

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY**  
**BENCH AT AURANGABAD**

**APPEAL FROM ORDER NO. 40 OF 2023**

Akhilabee w/o Shaikh Babu,  
Age : 50 years, Occu. Household,  
R/o. Aziziya Nagar, Parbhani,  
Tal. & Dist. Parbhani.

**....Appellant**  
[Orig. Defendant]

**Versus**

Akhil Ahmed s/o Abdul Hamid,  
Age : 60 years, Occu. Service,  
Ro. Dargah Road, Parbhani,  
Tal. & Dist. Parbhani.

**....Respondent**  
[Orig. Plaintiff]

....  
Mr. Pravin Kalani – Advocate for the appellant  
Ms A. N. Ansari – Advocate for respondent  
....

WITH  
**CIVIL APPLICATION NO. 7766 OF 2023**  
IN  
**APPEAL FROM ORDER NO. 40 OF 2023**

**CORAM : S. G. MEHARE, J.**  
**DATE : 11<sup>th</sup> OCTOBER, 2023**

**ORAL JUDGMENT :**

1. Heard the learned counsel for the appellant and the respondent.
2. The parties are being referred to as per their original status before the lower Court. The appellant is the original “defendant”, and the respondent is the original “plaintiff.”

3. The plaintiff had filed a suit for the specific performance of a contract on the basis of the agreement to sell dated 01.09.2004 and the final agreement to sell dated 19.11.2004. As per the agreement dated 19.11.2004, the sale deed was to be executed before 29.09.2006. In the alternative, the plaintiff had also prayed for the refund of the earnest amount on 18.06.2011. The plaintiff pleaded that the defendant received money from him from time to time, i.e. on 01.09.2004, 05.11.2004, 18.11.2004, 04.02.2005, 24.05.2005 and 25.07.2005. Since the defendant failed to perform her contract, the plaintiff issued a legal notice dated 16.03.2011, which was served to the defendant. Even then, the defendant did not take steps. The plaintiff again served a legal notice dated 30.05.2011 upon the defendant; however, there was no response on his part. Hence, as a last resort, he filed the suit.

4. The defendant contested the suit but did not enter the witness box. She has specifically pleaded that the suit was barred by limitation. She has also denied that there was any such agreement, and the notices, as alleged, were served upon her. She also denied receipt of payment allegedly made to her.

5. The learned trial Court held that there was an agreement to sell between the parties, and the defendant received

an amount of Rs. 92,500/- from the plaintiff from time to time. It is also held that the plaintiff was ready and willing to perform his part of a contract. However, he is not entitled to the relief of specific performance of a contract. In the absence of any alternate prayer for the refund of earnest money, the Court granted a decree for the refund of Rs. 92,500/- against the defendant, though the trial Court held that the suit of the plaintiff was barred by limitation.

6. The defendant had preferred an appeal before the first appellate Court and raised the legal issues. However, the learned District Judge – 2, Parbhani, remitted the matter back to the trial Court to decide the suit afresh after giving an opportunity to both the parties to lead evidence and also granted liberty to the plaintiff to make an application for amendment of the plaint to include the relief of refund of any earnest money or deposit made by him.

7. The learned counsel for the defendant vehemently argued that both the courts have passed perverse orders. Once a suit is held barred by limitation, it is barred for every purpose. The Civil Court had no jurisdiction under the Specific Performance of Contract to grant another relief unless specifically claimed. Therefore, once the suit was dismissed, it ought to have been dismissed for all purposes, but it seems that the exceeded leniency

has been shown by both the courts and the learned trial Court without jurisdiction has passed the decree for refund of money in the absence of prayer. The learned Additional District Judge has gone one stage ahead to remand the matter without framing appropriate points for determination and exceeded its jurisdiction, granting liberty to the plaintiff to amend the plaint. Therefore, learned counsel for the defendant argued that both the judgments and decrees are liable to be set aside.

8. Per contra, learned counsel for the plaintiff would submit that the plaintiff has led evidence that the defendant had extended the time to perform his part of a contract orally from time to time, and lastly, when the defendant refused to perform his part of a contract in 2011, notices were issued to her. Therefore, the suit was well within limitation from the date of her refusal. She also argued that the first appellate Court had considered the facts in detail and correctly remitted the matter back, granting liberty to both parties to prove and disprove the claims of each other. Therefore, the order of the first appellate Court does not warrant interference.

9. It is really surprising that after recording a finding that the suit is barred by limitation, the trial Court granted a decree of

refund of the earnest money. The trial Court has considered Article 54 of the Limitation Act, 1963, which provides that a suit for the specific performance of a contract can be filed within three years from the date fixed for the performance and if no such date is fixed, the limitation starts to begin from the date of notice of the denial by the plaintiff. During the course of the argument, it is argued that there was a written agreement, and the date for performance was also fixed. If the date is fixed for the performance of a contract is considered, the suit is barred by limitation. As far as the extension of the period on the basis of the payments made towards the consideration from time to time, the record reveals that all those payments were made before the date fixed for the performance of the contract by the defendant. The last payment was made on 25.07.2005. There was nothing on record to show that, at any point of time the time was extended by paying the money to the defendant.

10. Considering the rival contentions of the parties, the following points fall for consideration: -

- [i] Whether the suit was barred by limitation?
- [ii] Can any other relief in the alternate without prayer in the Specific Relief Act be granted?
- [iii] Whether the Court can award the refund of the amount when the suit has been held barred by limitation?

11. Regarding the first point of limitation, the suit for the specific performance of the contract is governed under Article 54 of the Limitation Act. This section has been divided into two parts for counting the periods of the limitation. The first part provides that the suit shall be filed within three years from the date fixed for the performance, and the second part provides that if no such date is fixed, the suit shall be filed within three years when the plaintiff has noticed that the performance is refused.

12. As discussed above, there was a written agreement, and 29.09.2006 was fixed for the performance. Admittedly, the suit was filed after three years from the date fixed for the performance.

13. Learned counsel for the plaintiff has vehemently argued that the defendant had received money towards the part consideration from time to time, which shows that the time was extended for the performance of the contract. It is also argued that the plaintiff had issued a notice in 2011 but the defendant refused to perform his part of a contract. Hence, that was the cause of action.

14. The provision of Article 54 of the Limitation Act is very specific. It is not disputed that the date was fixed for performance

in a written agreement. However, the plaintiff explained that it was impliedly extended by receiving the part consideration from time to time. The defendant received the last part of the consideration amount on 25.07.2005. It was before the date fixed for performance. There is no explanation for the silence from the last payment to the defendant until the plaintiff issued notice to the defendant. Even if it is presumed for the sake of arguments that the time was extended on receipt of the part payment, the limitation was till 2009. Against this backdrop, even on the preponderance of probabilities, the case of the plaintiff that the time was extended orally does not appeal to the human mind. In the normal course, time ought to be extended by an independent document on the old document. The service of notice could not be a cause of action if the date for the performance is fixed or agreed. The learned trial Court has considered provisions of law and correctly held that the suit of the plaintiff was barred by limitation. However, the learned District Judge did not utter a single word about the grounds raised by the defendant and did not frame the points for determination. Only a single point was framed whether any interference is required in the impugned Judgment and decree of the trial court. The learned Additional District Judge has brushed aside the law regarding the Judgment of the first appellate Court. The First Appellate Court is the last fact-finding Court. It is

supposed to rewrite the Judgment on reappreciating the evidence. For that purpose, it has to frame the points for determination involved in the appeal. That apart, even after passing the decree of refund of money without prayer and holding that the suit is barred by limitation, the trial court granted awarded the refund of the earnest amount. He did not touch such crucial questions. The learned Additional District Judge-2, Parbhani, also did not consider the ingredients of Order 41 Rule 23A of the Code of Civil Procedure for remitting the matter for retrial. Remand is not a matter of course. There shall be grounds for remand. There was nothing in his Judgment that few issues remained to be framed and determined. If it thinks fit to remand the case, the appellate Court has to direct the trial Court on what issue or issues shall be tried in the case so remanded. In other words, when the appellate Court requires the remand, it has to frame the issue or issues to be tried by the trial Court. Order 41 Rule 24 of the Code of Civil Procedure controls the power of remand under Order 41 Rule 23-A. It has been provided that where the evidence on record is sufficient, the appellate Court should determine the case finally. Sufficient evidence was on record. The Appellate Court had no reason to remand the case. The required issues were framed in the trial Court, and parties had contested on the said issues. Hence, it was not a fit case for remand. That apart, the Appellate Court exceeded its jurisdiction by

advising the appellant to amend the prayer demanding the earned money alternatively. Therefore, the Judgment of the first appellate Court is not only illegal but also perverse.

15. Section 22 of the Specific Relief Act prohibits the Court from granting the relief not prayed for. Sub-section 2 of the said section provides that any other relief, including the refund of any earnest money or deposit paid, shall not be granted unless it has been specifically claimed. The learned trial court also exceeded its jurisdiction, granting the relief which was not claimed. Once the suit is held barred by limitation, it is barred for all consequential reliefs in the suit for the specific performance of the contract. The limitation for recovery of any money is three years, but both Courts have completely ignored this legal aspect.

16. For the above reasons, points no. 1 is answered in the affirmative and points no. 2 and 3 are answered in the negative. Hence, the appeal deserves to be allowed.

**ORDER**

- 1) The appeal is allowed.
- 2) The Judgment and decree passed by learned 5<sup>th</sup> Civil Judge Junior Division, Parbhani, passed in Regular Civil Suit No. 127 of 2012, and the Judgment and decree of

the learned District Judge – 2, Parbhani, passed in Regular Civil Appeal No. 54 of 2018 dated 22.02.2023, are quashed and set aside.

- 3) The suit of the plaintiff stands dismissed with costs.
- 4) R&P be returned to the trial Court.
- 5) In view of the disposal of the appeal pending civil applications, if any, stand disposed of.
- 6) Rule made absolute in the terms above.

**[ S. G. MEHARE ]**  
**JUDGE**

SG Punde