



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

**901 SECOND APPEAL NO.312 OF 2023
WITH
CIVIL APPLICATION NO.7353 OF 2023**

Kisan s/o Fikarchand Bhatewale,
Age : 53 years, Occu.: Agri., & Business,
R/o.: Lalmandi Road, Begumpura,
Aurangabad

.... **APPELLANT**
(Orig. Defendant No.3)

VERSUS

1. Bapusaheb s/o Pandurang Muley,
Age : 72 years, Occu.: Business,
R/o.: Begumpura, Aurangaabd

...**RESPONDENT NO.1**
(Original Plaintiff)

2. Smt. Harnabai w/o Revichand Lahamange,
Age : 77 years, Occu.: Household,
R/o.: Vidi Kamgar Housing Society,
Khokadpura, Aurangabad

3. Ganesh s/o Revichand Lahamange,
Age : 35 years, Occu.: Agril.,
R/o.: As above

...**RESPONDENT NO.2 & 3**
(Orig. defendant Nos.1 & 2)

....
Mr. Milind K. Deshpande, Advocate for the Appellant
Mr. Shaikh Mujtaba Gulam Mustafa, Advocate for Respondent No.1
Mr. Ajeet D. Kasliwal, Advocate for Respondent Nos.2 & 3
....

CORAM : SANDIPKUMAR C. MORE, J.

DATED : 01/10/2024.

ORDER :

1. Heard rival submissions on admission.

2. Being aggrieved with the judgment and order dated 20/02/2023 passed by the learned *Ad-hoc* District Judge-1, Aurangabad i.e. the learned first appellate court in Regular Civil Appeal No.307 of 2016 confirming the judgment and order dated 08/11/2016 passed by 4th Joint Civil Judge (Junior Division), Aurangabad i.e. the learned trial court, in Regular Civil Suit No.141 of 2012 the present appellant i.e. original respondent No.3 in the aforesaid suit, has filed this second appeal against concurrent findings of both the learned courts below.

3. Brief facts are as under :

On 24/06/2004 one Revichand executed an agreement to sell in favour of present respondent No.1 i.e. original plaintiff in respect of the suit house i.e. Municipal House No.1-1-23/3, CTS No.1362 consisting of two storied building at Begumpura, Aurangabad for consideration of Rs.2,50,000/-. He had accepted Rs.40,000/- out of the said consideration and the remaining amount was to be paid within two months. Thereafter, Revichand executed another agreement to sell dated 31/08/2004 in respect of the suit house by which the period for execution of sale deed was extended by further period of two months. Thereafter, Revichand expired in the year 2009, but on 22/01/2010 respondent No.1 / plaintiff got executed

Bharna-Pavti from present respondent Nos.2 & 3 being legal representatives of the deceased Revichand. Then respondent No.1 / plaintiff filed aforesaid suit against respondent Nos.2 & 3 for specific performance of contract, wherein the present appellant was added as defendant No.3. Then all the defendants namely the appellant and respondent Nos.2 & 3 contested the suit by claiming that the suit filed by the plaintiff was not within limitation and the alleged agreement to sell could not be proved and that the plaintiff is not entitled for claiming any specific performance. The learned trial court vide judgment and decree dated 08/11/2016 decreed the suit and directed defendant Nos.1 & 2 to execute sale deed of the suit property in favour of respondent No.1 / plaintiff by accepting the remaining amount of consideration of Rs.2,00,000/-. Being aggrieved with the said judgment of the learned trial court, the present appellant / defendant No.3 preferred the aforesaid appeal before the learned first appellate court but vide judgment and decree dated 20/02/2023 the learned first appellate court not only confirmed the judgment of the trial court but also directed the present appellant and respondent Nos.2 & 3 to execute sale deed of the suit property in favour of respondent No.1 / plaintiff jointly. Hence, this second appeal.

4. The learned counsel for the appellant submits that both the learned courts below, have definitely erred in granting specific performance in favour of respondent No.1/plaintiff by ignoring fact that suit filed by respondents was not in limitation and that the period for specific performance of the contract could not be said to be revived under *Bharna-Pavti* dated 22/01/2010. He also relied on following judgments:

- A) *Chand Rani (Smt) (Dead) by LRS. vs. Kamal Rani (Smt) (Dead) by LRS., reported in (1993) 1 SCC 519;***
- B) *Sampuran Singh and others vs. Smt. Niranjan Kaur and others, reported in AIR 1999 SC 1047 &***
- C) *Santosh Hazari vs. Purushottam Tiwari (deceased) by LRS., reported in (2001) 3 SCC 179.***

5. On the contrary, the learned counsel for respondent No.1 strongly resisted the submissions made on behalf of the appellant / defendant No.3 and supported both the impugned judgments. On the other hand, the learned counsel for respondent Nos.2 & 3 / original defendant Nos.1 & 2 pointed out that the judgment of the first appellate court has attained finality against defendant Nos.1 & 2 since they have already withdrawn the balance amount of

consideration and executed sale deed of the suit house in favour of respondent / plaintiff. According to him, only possession of the suit house of the present appellant is to be delivered.

6. It is significant to note that the appellant has raised two main substantial questions of law; first that the suit of the plaintiff is not in limitation and secondly the *Bharna-Pawti* executed by respondent Nos.2 & 3 subsequent to the death of Revichand was not sufficient to revive the period of specific performance. So far as the first substantial question is concerned, the learned counsel for the appellant relied on the judgment of the Hon'ble Apex Court in the case of **Chand Rani vs. Kamal Rani** (*supra*), wherein it is observed that even if time is not of the essence of the contract the court has to infer that it is to be performed in a reasonable time if the conditions are evident:

- i) *From the express terms of the contract;*
- ii) *from the nature of the property; and*
- iii) *from the surrounding circumstances, for example : the object of making the contract.*

However, on going through both the impugned judgments it is clearly evident that both the learned courts below have held on the

basis of evidence that time was not made essence of the contract executed between Revichand and respondent No.1 / plaintiff. It has come on record that sale deed was to be executed after the litigation between Revichand and the appellant ends. Further, the present appellant / defendant No.3 was well aware about the agreement to sell between Revichand and respondent No.1 / plaintiff but still he preferred to purchase the suit property from present respondent Nos.2 & 3 during the pendency of the suit. Further, the contents of the agreement to sell were proved by respondent No.1 / plaintiff and there is concurrent finding to that effect. Thus, it can not be said that the suit of respondent No.1 was barred by limitation as both the learned courts below after discussing the evidence on record and by going through recitals of the agreement, observed that it was in limitation in view of legal provisions of law.

7. So far as second substantial question of law is concerned, the appellant is claiming that even though respondent Nos.2 & 3 had executed *Bharna-Pauti* by referring earlier agreement to sell and thereby accepted the same, whether it can be said that the period for specific performance got revived ? The learned counsel for the appellant for this purpose relied on the judgment of the Hon'ble

Apex Court in the case of **Sampuran Singh and others vs. Niranjana Kaur and others** (*supra*) wherein it is observed as follows :

“Section 18 (1) itself starts with the words “Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made...” Thus, the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit, in other words, if the limitation has already expired, it would not revive under this Section. It is only during subsistence of a period of limitation, if any, such document is executed, the limitation would be revived afresh from the said date of acknowledgment. In the instant case, admittedly, the oral mortgage deed is in March, 1893. If the period of limitation for filing suit for redemption is 60 years then limitation for filing a suit would expire in the year 1953. Thus, by the execution of the document dated 11th January 1960 it cannot be held by virtue of Section 18 that the period of limitation is revived afresh from this date.”

However, it has been concurrently held by both the learned courts below that time was not essence of transaction between Revichand and respondent No.1 / plaintiff. Moreover, respondent

Nos.2 & 3 have also not denied the execution of *Bharna-Pawti* executed in favour of respondent No.1 / appellant. Moreover, the appellant was also aware about the transaction between Revichand and respondent No.1/ plaintiff. Therefore, the refusal of execution of the sale deed was in fact the starting point of limitation for filing suit. Thus, considering all these aspects both the learned courts below have observed that the appellant and respondent Nos.2 & 3 were under an obligation to complete the transaction. Apart from this, it is extremely important to note that present respondent Nos.2 & 3 have already executed sale deed of the suit premises as per the judgment and order of both the learned courts below in favour of the present respondent No.1 / plaintiff. Thus, considering all these aspects, no substantial questions of law as raised by the appellant are involved in this matter and therefore, the second appeal stands dismissed at admission stage alongwith Civil Application No.7353 of 2023.

(SANDIPKUMAR C. MORE, J.)