

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.728 OF 2016**

Dattatraya Bajirao Kale	]	
Age - 48 Yrs. Occu- Agriculturist,	]	
R/at Newase Road, Baramati,	]	
District - Pune.	]	Appellant
		(Original Defendant No.5)

Vs.

[1] Shri Dinkar Pandurang Pawar	]	
(since deceased through Legal Heirs)]		Respondent
		(Original Plaintiff)
[1A] Sulochana Dinkar Pawar	]	
Age - 65 Yrs. Occu - Household,	]	
[1B] Ashok Dinkar Pawar	]	
Age - Adult, Occu - Agriculturist	]	
[1C] Arvind Dinkar Pawar	]	
Age - Adult, Occu - Agriculturist,	]	
[1D] Pradip Dinkar Pawar	]	
Age - Adult, Occu - Agriculturist,	]	
Nos. 1A to 1D Residing at -	]	
Jainkawadi, Tal Baramati,	]	
District - Pune.	]	
[1E] Savita Bhauso Fargade	]	
Age - Adult, Occu - Agriculturist,	]	
R/at - Boripardhi, Tal Daund,	]	
District - Pune.	]	
[1F] Sunita Bhauso Fargade	]	
Age - Adult, Occu - Agriculturist,	]	
R/at, Warwand, Tal - Daund,	]	
District - Pune.	]	

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| 1[G] | Nita Balu Lawand |] | |
| | Age - Adult, Occu - Household, |] | |
| | R/at - Nimbodi, Tal - Baramati, |] | |
| | District - Pune. |] | |
| [2] | Tulsabai Nivrutti Mane, |] | |
| | Age - 75 Yrs. Occu - Nil, |] | |
| | R/at - Kasba, Baramati, |] | |
| | District - Pune. |] | |
| [3] | Jayashree Mohanrao Jagtap |] | |
| | Age - 48 Yrs. Occu - Household, |] | |
| | R/at - Jalgaon Supe, Tal Baramati |] | |
| | District - Pune. |] | |
| [4] | Balubai Dadaso Jagtap |] | |
| | Age - 46 Yrs., Occu - Household, |] | |
| | R/at - Jalgaon Supe, Tal Baramati, |] | |
| | District - Pune. |] | |
| [5] | Ashabai Dashrath Jadhav, |] | |
| | Age - 42 Yrs. Occu - Household, |] | |
| | R/at - Parinche, Tal - Purandar, |] | |
| | District - Pune. |] | |
- Respondents
(Original Defendant Nos.1 to 4)

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Mr. Abhijit P. Kulkarni, for Appellant.
Mr. Himanshu Kode, for Respondent No.1C.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 11th JULY, 2022.
PRONOUNCED ON : 21st JULY, 2022.

JUDGMENT:

1. Feeling aggrieved with the concurrent findings of facts by the trial as well as the First Appellate Court, appellant/original defendant No.5 has approached this Court by preferring a second appeal amongst following facts and grounds.

2. Respondent No.1 - Dinkar Pandurang Pawar was the original plaintiff. After his death, his legal heirs - respondents No.[1A] to 1[G] and respondents No.2 to 5 have been brought on record as his legal representatives, who have prosecuted the suit before the Courts below.

3. Regular Civil Suit No.218 of 1991 was filed by the original plaintiff for specific performance of contract and declaration to the effect that a sale deed executed by defendants No.1 to 4 in favour of appellant herein/defendant No.5 dated 1st March, 1999 was not bound upon him in respect of Gat No.88, Gat No.224 and Gat No.213 and Gat No.77 situate at Village Jainakwadi, Baramati (for short "suit property"). There was a registered agreement of sale between deceased Nivrutti Krishna Mane and the plaintiff *qua* the suit property on 3rd May, 1974. Nivrutti Mane agreed to sell the suit property to the plaintiff for a consideration of Rs.3250/- and had accepted Rs.2000/- towards earnest money. It was agreed between the parties that the sale deed in respect of the suit property would be executed as and when deceased Nivrutti would obtain permission from the competent authority to sell the suit property, meaning thereby, time was not the essence of contract. It is the contention of the plaintiff that on 3rd May, 1974 itself deceased Nivrutti Mane had delivered possession of the suit property by executing possession receipt.

4. Defendant No.1 - Smt. Tulsabai is the widow of Nivrutti Mane whereas defendants No.2 to 4 are his married daughters. Deceased Nivrutti Mane, during his lifetime, was ready and willing to perform his part of contract, in the sense, he was ready and willing to execute

the sale deed. However, the sale deed could not be executed despite repeated requests by the plaintiff and also in view of very close relations between two families. After the death of deceased Nivrutti Mane, his legal representatives were ready and willing to execute the sale deed, but even by saying that unless sale deed is executed, soul of deceased Nivrutti would not rest in peace, they could not remain faithful to their promise.

5. Plaintiff had issued a notice to the defendants on 21st May, 1991, thereby asking them to execute a sale deed in respect of the suit property and to inform a specific date as to when they would attend the office of the Sub Registrar. The defendants refused to accept the notice and, therefore, the plaintiff was constrained to file a suit for specific performance.

6. During pendency of the suit, defendants No.1 to 4 had sold the suit property in favour of defendant No.5 on 1st March, 1999 despite publication of a notice in the local newspaper "*Ransing*" by the plaintiff on 4th February, 1999. The plaintiff contends that the said transaction and the sale deed entered into by the legal representatives of deceased Nivrutti in favour of defendant No.5 is bogus, sham and not binding upon him. According to him, he has been in possession of the suit property ever since deceased Nivrutti had executed an agreement of sale and a possession receipt dated 3rd May, 1974. The plaintiff had placed on record documentary evidence in the form of public documents as per section 31 of the Maharashtra Land Revenue Code which comprises order of the Sub Divisional Officer in final Appeal No.221 of 2001 dated 28th January, 2003. From the said document, it has been substantiated that name

of the plaintiff has been recorded in the record of rights as well in 7/12 extract *qua* the suit property. Admittedly, decision of S.D.O has not been challenged by the appellant-defendant No.5. It has attained finality.

7. Defendants No.1 to 4 i.e legal representatives of deceased Nivrutti Mane, however, took a plea in the written statement that the suit was barred by limitation. They had also raised a plea that there was no reason for deceased Nivrutti to sell the suit property as there was no legal necessity. They also denied execution of any agreement to sell between deceased Nivrutti and the plaintiff.

8. Defence of the appellant/defendant No.5 was that the suit property has been in his possession ever since he purchased it and, therefore, prayed for dismissal of the suit, *inter alia*, in his counter claim, he contended that he had become owner of the suit property by virtue of a registered sale deed dated 1st March, 1999 which was executed in his favour by defendants No.1 to 4 and was put in possession thereof. There are entries in the record of rights to that effect. He, therefore, prayed for a relief of perpetual injunction against the plaintiff. While countering the counterclaim of appellant-defendant No.5, plaintiff had denied all the contentions raised by defendant No.5 in the counterclaim by reiterating his case.

9. After framing necessary issues, learned Civil Judge (Junior Division) Baramati by the first impugned judgment, decreed the suit of the plaintiff with costs, *inter alia*, directing defendants No.1 to 5 to execute a sale deed *qua* the suit property in favour of the plaintiff by depositing balance amount of consideration in the court. The trial

Court had also restrained the defendants from interfering with possession of the plaintiff over the suit property.

10. Original defendants No.1 to 4 did not prefer any appeal against the impugned judgment for the obvious reason that they lost cause in the *lis*. However, it is only the defendant No.5-appellant herein who had preferred First Appeal before the District Judge, *Baramati* bearing Civil Appeal No.48 of 2007.

11. Learned District Judge, after evaluating the facts and evidence, upheld the judgment of the trial Court by dismissing the appeal against which the appellant/defendant No.5 has approached this Court.

12. I heard Mr. Abhijit Kulkarni, learned Counsel appearing for the appellant and Mr. Himanshu Kode, for respondents No.1 (C) on the point of admission.

13. At the outset, Mr. Kulkarni would argue that both the Courts below have committed a grave error, not only in law, but in facts, by observing that the plaintiff had proved that he was always ready and willing to perform his part of contract *qua* the suit property. He would argue that the Courts below overlooked a glaring aspect that the suit came to be filed almost after 17 years and, therefore, was barred by limitation.

14. With the assistance of Mr. Kulkarni, I have meticulously gone through the entire record and proceedings and evidence adduced by the parties in order to ascertain as to whether concurrent findings of

two Courts below are perverse or otherwise in light of the fact that normally, interference is not permissible when there are concurrent findings of both the Courts below. What is required to be seen in a second appeal is existence of a substantial question of law. It is a settled legal position that if concurrent findings of facts are recorded, *dehors* the pleadings or is based on no evidence or misreading of material documentary evidence, or is recorded against any provision of law or the decision is one which no Judge acting judicially could reasonably have reached, then only such grounds will constitute substantial question of law within the meaning of section 100 of the Code of Civil Procedure.

15. Mr. Kulkarni would submit that the second appeal needs to be admitted on the ground of limitation which, according to him, is a substantial question of law and also on the second ground that the Courts below have not properly appreciated the pleadings and evidence with regard to the ready and willingness of the plaintiff to perform his part of contract.

16. Mr. Kode, on the other hand, would argue that the appellant is not a *bona fide* purchaser, for, he was very well aware of the pendency of the suit between the plaintiff and defendants and, even then, he incurred a risk by purchasing the suit property. He was well aware that the suit property was put into the possession of the plaintiff by deceased Nivrutti Mane and that the plaintiff was always ready and willing to perform his part of contract. He would argue that time was not the essence of contract and, therefore, there is no substantial question of law on the aspect of limitation involved in this appeal.

17. There is no dispute that deceased Nivrutti Mane was the owner of the suit property. The suit property was ancestral. There is also no dispute that original defendants No.1 to 4 are the legal heirs and representatives of deceased Nivrutti.

18. Admittedly, appellant/defendant No.5 is the subsequent purchaser during pendency of the suit bearing R.C.S No.218 of 1991. Exhibit 144 is the possession receipt and Exhibit 145 is registered agreement of sale dated 3rd May, 1974 in favour of plaintiff - Dinkar Pawar by deceased Nivrutti Mane. Suit property was agreed to be sold for a consideration of Rs.3250/-. Plaintiff had paid Rs.2000/- toward earnest money. Possession of the suit property was delivered to the plaintiff on 3rd May, 1974 itself.

19. Recitals of the terms of agreement indicate that deceased Nivrutti Mane would obtain necessary permission from the concerned authority for the purpose of execution of sale deed and, only after getting such permission, he would accept the balance consideration and executed a registered sale deed in favour of the plaintiff.

20. Since deceased Nivrutti Mane could not obtain necessary permission from the competent authority, sale deed could not be executed in favour of the plaintiff. After the death of Nivrutti Mane, it is contended that defendants No.1 to 4 were ready and willing to execute a sale deed in favour of the plaintiff by stating that they would obtain necessary permission and execute the same. However, it is the contention of the plaintiff that later on defendants No.1 to 4 had changed their mind at the instigation of some relatives and avoided to execute a sale deed.

21. A notice dated 21st May, 1991 through one Advocate Mr. Prabhune came to be issued to the defendants requesting them to execute a registered sale deed, however, notice was neither received nor replied. Notice is at Exhibit 139.

22. A bare look at the plaint and the evidence of the plaintiff would reveal that all the aforesaid facts including a specific averment that the plaintiff was always ready and willing to perform his part of contract have been specifically pleaded and proved. There is a reference of a notice dated 21st May, 1991 issued on his behalf by his Advocate. There is also a specific averment in the plaint that during pendency of the suit, defendants No.1 to 4 had entered into a transaction of sale in respect of the suit property with defendant No.5-appellant herein on 1st March, 1999.

23. It has been specifically averred in para 3-A of the plaint as regards publication of a notice in local newspaper "*Ransingh*" on 4th February, 1999 through Advocate Sonawane. The said public notice indicates that nobody should enter into any transaction *qua* the suit property. It is quite clear from the averments and the evidence of the plaintiff that appellant-defendant No.5 had a notice and was well aware of the transaction between the plaintiff and the defendants as well as pendency of a suit in the court. He, therefore, cannot be said to be a *bona fide* purchaser without notice. The appellant-defendant No.5 has, therefore, incurred a risk in buying the suit property in the capacity of a *lis pendens* purchaser.

24. It is apparent from the cross-examination of the appellant-defendant No.5 that he did not inquire as regards pending litigation *qua* the suit property before buying it. His cross also reveals that

despite having knowledge of the entries *qua* the suit property in the name of the plaintiff in revenue record, he went on to buy the same. Even his witness too, unequivocally admitted in cross that he knew about the possession of the plaintiff over the suit property since 1991. These aspects not only belie and falsifies claim of appellant-defendant No.5 but also buttresses the plaintiff's case. For the aforesaid reasons, appellant-defendant No.5 cannot be said to be a *bona fide* purchaser of the suit property without notice.

25. Findings recorded by the Courts below are, therefore, proper, legal and correct on the basis of evidence on record. There is absolutely no perversity in analyzing and placing reliance upon the evidence on record. Reliance placed by Mr. Kulkarni on a decision of the Supreme Court in the case of **State of Rajasthan and others Vs. Shiv Dayal and another, (2019) 8 Supreme Court Cases, 637** would not be of any benefit for the simple reason that concurrent findings arrived at by the Courts below can be interfered with only if there is a perversity. As it has been settled by a catena of decisions that second appeal can be entertained only on a substantial question of law, it would be apposite to extract paragraphs 12 to 17 of the said judgment which read thus;

"12. Indeed, we find that the High Court dismissed the second appeals essentially on the ground that since the two Courts have decreed the suit, no substantial question of law arises in the appeals. In other words, the High Court was mostly swayed away with the consideration that since two Courts have decreed the suit, resulting in passing of the decree against the State, there arises no substantial question of law in the appeals. It is clear from the last

paragraph of the impugned order, which reads as under:

“Under these circumstances, when both the Ld. Courts have arrived at the conclusion that the disputed area is outside the forest area. Therefore, the principles laid down in T.N. Godavarman Thirumulpad Vs. Union of India (abovequoted) cannot be enforced in this appeal.”

(Emphasis supplied)

13. We do not agree with the aforementioned reasoning and the conclusion arrived at by the High Court. It is not the principle of law that where the High Court finds that there is a concurrent finding of two Courts (whether of dismissal or decreeing of the suit), such finding becomes unassailable in the second appeal.

14. True it is as has been laid down by this Court in several decisions that “concurrent finding of fact” is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”). However, this rule of law is subject to certain well known exceptions mentioned infra.

15. It is a trite law that in order to record any finding on the facts, the trial court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties. Similarly, it is also a trite law that the appellate court also has the jurisdiction to appreciate the evidence de novo while hearing the first appeal and either affirm the finding of the trial Court or reverse it. If the appellate Court affirms the finding, it is called "concurrent finding of fact" whereas if the finding is reversed, it is called

"reversing finding". These expressions are well known in the legal parlance.

16. When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded dehors the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (See observation made by learned Judge, Vivian Bose, J., as his Lordship then was a Judge of the Nagpur High Court in Rajeshwar Vishwanath Mamidwar v. Dashrath Narayan Chilwekar, para 43).

17. In our opinion, if any one or more ground, as mentioned above, is made out in an appropriate case on the basis of the pleading and evidence, such ground will constitute substantial question of law within the meaning of Section 100 of the Code".

(emphasis supplied)

26. It is a trite law that in order to record any finding on the facts, the trial Court as well as the First Appellate Court are required to appreciate the entire evidence (oral and documentary) on record in the light of the pleadings of the parties. In the case before the Supreme Court, concurrent findings of facts were recorded by the Courts below *dehors* pleadings which necessarily means the judgments were based on no evidence or misreading of several material documents, which is not the case in hand. Ratio laid down therein, therefore, would not be made applicable to the present set of facts.

27. As regards readiness and willingness, as already stated hereinabove, there are not only specific averments in the plaint but also acceptable evidence on record indicating that the plaintiff was always ready and willing to perform his part of contract. When original defendants No.1 to 4 avoided to execute a sale deed *qua* the suit property, a notice Exhibit 139 came to be issued by the plaintiff through Advocate Prabhune on 21st May, 1991 indicating his readiness and willingness to perform his part of contract. However, it was neither accepted nor complied with by the defendants. Interestingly, defendants admitted receipt of such notice in their written statement. It is quite sufficient to indicate readiness and willingness of the plaintiff to perform his part of contract, as he had specifically asked as to when they (defendants) would attend the office of Sub Registrar to execute the sale deed. In a suit for specific performance, the plaintiff is not only required to aver in the plaint that he is ready and willing to perform his part of contract but at the same time is also required to prove the same by evidence whereupon it becomes incumbent upon Court to record a finding with regard to compliance of section 16 (c) of the Act before passing a decree for specific performance.

28. It is also a matter of record and as already stated hereinabove, despite a clear notice published in a local newspaper "*Ransingh*" by the plaintiff on 4th February, 1999, defendants No.1 to 4 had sold the suit property to appellant-defendant No.5 on 1st March, 1999. It is needless to comment upon the conduct of the defendants as it is self evident. Defendants have, indeed, breached the contract.

29. So far as period of limitation is concerned, it is governed by Article-54 of the Limitation Act, 1963. In view of Article 54, period of limitation is three years and it is to be calculated from the date specified in the agreement for performance or, in the absence of any such stipulation, within three years from the date, the performance was refused. Article 54 of the Limitation Act, therefore, has two parts. According to the first part, the period of three years is to be calculated from the date specified in the agreement for performance. The position of law is very clear, in the sense, when no such date of performance of contract is fixed then limitation would begin when the plaintiff has noticed that performance is refused.

30. As stated hereinabove, limitation began to run on 21st May, 1991 when the defendants refused to comply with the notice dated 21st May, 1991 issued on behalf of the plaintiff. The suit, therefore, has been well within limitation. Argument of Mr. Kulkarni that the suit is barred by limitation as it came to be filed on 15th July, 1991 i.e 17 years after execution of agreement of sale dated 3rd May, 1974 would not hold water for the simple reason that the appellant herein is a stranger to the contract between the plaintiff and the defendants. It cannot be heard to say that he has a legal right to raise a plea of limitation, for, he was not a party to the agreement dated 3rd May, 1974. In the given set of facts, evidence and circumstances, there was no question of enforcing the contract *qua* the present appellant.

31. Both the Courts below have, therefore, exercised their discretion in granting specific relief reasonably, properly and judiciously in view of settled principles of law as envisaged in section 20 of the Specific Relief Act. The Courts below have not only taken into account, totality of the circumstances, but also conduct of the parties, especially the appellant-

defendant No.5 herein and respective interests under the contract while granting relief to the plaintiff.

32. For the reasons aforesaid, I do not find any merit in the arguments of the learned Counsel for the appellant as no substantial question of law is involved herein, and hence, the second appeal stands dismissed. In the circumstances, parties to bear their respective costs.

[PRITHVIRAJ K. CHAVAN, J.]