court and by the first appellate Court are as follows :

(a)	<u>Execution of a sale-deed by deceased Pandhari on 26/07/1995 -</u> Answered in favour of the plaintiff and also affirmed by the first appellate Court.
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(b)	<u>Readiness and willingness on the part of the plaintiff -</u> Answered in the affirmative.
(c)	<u>On the point of possession of the land -</u> The defendants were held to be in possession by the trial Court.
(d)	<u>The plaintiff being the agriculturist -</u> Answered in favour of the plaintiff by both the Courts.
(e)	<u>Refusal to perform the part of the contract -</u> Answered by the first appellate Court in favour of the plaintiff.

**EXECUTION OF AGREEMENT FOR SALE BY
DECEASED-PANDHARI ON 26/07/1995 :**

08] This Court did not find any room for arriving at different conclusion so far as the execution of agreement for sale. Apart from the plaintiff, the scribe of the agreement by name Jaideo Atram and attesting witness Namdeo Dadaji Aswale were examined. Though the defendants have disputed the execution by their predecessor-in-title, both the Courts below found the above evidence sufficient to prove the execution.

09] It is the matter of record that the agreement was executed by the predecessor-in-title of the defendants, whereas the

suit is filed against the defendants being the legal heirs. In order to buttress his submission that the suit for specific performance is also maintainable against the legal heirs of the parties to the agreement, learned Advocate Shri Deshpande for the respondent has relied upon a judgment in the case of **Ram Baran Prasad vs. Ram Mohit Hazra & others [AIR 1967 SC 744]**. Who can be the necessary party in a suit for specific performance, he relied upon the judgment in the case of **Kasturi vs. Iyyamperumal & others [(2005) 6 SCC 733]**. The law on this point is very clear. As per Section 19(b) of the Specific Relief Act, a specific performance suit is maintainable against those persons, who claimed title from one of the executants of the agreement. So, as such, the suit against the legal heirs of Ramkrishna Warrarkar is maintainable.

SPECIFIC PERFORMANCE AGAINST MINORS

10] The issue will come “whether the agreement is executed by predecessor-in-title, whether Court can grant specific performance against his legal representatives when some of them are minors?” It is true that as per Section 54 of the Transfer of Property Act, any agreement for sale does not create any interest. The issue of obtaining permission of the Court under Section 8(2) of

the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as “the Act of 1956” for brevity) is certainly required to be gone into by the Court when the decree for specific performance is to be passed. Reason is simple. Ultimately, Court has to consider the situation prevailing at the time of taking decision on suit. So, certainly the appellants are entitled to agitate that point when the issue of specific performance had arisen before the Court.

OBTAINING PERMISSION OF THE COURT BY THE GUARDIAN

11] Admittedly, defendant No.3-Ku. Ranjana Warrarkar, defendant No.4-Ku. Manisha Warrarkar, defendant No.5-Vithalrao Warrarkar and defendant No.6-Ku. Anjana Warrarkar were minors when the suit was instituted on 12/06/1996. Admittedly, the appellants have not obtained any permission from the Court as contemplated under Section 8(2) of the Act of 1956. Such permission has to be obtained by the natural guardian. As per Section 6(a) of the Act of 1956, the natural guardian for a boy or an unmarried girl is the father, and after him, the mother. So, appellant No.1-Bajabai is the natural guardian of defendant Nos.3 to 6.

12] The grievance of the appellants is that even though this objection was taken in the written statement, neither the trial Court nor the appellate Court has framed issue in that respect. It may be true that both the Courts have neither framed issue nor given a finding on that aspect.

13] Learned Advocate Shri Deshpande for the respondent has relied upon a judgment in the case of **Nangali Amma Bhavani Amma vs. Gopalkrishnan Nair & others [(2004) 8 SCC 785]**, whereas learned Advocate Mrs. Thakre has relied upon the judgment in the case of **Saroj vs. Sunder Singh & others [(2013) 15 SCC 727]**. In those cases, there was a suit for cancellation of the document by the minor. The issue was, whether after attaining the majority, the suit was filed within the time limit of three years as contemplated under Article 60 of the Limitation Act? They were held perfectly maintainable. Section 8(3) makes the agreement voidable at the instance of the minor or the person claiming under him. Mean to say that it is the choice of the minor, whether to get rid of the said agreement or to continue with the obligation created by the agreement. Certainly, the suit has to be filed within three years on attaining the majority.

INACTION OF MINORS ON ATTAINING MAJORITY

14] According to the learned Advocate Shri Deshpande, there was an inaction on the part of defendant Nos.3 to 6 in challenging the agreement after attaining the majority. The suit was filed on 31/03/2000. He invited my attention to the respective age of these defendants in the cause title of the plaint. According to him, they have not taken any action within the prescribed period after attaining the majority and, as such, they are estopped from taking a plea by way of written statement. Whereas, according to learned Advocate for the appellants, they cannot be estopped when they want to avoid the obligations created by the agreement in question. It will be material to consider the observations of the first appellate Court on those aspects.

15] In paragraph 24, the first appellate Court

- “has taken a note of signing on the written statement by defendant No.2-mother for and on behalf of minor defendant Nos.3 to 5”. The first appellate Court observed “that minor defendants were represented by defendant No.2, who is the legal guardian. Therefore, the submissions are absolutely devoid of substance and without any meaning”.

Whereas, the trial Court

- “has taken a note of filing of written statement by defendant No.2 on behalf of her minor children through the lawyer. It was further observed that the interest of defendant No.2 is not adverse to the interest of minors”.
- Hence, the trial Court also refused the grievance about appointment of the guardian for the minors.

16] From these findings, it is very well clear that there is no observation about requirement of Section 8(2) of the Act of 1956.

17] I do not think that any of the citations filed by learned Advocate Shri Deshpande will be useful to him. When the property consists of a joint family property, in that case, there was no necessity of requiring permission of the Court under Section 8 of the Act of 1956, if minors' share is to be sold. The reason is, his share is undetermined. Here this is not the case. Property sought to be sold is the separate property of deceased vendor.

18] It is very well true that both the Courts below have not considered the provisions of Section 8(2) of the Act of 1956. They have restricted themselves in accepting the act of defendant No.2

to sign on a written statement as natural guardian of the minors. No doubt, the mother is their natural guardian. Does it mean to say that the natural guardian-mother on behalf of the minor children can give a consent for execution of sale-deed on the basis of agreement for sale executed by their predecessor-in-title? No doubt, if the natural guardian will agree to execute a sale-deed on behalf of the minor children, it can certainly be executed. It is not illegal. It will be a choice of the minor to challenge it on attaining majority on the ground of not obtaining permission from the Court.

19] It is very well true that the minor defendant Nos.3 to 6 have not filed the suit thereby challenging the agreement for sale. Their natural guardian-mother has confined herself in filing the written statement on her behalf and on behalf of the minor children, in which she has agitated the grievance about not obtaining permission from the Court. So, the grievance, which is not made by filing a suit within the prescribed period of limitation, can it be made by way of written statement? The answer will be in positive. It is for the reason that if the provisions of the Limitation Act are perused, we can find that it prescribes the period of limitation for filing the proceedings either suits, applications or appeals. So, if those proceedings are not taken within the prescribed period, the

remedy is lost. It does not mean that the right is extinguished. It survives. The Limitation Act does not prescribe the period of limitation for filing of written statement. It is governed as per Order VIII of Code of Civil Procedure i.e. procedural in nature. This has precisely been held by the Hon'ble Supreme Court in the case of **Shrimant Shamrao Suryavanshi & another vs. Pralhad Bhairoba Suryavanshi [Dead] by L.Rs. & others [(2002) 3 SCC 676]**. The issue involved was, whether a plea on the basis of part performance under Section 53-A of the Transfer of Property Act can be taken in the written statement, particularly when that right is not agitated by filing of a suit. It has been observed in the aforementioned judgment. For ready reference, paragraph 20 is reproduced below.

"It is, therefore, manifest that the Limitation Act does not extinguish a defence, but only bars the remedy. Since the period of limitation bars a suit for specific performance of a contract, if brought after the period of limitation, it is open to a defendant in a suit for recovery of possession brought by a transferor to take a plea in defence of part-performance of the contract to protect his possession, though he may not be able to enforce that right through a suit or action."

20] In view of that, I hold that such grievance can be taken by way of written statement and not filing a suit challenging the

agreement by the minors after attaining the majority, does not come in their way.

21] When the written statement was filed, they were admittedly minors. Even, their evidence was given by defendant No.2 – mother. She has agitated this point. This is sufficient manifestation of the intention to avoid the contract. In view of the above discussions, I am not inclined to accept the contention of learned Advocate Shri Deshpande in that respect. Hence, question Nos.1, 2 & 3 have to be answered in the negative. When defendant No.3 to 6 are minors, decree for specific performance directing them to execute a sale-deed cannot be granted.

22] There is also an argument that the provisions of Order 32 Rule 3 of C.P.C. were not followed. My attention is also brought to the last paragraph of the written statement to that effect. The judgment in the case of **K.P. Natarajan & another vs. Muthalammal & others [2021 SCC Online SC 467]** is relied upon on behalf of the appellants. Whereas, learned Advocate Shri Deshpande contended that defendant No.2, being the mother, is a natural guardian and there is no material irregularity.

23] It is true that the trial Court has refused to give benefit to the defendants for the reason that no prejudice has been caused to the interest of minors (paragraph 23). Whereas, the first appellate Court has given weightage to defendant No.2, being the legal guardian.

24] Certainly, the provisions of Order 32 Rule 3-A of C.P.C. will not be applicable, because there is no grievance that guardian of the minors had interest in the subject matter of the suit adverse to that of minors. It is true that defendant No.2 is the natural guardian of the minors as per the provisions of the Act of 1956. In the case of K.P. Natarajan, the High Court of Madras set aside the ex parte decree. One of the grievances, was that the provisions of Order 32 Rule 3 of C.P.C. were not followed. Though the issue before the High Court was about correctness of the order refusing to condone the delay, ex parte decree itself was set aside. The said order was confirmed by the Hon'ble Supreme Court. Though the plaintiff applied for appointing second respondent-father as a guardian of a minor, the trial Court observed that "*Batta served. Vakalat by guardian to minor filed. Hence this petition is closed*". The Hon'ble High Court considered the difference between the provisions of Order 32 Rule 3 of C.P.C. and the amendments made

by Madras High Court therein. So, the ratio laid down therein is restricted to the facts of that case.

25] This Court has already observed about non-compliance of the provisions of Section 8(2) of the Act of 1956. The provisions of Order 32 Rule 3 of C.P.C. are general in nature and they are applicable to all kinds of suits including the suit for specific performance. Whereas, the provisions of Section 8(2) of the Act of 1956 come into picture only when the natural guardian has to deal with the property of a minor in the manner laid down therein. This Court feels that in the facts before us, the representation by defendant No.2-mother for defendant Nos.3 to 6, is sufficient compliance.

FINAL CONCLUSION

26] For the above discussions, the impugned judgment cannot be sustained. Even though, the issue of obtaining permission of the Court under Section 8(2) of the Act of 1956 had arisen at the stage of suit for specific performance, still the Court has to see that the provisions of Section 8(2) of the Act of 1956 are complied or not. We do agree that the respondent is not to be blamed for early death of Pandhari i.e. without executing sale-deed.

Be that it may, Court cannot give go by to the provisions of Section 8(2) of the Act of 1956. As they are not complied, the decree for specific performance as granted by the trial Court cannot be confirmed by this Court. It needs to be set aside. At the same time, the defendants cannot be directed to obtain the leave of the Court as contemplated under Section 8(2) of the Act of 1956. Because that was not the condition either on the original agreement and it cannot be by way of subsequent agreement.

27] The plaintiff has made alternative prayer for refund of earnest money of Rs.20,000/- and to create a charge on the suit land for the said amount, till the time it is repaid. There is a concurrent observations about payment of earnest money of Rs.20,000/-. So, the plaintiff is certainly entitled for refund of the earnest money. Section 22(1)(b) of the Specific Relief Act, 1963 empowers the Court to order for refund of the earnest money when the specific performance is refused. So, that order can certainly be passed. Even the direction to create a charge of the amount on the suit land can also been created. The amount has to be refunded and that too along with the interest at the rate of 6%. Hence, the following order is passed :

ORDER

- i.** The appeal is partly allowed.
- ii.** The judgment passed by the Civil Judge Senior Division, Yavatmal in S.C.S. No.98/1996, dated 31/03/2000 and the judgment passed by the Additional District Judge, Pandharkawada, District Yavatmal in R.C.A. No.131/2002, dated 18/07/2006 are hereby set aside.
- iii.** The suit of the plaintiff is partly decreed.
- iv.** Defendant Nos.1 to 6 are hereby directed to refund earnest money of Rs.20,000/- at the rate of 6% interest from the date of receipt i.e. 26/07/1995, until the date of repayment.
- v.** It is hereby directed that there will be charge of the decretal amount on the suit land till the time the amount is deposited before the trial Court.
- vi.** If the respondent has deposited Rs.10,000/- as per the judgment of the trial Court, it be refunded to him.
- vii.** The parties to bear their own costs.

(S.M. MODAK, J.)