

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.350 OF 2022
WITH
INTERIM APPLICATION NO.2526 OF 2022
IN
SECOND APPEAL NO.350 OF 2022

1.Devoo Ambo Patil (since deceased)
through its legal representatives
Appellant Nos.2 to 6 herein
2. Ramchandra Devoo Patil
3. Pandit Shankar Devoo Patil
4. Ratan Devoo Patil
5. Smt. Bhaivabai Patil
6. Smt. Latabai Patil
7. M/s. Everest Land Developers ..Appellants

V/S.

1. Hiren Venilal Sevak
2. Parshuram Devoo Patil since
deceased through his legal
representatives-
2(a) Suman P. Patil
2(b) Vinod P. Patil
2(c) Shobha P. Patil
2(d) Jaymala P. Patil
2(e) Vandana P. Patil
2(f) Renuka P. Patil
2(g) Nirmala P. Patil
2(h) Bhalchandra P. Patil (deceased)
2(i) Lina P. Patil
3. Mohan Devoo Patil (deceased)
4. Smt. Vimlabai Iggabai Patil alias
Vimal Narsingh Shinge
since deceased represented by her
heirs and legal representatives-
4(a) Arun Narsingh Shinge
4(b) Chayya Harish Patil
4(c) Nanda Janardhan Bhadri

4(d) Laxmi Kavish Mhatre
4(e) Miyahara Harish Patil

..Respondents

**WITH
SECOND APPEAL NO.353 OF 2022
WITH
INTERIM APPLICATION NO.17807 OF 2023
IN
SECOND APPEAL NO.353 OF 2022**

M/s Harmony Lifestyle Structures
Private Limited a Private Limited
Company through its Director Mr.
Deepak Jain

..Appellant

V/S.

1. Hiren Venilal Sevak,
partner of M/s. Build-Well
Developers,

2. Devoo Ambo Patil through his
legal representatives
Appellant Nos.3 to 10 herein

3. Parshuram Devoo Patil through
his legal representatives

3(a) Suman P. Patil

3(b) Vinod P. Patil

3(c) Shobha P. Patil

3(d) Jaymala P. Patil

3(e) Vandana P. Patil

3(f) Renuka P. Patil

3(g) Nirmala P. Patil

3(h) Bhalchandra P. Patil (since
deceased) represented by heir and
legal representative

3(i) Lina P. Patil

4. Ramchandra Devoo Patil

5. Pandit Shankar Devoo Patil

6. Ratan Devoo Patil

7. Mohan Devoo Patil (deceased)

8. Smt. Vimlabai Iggabai Patil alias
Vimal Narsingh Shinge, since

deceased represented by her heirs
and legal representatives

8(a) Arun Narsingh Shinge

8(b) Chayya Harish Patil

8(c) Nanda Janardhan Bhadri

8(d) Laxmi Kavish Mhatre

8(e) Vidyadhar Harish Patil

9. Smt. Bhaivabai Patil

10. Smt. Latabai Patil

11. M/s. Everest Land Developers

..Respondents

Mr. Ashutosh Kumbhakoni, *Senior Advocate with Mr. Sandesh D. Patil and Ms. Anusha P. Amin i/b. Mr. Chintan Shah for the Appellant in SA/350/2022.*

Mr. Ranjit Thorat, *Senior Advocate with Mr. Pradeep Thorat, Mr. D.Y. Chitnis, Mr. Abhilesh Chitre, Ms Sonali Dalvi, Mr. Rehan G & S.P. Singh i/b. M/s. Deepak Chitnis Chiparikar and Co. for the Appellants in SA/353/2022.*

Mr. Vineet Naik, *Senior Advocate with Mr. Sukand Kulkarni and Mr. Amit Shaligram i/b. Mr. Govind B. Solanke for the Respondents.*

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 5 APRIL 2024.

PRONOUNCED ON : 16 APRIL 2024.

JUDGMENT:

A. THE CHALLENGE

1. These appeals are filed challenging the Judgment and Decree dated 15 January 2022 passed by the learned District Judge-2, Thane in Regular Civil Appeal No.188 of 2012, by which the

appeal has been allowed and the Judgment and Decree dated 30 March 1998 passed by the Civil Judge Senior Division, Thane in Special Civil Suit No.454 of 1994 is set aside. The first Appellate Court has decreed Special Civil Suit No.454 of 1994 holding that the Plaintiff is entitled to specific performance of the Agreement for Sale dated 11 January 1988. It has directed Plaintiff to deposit the balance amount of consideration of Rs. 4,30,850/- with further directions to Defendant Nos. 1 to 9 to execute Conveyance Deed in Plaintiff's favour in respect of the suit lands. Defendants are further restrained by an order of permanent injunction from alienating, transferring and /or creating third party interests in respect of the suit lands.

2. In the Special Civil Suit No.454 of 1994, original Defendant Nos. 1 to 9 were vendors, who had executed Agreement for Sale dated 11 January 1988 in Plaintiff's favour. After dismissal of the Suit by the Trial Court on 30 March 1998, M/s. Everest Land Developers (***Everest***) purchased land bearing Survey No. 62 Hissa No. 6 from Defendant Nos.1 to 9 on 13 May 2009. Therefore, *Everest* came to be impleaded as Respondent No.10 in Regular Civil Appeal No.188 of 2012. On 2 August 2012, *Everest* sold the land bearing Survey No.62 Hissa No. 6 to M/s Harmony Lifestyle Structures Private Limited (***Harmony***), who was not impleaded in the appeal before the first Appellate Court.

3. The impugned decree of the first Appellate Court directs original Defendant Nos. 1 to 9 (vendors) to execute Conveyance Deed in respect of the suit lands bearing Survey No. 62 Hissa No.2 and Survey No. 62 Hissa No.6 in Plaintiff's favour. Out of original Defendant Nos.1 to 9, only original Defendant Nos.1, 3 to 5, 8 and 9

have filed Second Appeal No. 350 of 2022 alongwith *Everest*, who was impleaded as Respondent No.10 in Regular Civil Appeal No.188 of 2012. The original Defendant Nos. 2, 6 and 7 are impleaded as proforma Respondents to Second Appeal No.350 of 2022. On the other hand, *Harmony*, who purchased part of the suit land on 2 August 2012 and who was not impleaded either before the Trial or the first Appellate Court has filed Second Appeal No.353 of 2022. By order dated 21 August 2023 this Court (Coram: N.R. Borkar, J.) has granted leave to *Harmony* to file appeal challenging the Judgment and Decree of the first Appellate Court.

B. FACTUAL MATRIX

4. Defendant Nos. 1 to 9 are the original owners in respect of two agricultural lands bearing Survey No. 62 Hissa No.2 admeasuring 1267.28 square yards, equivalent to 1060 square meters and Survey No. 62 Hissa No.6 admeasuring 4567.75 square yards equivalent to 3820.60 sq.meters at village-Ovale, Taluka and District -Thane. This is the suit property described in the Plaint.

5. On 11 January 1988, the original owners i.e Defendant Nos. 1 to 9 executed unregistered agreement for sale in Plaintiff's favour agreeing to sell the suit property for consideration of Rs. 6,41,850/-. The agreement records that the consideration was fixed at Rs. 110 per sq. yard subject to actual survey of the land. On execution of the agreement, Plaintiff paid earnest money of Rs. 61,000/- and agreed to pay further amount of Rs.50,000/- to Vendors on making clear and marketable title, Rs.50,000/- on survey and demarcation of land and fixation of boundaries and Rs. 4,80,850/- on execution of Conveyance within a period of 15 months from the date

of execution of the agreement. According to Plaintiff, total amount of Rs. 2,11,000/- has been paid by him to Defendant Nos.1 to 9. Parties had agreed that survey of the land would be conducted for ascertainment of actual area. The Vendors agreed to obtain permission from the Competent Authority under provisions of Maharashtra Tenancy and Agricultural Lands Act, 1948 (**Tenancy Act**) as well as under Section 230A of the Income Tax Act, 1961. Since the land was agricultural land, the purchaser agreed to get the same converted to non-agricultural use. Within two days of execution of the Agreement for Sale dated 11 January 1988, Defendant Nos.1 to 9 executed Power of Attorney in Plaintiff's favour on 13 January 1988. Though several powers in respect of the suit property was given to the Plaintiff under the Power of Attorney, it is Plaintiff's case that the same did not include power to get land surveyed or measured for the purpose of ascertainment of actual area. According to Plaintiff, Defendant Nos.1 to 9 did not get land surveyed and measured for the purpose of arriving at final consideration amount to be paid in terms of the clauses 3 and 4 of the Agreement. That they did not clear encroachment in respect of north west portion of the land bearing Survey No.62/6 (to the extent of 4 Guntha). It appears that the said portion admeasuring 4 Guntha in Survey No. 62/6 was already sold by Defendant Nos.1 to 9 to M/s. Rajbir Constructions vide registered agreement dated 3 April 1982.

6. On 3 December 1990, Defendant Nos.1 to 9 sent notice to Plaintiff terminating the Agreement for Sale, cancelling the Power of Attorney and forfeiting the earnest money alleging that Plaintiff had failed to perform his part of the contract. Plaintiff sent reply dated 17 December 1990 stating that he was in use and occupation of the suit

property and that Defendant Nos. 1 to 9 did not specify the exact non-compliance by him. That a breach was committed by vendors in the form of non-disclosure of transaction of sale in favour of M/s. Rajbir Constructions. Plaintiff accordingly called upon Defendant Nos.1 to 9 to survey the land as well as to indicate the location where third party rights were created by them. Plaintiff stated in the reply that he was ready and willing to perform the contract and contended that termination of the Agreement was bad in law and illegal. Plaintiff again wrote to Defendant Nos.1 to 9 on 8 January 1991.

7. On 30 April 1994, Plaintiff filed Special Civil Suit No.454 of 1994 seeking a declaration that the Power of Attorney dated 13 January 1988 and Agreement dated 11 January 1988 were subsisting, existing and binding on the Defendants in respect of the suit property. Plaintiff prayed for specific performance of the Agreement dated 11 January 1988 seeking direction against Defendants to execute conveyance in respect of the Suit lands in his favour. He also sought an injunction against Defendants from interfering with his possession and from transferring or alienating the suit lands. Defendants appeared in the Suit and filed written statement and denied handing over possession of the suit lands to Plaintiff. They contended that despite execution of Power of Attorney, Plaintiff failed to get the suit lands surveyed. They further contended that they were not supposed to do anything under the Agreement. They relied upon termination notice dated 3 December 1990. The Suit was also resisted on the ground of limitation by referring to provisions of Article 54 of the Limitation Act.

8. During Trial of the Suit, Plaintiff examined himself. On behalf of the Defendants, three witnesses were examined. After

considering the pleadings and evidence on record, the Trial Court proceeded to dismiss the suit by decree dated 30 March 1998.

9. Plaintiff filed First Appeal No. 445 of 1999 before this Court challenging the Trial Court's decree dated 30 March 1998. During pendency of the First Appeal, Defendant Nos. 1 to 9 executed Agreement for Sale in respect of one of the suit lands bearing Survey No. 62/6 in favour of Everest. On 18/06/2007, Plaintiff registered notice of *Lis Pendens*. On 13/05/2009, Defendant Nos. 1 to 9 executed sale deed in respect of land bearing Survey No.62/6 in favour of *Everest*. The Plaintiff therefore impleaded *Everest* as Respondent No.10 in the Appeal.

10. In the year 2012, First Appeal No.445 of 1999 came to be transferred to District Court, Thane and was registered as Regular Civil Appeal No.188 of 2012. By the impugned Judgment and Decree dated 15 January 2022, District Court, Thane, allowed the Regular Civil Appeal No.188 of 2012 filed by Plaintiff. It has set aside the decree dated 30 March 1998 passed by the Trial Court and has decreed Special Civil Suit No.454 of 1994. The first Appellate Court has held that Plaintiff is entitled to specific performance of the Agreement for Sale dated 11 January 1988 and has directed him to deposit the balance amount of consideration of Rs.4,30,850/- in the District Court. The first Appellate Court has further directed Defendant Nos. 1 to 9 to execute Conveyance Deed in Plaintiff's favour in respect of both the suit lands bearing Survey Nos. 62/2 and 62/6. Defendants are further restrained from alienating, transferring and/or creating third party interests in respect of the suit lands.

11. Aggrieved by the Judgment and Decree dated 15 January 2022, some of the original Defendants (Defendant Nos.1, 3 to

5, 8 and 9) alongwith *Everest* have filed Second Appeal No.350 of 2022. As observed above, during pendency of the appeal Defendant No. 10 (*Everest*) has sold the suit property bearing 62/6 to *Harmony*, who was never impleaded in the appeal. Though the decree does direct M/s. Harmony Lifestyle Structures Pvt. Ltd. to convey the suit property bearing Survey No. 62/6 to Plaintiff, it has filed Second Appeal No.353 of 2022 challenging the impugned decree of the first Appellate Court dated 15 January 2022.

12. By order dated 20 October 2023 this Court admitted both the Second Appeals by formulating following substantial questions of law:-

- (a) Whether the suit filed by the plaintiff was barred by the Limitation Act, 1963.
- (b) Whether the decree for specific performance could have been passed without considering the provisions of Section 20 of Specific Relief Act, 1963.
- (c) Whether the Appellate Court could have passed unconditional decree in respect of an agricultural tenanted land.
- (d) Whether the original suit filed by the plaintiff for decree of specific performance was maintainable without seeking declaratory relief with respect to termination of the agreement vide notice dated 03/12/1990, was maintainable.

13. While admitting the appeal, this Court directed the Appellant *Harmony* to maintain status-quo during pendency of the Appeals and not to create any third-party interests in respect of the suit lands.

C. SUBMISSIONS

14. Mr. Kumbhakoni, the learned senior advocate appearing for Appellants in the Second Appeal No.350 of 2022 would submit that Plaintiff's Suit was clearly barred by limitation. Inviting my attention to Paragraph No.15 of the plaint, Mr. Kumbhakoni would submit that Plaintiff himself admitted that cause of action for filing the Suit first arose on 3 December 1990, when legal notice was sent by Advocate of Defendants. Relying on Article 54 of the Limitation Act, he would submit that the Suit for specific performance of the contract could be filed within three years from the date when the Plaintiff noticed that the performance was refused. That original Defendants emphatically refused performance of the contract by issuing notice dated 3 December 1990. Inviting my attention to paragraph No. 7 of the Plaintiff's reply dated 17 December 1990, Mr. Kumbhakoni would submit that termination of contract was noticed by Plaintiff, who dealt with the same in paragraph 7 of his reply dated 17 December 1990. That acquisition of notice of termination by Plaintiff was thus specifically acknowledged. Thus, refusal to perform contract by the Defendants was noticed by Plaintiff on the date of receipt of notice dated 3 December 1990 and in any case on 17 December 1990, when he dealt with correctness of notice of termination. That therefore under Article 54 of the Limitation Act, the time for filing Suit for specific performance begun to run on 3 December 1990 and in any case on 17 December 1990. Mr. Kumbhakoni would also rely upon Article 58 of the Limitation Act in respect of the Plaintiff's prayer to seek declaration of subsistence of contract. That under Article 58, the time to file suit to obtain any

other declaration begins to run when the right to sue first accrues. That Plaintiff himself admitted in the Plaint that right to sue first accrued for him on 3 December 1990. Relying on Section 9 of the Limitation Act, Mr. Kumbhakoni would submit that since time begun to run from 13 December 1990, running of time was continuous and was not disrupted or terminated by any event and that the same expired on completion of period of three years. According to Mr. Kumbhakoni as per Article 54, the period of limitation of three years expired on 16 December 1993. Similarly, the period of three years prescribed under Article 58 for seeking declaration of either subsistence of contract or termination thereof also expired on 16 December 1993. That therefore, Plaintiff's suit filed on 30 April 1994, after three years and five months from the date of termination notice of 3 December 1990, was clearly barred by limitation.

15. Mr. Kumbhakoni would further submit that Plaintiff did not seek prayer for setting aside termination effected by Defendants vide notice dated 3 December 1990. That in the light of Agreement for Sale being terminated by notice dated 3 December 1990, the Agreement between the parties ceased to exist and since there was no Agreement, there was no question seeking specific performance thereof. That Plaintiff's prayer that Agreement was subsisting did not mean that he sought prayer for setting aside termination. That declaration about subsistence of Agreement cannot be a substitute for declaration that termination was illegal. That Plaintiff therefore could not seek specific performance of a terminated Agreement, without questioning the validity of termination. He would submit that in the absence of any prayer challenging termination dated 3 December 1990, the first Appellate Court erroneously went into the

issue of validity of termination. That there was neither prayer nor issue relating to validity of termination of agreement.

16. In support of his contention that the decree for specific performance of contract cannot be sought without seeking declaratory relief with respect to termination of contract vide notice dated 3 December 1990, Mr. Kumbhakoni would rely upon judgment of the Apex Court in ***I.S. Sikandar (D) by LRs vs. K. Subramani and Ors.*** (2013) 15 SCC 27. Relying on judgment of the Division Bench of this Court in ***Kanayalal Madhavji Thakkar vs. Shree Padmanabh Builders*** 2011(1) Mh.L.J. 939, Mr. Kumbhakoni would submit that declaration about subsistence of contract cannot be sought without challenging termination notice, especially when Plaintiff noticed such termination. That mere clever act of draftsmanship cannot provide escape route for Plaintiff from consequences of Suit relating validity of termination being barred by limitation. Relying on judgment of Single Judge of this Court, Bench at Nagpur in ***C. Padmawati Naidu and Ors. vs. Friends CHS Ltd. Nagpur and Ors.***, 2016(4) Mh.L.J. 289, Mr. Kumbhakoni would submit that once the limitation started running from the point of refusal on the part of the vendor, the same continues to run and would stop only on the date of filing of the Suit. According to him, the learned Judge in ***C. Padmawati Naidu*** has further dealt with the issue of consequences of failure to seek relief about validity of termination of contract.

17. In support of his contention that the legislature has deliberately and consciously used the word 'first' between the words 'sue' and 'accrues' in Article 58 of the Limitation Act, Mr.

Kumbhakoni would rely upon judgment of the Apex Court in ***L.C. Hanumanthappa vs. H.B. Shivakumar*** (2016) 1 SCC 332 and ***Khatri Hotels Pvt. Ltd. & Anr. vs. Union of India and Anr.*** (2011) 9 SCC 126.

18. Mr. Kumbhakoni would further submit that the decree passed by the first Appellate Court is otherwise faulty. Inviting my attention to the Agreement for Sale dated 11 January 1988, he would submit that execution of Conveyance Deed was conditional, subject to procurement of permission under the Tenancy Act as well as seeking permission under Sections 43 and 63 of the Maharashtra Land Revenue Code, 1966 by Plaintiff, who was intending to purchase the agricultural land. That the decree of the first Appellate Court directs execution of conveyance straightway in Plaintiff's favour in absence of satisfaction of the above two conditions. That though land admeasuring 4 Guntha is admittedly previously sold by original Defendants to M/s. Rajbir Constructions, the first Appellate Court erroneously directed execution of conveyance of the entire land in Plaintiff's favour in absence of any challenge to the Sale Deed dated 3 April 1982. That during pendency of the appeal, the land bearing Survey No.62/6 is sold by Defendant No.10 in favour of *Harmony*, who is today the owner in respect of the that land. That therefore the first Appellate Court could not have directed original Defendant Nos.1 to 9 to convey land bearing Survey No.62/6, which is no longer in their ownership. Relying on the judgment of the Division Bench of this Court in ***M/s. Shree Kamal Constructions and others Vs. Kamlakar Jiwan Patil & Ors.*** (2013) 4 AIR Bom R 348, Mr. Kumbhakoni would submit that in a situation where the Vendor has subsequently sold the land to a third

party, the proper form of decree is to either declare the subsequent purchase as void between Plaintiff and Vendor and thereafter direct conveyance by the Vendor alone, or to direct both Vendor and third party to execute the Conveyance or the third option is to direct execution of the conveyance directly by the third purchaser. According to Mr. Kumbhakoni the first Appellate Court has erroneously directed the original Defendant Nos.1 to 9 to execute the Conveyance ignoring the fact that they are no longer owners of land bearing Survey No.62/6. Since the decree is faulty, Mr. Kumbhakoni would urge for setting aside the same on that count as well.

19. Mr. Kumbhakoni would further submit that the first Appellate Court has ignored the position that the relief of specific performance, being discretionary in nature, the same ought to have been refused considering the position that part of the land was already sold before Agreement dated 11 January 1988 and the balance portion was sold to *Harmony* during pendency of the appeal. That therefore even if the Suit was found to be within limitation, the relief of specific performance ought to have been rejected considering the facts and circumstances of the case.

20. Mr. Throat, learned senior advocate appearing for the Appellant in Second Appeal No.353 of 2022 would adopt the submissions canvassed by Mr. Kumbhakoni. Additionally, he would submit that Article 54 of the Limitation Act consciously provide for two eventualities for determining starting point of limitation. That the limitation period is to be computed either from the date fixed for performance of contract and in the event such date is not fixed, the same has to be from the date on which the Plaintiff notices refusal on the part of Defendants. That in the present case the Plaintiff

admittedly had notice of refusal, which was acknowledged by him in his reply dated 17 December 1990. That the Suit was thus, barred by limitation. That the first Appellate Court has erroneously relied upon Article 113 of the Limitation Act, which has no application to the present case.

21. Mr. Thorat would further submit that time was the essence of the contract as Plaintiff had agreed to complete transaction of sale within 15 months. That no material was produced by Plaintiff to demonstrate performance on his part within agreed period of 15 months. That the first Appellate Court has erroneously employed reverse mechanism by first going into the issue of validity of termination and then holding that the Suit was within limitation. Lastly, Mr. Thorat would submit that the Appellant is a bonafide purchaser for value and the impugned decree cannot have any effect on valid acquisition of title by it.

22. *Per contra*, Mr. Vineet Naik, the learned senior advocate appearing for the original Plaintiff would oppose both the appeals and support the decree of the first Appellate Court. He would submit that Plaintiff's Suit was perfectly within limitation. That the starting point of limitation in the present case is required to be considered in the light of covenants in the Agreement for Sale dated 11 January 1988. According to Mr. Naik, conduct of survey and measurement of lands and ascertainment of their exact area was necessary for determining the final consideration to be paid as the parties agreed to effect sale transaction for consideration of Rs. 110 per sq. yard. That in absence of measurement of lands and ascertainment of exact area to be sold, the transaction of sale could not have been completed. That therefore performance of the

agreement was dependent on vendors getting the land surveyed and measured and ascertaining the exact area for determination of final consideration. That the Power of Attorney executed in Plaintiff's favour did not contain power to get the land surveyed or measured and that therefore the responsibility of survey and measurement continued to rest on the shoulders of Vendors. Since Vendors failed to perform their obligations, the starting point of limitation did not actually begin to run.

23. Mr. Naik would further submit that the termination notice issued by the original Defendants was meaningless as it contained a vague assertion that Plaintiff failed and neglected to perform his part of the contract. That except making a vague and bald statement, Defendants did not point out as to which part of the contract was not performed by Plaintiff. He would take me through the Plaintiff's reply dated 17 December 1990 to demonstrate that he was unable to finalise the sale transaction on account of discovery of sale of area admeasuring 4 Guntha to third party. That unless the area sold to the third party as well as its location was ascertained, it was impossible to determine the exact price to be paid to Defendants since the parties had agreed to sell the land at consideration at Rs.110 per sq.yards. That Defendants dishonestly suppressed the sale of land admeasuring 4 Gunthas to M/s. Rajbir Constructions vide Agreement dated 3 April 1982 and made a false representation in Clause 11 of the Agreement dated 11 January 1988 that they had not sold any portion of the land to any party. That therefore the termination notice itself was bad in law and illegal and it was therefore not necessary for Plaintiff to seek a declaration about its illegality. That Plaintiff did not stop at issuing the reply dated 17

December 1990 but further corresponded with the Defendants on 8 January 1991.

24. Relying on the judgment of the Apex Court in ***Vundavalli Ratna Manikyam and Anr. vs. V.P.P.R.N. Prasada Rao*** (2020) 3 SCC 289, Mr. Naik would submit that Article 113 of the Limitation Act would apply in the facts and circumstances of the present case and the period of limitation would commence from the date when right to sue accrued, which in the present case is 15 March 1994. So far as the discretion of the Court to grant specific performance in the light of amendment of Section 20 of the Specific Relief Act, 1963 is concerned, Mr. Naik would submit that the first Appellate Court has rightly exercised its discretion in granting decree of specific performance. That the time was not the essence of the contract as rightly held by the first Appellate Court. It has further held that Plaintiff was always ready and willing to perform his part of the contract. The first Appellate Court has held that Plaintiff repeatedly requested Defendants to co-operate for completion of the transaction. It has also held that the Power of Attorney did not give power to the Plaintiff to get the land surveyed or measured. Considering the above findings, exercise of discretion by the first Appellate Court in favour of the Plaintiff cannot be termed as unwarranted.

25. So far as failure on the part of Plaintiff to seek declaratory relief with respect to termination notice dated 3 December 1990 is concerned, Mr. Naik would submit that the said relief relating to termination was implicit in the prayer seeking declaration about subsistence of Agreement. That Plaintiff claimed substantive relief about subsistence of the Agreement and that same

was binding on Defendants and once the said prayer is granted, the same would result in termination notice automatically becoming bad in law. That the Trial and the first Appellate Court framed specific issues about cancellation of Agreement by notice dated 3 December 1990. That the issue of validity of termination of notice has been adjudicated by both the Trial and the first Appellate Court. That the first Appellate Court has rightly held that the issue of limitation will have to be decided on the touchstone of validity and legality of termination notice. That the judgment of the Apex Court in ***I.S. Sikandar*** (Supra) has no application in the present case since time was essence of contract in the case before the Apex Court and none of the Courts had framed issue regarding validity and otherwise of the termination notice. In the present case, the time was not the essence of contract and both the Courts below have specifically framed a necessary issue relating to validity of termination. Mr. Naik would further submit that the first Appellate Court has held the Plaintiff to be in possession of the suit property and his possession is required to be protected under Section 53A of the Transfer of Property Act.

26. On the issue of passing of unconditional decree by the first Appellate Court, Mr. Naik would submit that once the first Appellate Court has directed execution of Conveyance all the conditions stipulated in the Agreement would come into play. That mere stipulation of condition for obtaining prior permission under the Tenancy Act could not have deterred the first Appellate Court from decreeing the Suit for specific performance of the Agreement. Mr. Naik would rely upon judgment of this Court, Bench at Aurangabad in ***Kalandi Baburao Raut & Ors. vs. Dattu Damu Thakare*** (2008) 5 Bom CR 693 in support of his contention that Agreement for

Sale is not a transfer and that the same does not require permission under Section 43 of the Tenancy Act. He would further submit that the decree of the first Appellate Court cannot be termed as unconditional decree as the same holds the Plaintiff entitled to specific performance of Agreement dated 11 January 1988. Since the agreement is directed to be specifically performed, same would include compliance of Clause 6 thereof.

27. Mr. Naik would also raise objection to the manner of filing Second Appeal No.350 of 2022, which is filed only by 6 out of 9 original Defendants. That two Defendants having share in the land of 14.25% each (total share of 28.50%) have chosen not to challenge the decree of the first Appellate Court. That the appeal is actually filed by *Everest* on the basis of Power of Attorney signed by Defendant No.2 dated 1 July 2005, which expired on completion of sale transaction in its favour and in any case in favour of *Harmony*. That after demise of Respondent No.7, her heirs have not issued any Power of Attorney in favour of *Everest*. That in any case, the Power of Attorney is only in respect of the land bearing Survey No. 62/6 and not in respect of the land bearing Survey No. 62/2. That upon sale of land by *Everest* to *Harmony* on 2 August 2012, the Power of Attorney executed in favour of *Everest* automatically came to an end. Mr. Naik would therefore submit that the Appeal deserves to be dismissed for having filed in improper manner on the basis of invalid Power of Attorney.

28. Mr. Naik has relied upon the following judgments in support of his contentions:

- (a) ***Anantha Pillai vs. Rathnasabapathy Mudaliar and Others*** 1968 (2) Mh.L.J. 574;

- (b) ***M. Arul Jothi & Anr. vs. Lajja Bal (deceased) and Anr.*** (2000) 3 SCC 723;
- (c) ***Chand Rani (Dead) by LRs. vs. Kamal Rani (Dead) by LRs.*** (1993) 1 SCC 519;
- (d) ***Syed M.M. Rizvi vs. Subhash Singh and Ors.*** 2014 SCC Online All 15624;
- (e) ***Gaddipati Divija and Anr. Vs. Pathuri Samrayam and Ors.*** 2023 SCC OnLine SC 442;
- (f) ***Timblo Irmaos Ltd., Margo vs. Jorge Anibal Matos Sequeira & Anr.*** (1977) 3 SCC 474.

D. REASONING AND ANALYSIS

29. I have considered the submissions canvassed by the learned counsel appearing for rival parties and have gone through the pleadings, evidence and documents placed on record through private paper-book and compilations.

D. 1 LIMITATION

30. It is contended on behalf of the Appellants that the Suit filed by Plaintiff was barred by limitation either under Article 54 or Article 58 of the Limitation Act. The Suit was filed by Plaintiff essentially seeking specific performance of the Agreement dated 11 January 1988. Under Article 54 of the Limitation Act, the period of limitation for filing Suit for specific performance of contract is three years and the time begins to run from the date fixed for performance and if no such date is fixed, when the Plaintiff notices that the performance is refused. Article 54 reads thus:

	Description of suit	Period of Limitation	Time from which period begins to run
54.	For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused

31. In the present case, both the Courts have held that no specific time was fixed for performance of the contract. Though the Agreement provided for completion of transaction within a period of 15 months from the date of execution of the Agreement, on account of other stipulations for survey of land, ascertainment of its area as well as procurement of permission under the Tenancy Act, it cannot be stated that any specific time was fixed in the Agreement for performance of the contract. Therefore, what is relevant in the present case is the date on which Plaintiff noticed that Defendant Nos. 1 to 9 refused performance of contract. Appellants have relied upon notice dated 3 December 1990, by which performance of contract was refused. In this connection paragraphs 2 and 3 of the notice dated 3 December 1990 read thus:

“2. By an Agreement dated 11th January 1988, my client agreed to sell to you and you agreed to purchase from my clients the said plots of land at and for the total price or consideration and upon the terms and conditions contain therein. My clients state that in spite of repeated require and demands, you have failed and neglected to perform you part of the said contract and to observe the terms and conditions to be observed and performed by you, of the said Agreement. My clients are therefore entitled to cancel and/or terminate and/or rescind the said Agreement and to forfeit the earnest amount of Rs.61,000/- paid to them at the time of executing the said Agreement.

3) My clients have therefore instructed me to which I hereby do and cancel, terminate and rescind the said Agreement dated 11th January 1988, executed by you with my clients and forfeit the said amount of earnest paid by you to my clients as aforesaid. My clients have now right and absolute authority and liberty to sell and transfer or agree to sell and transfer and to deal with the said plots of land and/ or any part thereof with any other person or persons as my clients shall and may desire at their own description. My clients have further instructed me to, which I hereby do so and cancel and revoke the Power of Attorney executed by my clients in respect of the said plots of land and to return the same immediately to my clients. My clients hereby further inform you that any act, matter or thing one or cause to be done in past and future for and on behalf of my clients shall not be binding upon my clients and /or any of them which please note.”

32. Plaintiff responded to the notice dated 3 December 1990 vide reply dated 17 December 1990. In paragraph 7 of the reply, Plaintiff took note of Defendants’ action of termination of the Agreement and stated as under:

7. With reference to para 3 of the letter under reply, I am instructed to state that the due cancellation, termination and/or rescind of the said agreement dated 11th January 1988 by the letter under reply and forfeiture of the earnest money by your letter lands reply is illegal, bad-in-law and unwarranted. My client denies that your clients have any right or authority to sell and/or transfer the said land and/or to deal with the said land in the manner your clients like. My client/further says that the purported termination/cancellation/revocation of the Power of Attorney executed in his favor is also illegal, bad-in-law and unwarranted. Your clients are hereby called upon to carry out their part or obligation and to complete the sale of the land in favor of my client failing which my client will be compelled to file a suit for the specific performance of the said agreement entirely at your clients risk, costs and consequences.

33. Thus, Defendants had specifically refused to perform Agreement dated 11 January 1988 and communicated to the Plaintiff that they cancelled, terminated and rescinded the said Agreement and forfeited the amount of earnest money. Plaintiff noticed such

refusal on the part of the Defendants in his reply dated 17 December 1990 and joined issue with them about their right to terminate the contract. Though Mr. Naik has sought to contend that the communication about cancellation, termination or rescinding of the Agreement was baseless in the light of non-demonstration of any failure on the part of the Plaintiff to perform the exact part of contract, in my view, while deciding the issue of limitation, the Court need not go into the issue about validity of action of Defendants to terminate the contract. What is required to be noted is the date on which the Defendants refused to perform the contract and the date on which the Plaintiff noticed such refusal. Such termination may be invalid in law, but the same needs to be challenged within the prescribed period of limitation. In the present case, Defendants unequivocally refused to perform the contract treating the same as having been terminated by their notice dated 3 December 1990. Since Plaintiff dealt with such refusal on the part of Defendants in paragraph 7 of his reply dated 17 December 1990, the said date is required to be treated as the date on which the Plaintiff noticed refusal of performance by Defendants within the meaning of Article 54 of the Limitation Act. Therefore, the time for filing the Suit for specific performance of Agreement dated 11 January 1988 began running from 17 December 1990 and ended on 16 December 1993. The Suit filed by Plaintiff on 30 April 1994 was thus clearly barred by limitation under Article 54.

34. So far as the declaration sought by Plaintiff that the Agreement dated 11 January 1988 was valid, subsisting and binding on the Defendants is concerned, the period of limitation would be governed by Article 58 of the Limitation Act, which reads thus:

	Description of suit	Period of Limitation	Time from which period begins to run
58	To obtain any other declaration	Three years	When right to sue first accrues

35. Thus, the time for seeking declaration under Article 58 starts running from the date on which the right to sue first accrues. The legislature has consciously used the word “first” in Article 58. Thus, even in a case where the cause of action could be continuous, the time determined to file a Suit seeking declaration under Article 58 would begin to run from the date on which the right to sue first accrues. Subsequent recurrence of cause of action becomes irrelevant for the purpose of determination of period of limitation under Article 58.

36. In the present case the Plaintiff averred in paragraph 15 of the plaint as under:-

15. The cause of action first arose on 3.12.1990 when the defendants sent false, frivolous and illegal notice through their advocate. It again arose on 8.1.1991 when the defendants even after receiving the reply from the plaintiff kept mum avoided and neglected to perform their duty and finally it arose on 15.3.1994 when the defendants threatened the plaintiff for dire consequences avoided and neglected to perform their part of agreement and continues thereafter everyday today. Therefore, none of the causes of action are barred by law of limitation.

37. Thus, there is specific admission on the part of Plaintiff that cause of action first arose on 3 December 1990. Therefore, in the light of specific admission by Plaintiff that cause of action for seeking declaration that the agreement dated 11 January 1988 was

subsisting, existing or binding on the Defendants, arose on 3 December 1990 when Defendants sought to terminate the same, the period of limitation for seeking relief in prayer clause (a) of the plaint began running from 3 December 1990. As rightly pointed out by Mr. Kumbhakoni once the period of limitation starts running on the date of accrual of first right to sue, the same continues to run under Section 9 of the Limitation Act without any interruption. In ***L.C. Hanumanthappa*** (supra) the Apex Court has interpreted Section 58 of the Limitation Act by relying on its previous judgment in ***Khatri Hotels***. In ***Khatri Hotels*** (supra) the Apex Court has considered the distinction between Article 120 of the Limitation Act, 1908 and Article 58 of the Limitation Act, 1963 and has held that the legislature has designedly made a departure under Article 58 from the language used in Article 120 by incorporating the word “first” between the words “sue” and “accrued”. The Apex Court has held that if the Suit is based on multiple causes of action, the period of limitation under Article 58 would begin to run from the date when the right to sue first accrues. The Apex Court has further held that successive violation of the right gives rise to fresh cause of action and the Suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrues. The Apex Court has held in paragraphs 25 to 30 as under:-

25. Article 58 of the 1963 Act, which has bearing on the decision of this appeal, reads as under:

”THE SCHEDULE PERIODS OF LIMITATION

[See sections 2(j) and 3]

FIRST DIVISION - SUITS

Description of suit	Period Limitation	of Time from which period begins to run
---------------------	----------------------	--

*

*

*

PART III - SUITS RELATING TO DECLARATIONS

58

*

*

*

To obtain any
other declaration

Three years

When right to sue first
accrues

26. Article 120 of the Indian Limitation Act, 1908 (for short, 'the 1908 Act') which was interpreted in the judgment relied upon by Shri Rohtagi reads as under:

Description of suit	Period of Limitation	Time from which period begins to run
120 Suit for which no period of limitation is provided elsewhere in this Schedule	Six years	When right to sue first accrues."

27. The differences which are discernible from the language of the above reproduced two articles are:

- (i) The period of limitation prescribed under Article 120 of the 1908 Act was six years whereas the period of limitation prescribed under the 1963 Act is three years and,
- (ii) Under Article 120 of the 1908 Act, the period of limitation commenced when the right to sue accrues. As against this, the period prescribed under Article 58 begins to run when the right to sue first accrues.

28. Article 120 of the 1908 Act was interpreted by the Judicial Committee in *Bolo v. Koklan* AIR 1930 PC 270 and it was held:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least, a clear or unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

The same view was reiterated in *Annamalai Chettiar v. Muthukaruppan Chettiar* ILR (1930) 8 Rang 645 and *Gobinda Narayan Singh v. Sham Lal Singh* (1930-31) 58 IA 125.

29. In *Rukhmabai v. Laxminarayan*, AIR 1960 SC 335 the three-Judge Bench noticed the earlier judgments and summed up the legal position in the following words:

”33. ... The right to sue under Article 120 of the 1908 Act accrues when the defendant has clearly or unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective or innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.”

30. **While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word ‘first’ has been used between the words ‘sue’ and ‘accrued’. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued.”**

(emphasis supplied)

38. In my view therefore, both the prayers made by Plaintiff for specific performance of the Agreement dated 11 January 1988 as well as seeking declaration that the Agreement was subsisting or binding are clearly barred by provisions of Articles 54 and 58 of the Limitation Act. The first Appellate Court has undertaken the process of first determining whether the termination notice was legal and valid and thereafter holding that the Suit is within limitation. In absence of any prayer regarding validity of termination (which aspect has been dealt with separately), the first Appellate Court arrived at a finding that the termination notice itself was invalid. After holding that the termination notice was illegal, the first Appellate Court has held the Suit to be within limitation by referring to provisions of Article 113 of the Limitation Act. In my view, the entire process of

reverse engineering employed by the first Appellate Court by deciding the issue of limitation by linking it with the issue of validity of termination notice is grossly incorrect. The Plaint did not contain a prayer regarding validity of termination notice. This is the reason why neither Trial Court nor Appellate Court framed an issue as to whether the termination notice was invalid. In any case, the validity or otherwise of the termination notice has no connection with the issue of limitation. Even if the Plaint was to contain a prayer for declaring the termination notice to be invalid, still the period of limitation would apply to adjudicate that prayer. It is impermissible for the Court to first decide merits of termination and then hold the prayer for specific performance to be within limitation. The approach adopted by the first Appellate Court suffers from serious flaw.

39. There was no occasion for the first Appellate Court to decide the issue of validity of termination in absence of prayer or issue in that regard. The issue No.4 framed by the first Appellate Court “*Do Defendants prove that they had already cancelled the agreement by notice dated 3 December 1990*”, relates to factual enquiry into the aspect whether the Defendants had issued notice of termination dated 3 December 1990 or not. Issue No.4 did not permit the first Appellate Court to undertake an enquiry into validity of termination notice. Whether the Agreement is factually terminated or not is an altogether different issue from the issue of validity of such termination. In a given case, the Defendants may contend that the termination notice was served and the contract was terminated. The Plaintiff may either dispute issuance of such notice and contend that the contract was never terminated. On this debate, the issue whether termination was effected or not can be entertained. However, if the

Defendants prove that termination notice was served, it is for the Plaintiff then to seek a declaration that the termination notice is illegal. The enquiry then travels to altogether different issue as to whether such termination is legally valid or not. Issue No.4 in the present case related only to factual enquiry by the first Appellate Court as to whether the Defendants issued notice dated 3 December, 1990 cancelling the agreement or not. Whether such cancellation /termination is valid or otherwise, fell outside the scope of enquiry of the first Appellate Court while deciding the Issue No.4. In my view therefore, the first Appellate Court has committed gross error in going into the issue of validity of termination in absence of prayer in that regard.

40. Also of relevance is the fact that in paragraph 40 of its judgment, the first Appellate Court has recorded “*prima facie*” finding that “*the notice dated 3 December 1990 is illegal*”. In the final judgment, there was occasion for the first Appellate Court to record a *prima facie* finding. Based on such ‘prima facie’ finding that termination notice dated 3 December 1990 is illegal, the first Appellate Court has held that question of limitation does not arise. The relevant findings recorded by the first Appellate Court in this regard read thus:-

“40. ... The Trial Court failed to consider that since the Defendants did not comply with their terms and conditions mentioned in the suit agreement the termination of the suit agreement by alleged notice dated 3rd December 1990 is **prima facie** illegal and hence the question of limitation does not arise.”

(emphasis and underlining supplied)

41. In my view, the findings recorded by the first Appellate Court on the Issue No.4 is totally unsustainable and liable to be set aside.

42. Mr. Naik has relied upon judgment of the Apex Court in ***Vundavalli Ratna Manikyam*** (supra) in support of his contention that provisions of Article 113 of the Limitation Act would apply and not Article 54. The facts in the case before the Apex Court were entirely different. In the Agreement, it was agreed by the parties that Vendors would settle all disputes in the property, which was subjected to acquisition. The Plaintiff got the acquisition proceedings set aside in the year 1984-1985 and thereafter served legal notice for specific performance, which request was refused by Defendants on 31 January 1986. The Suit was filed by the Plaintiff in the year 1986. The Defendants therein raised an objection of limitation on the ground that the Suit was beyond the period of three years after execution of Agreement dated 7 May 1981. It is in the light of the aforesaid facts of the case that the Apex Court held in paragraphs 6.2 and 6.3 of the judgment as under:-

6.2 However, the trial Court dismissed the suit solely on the ground that the suit for specific performance was barred by limitation applying Article 54 of the Limitation Act. On the other hand, it was the specific case on behalf of the plaintiff that in the facts and circumstances of the case, Article 113 of the Limitation Act shall be applicable as the suit was filed within a period of three years when the right to sue accrued. According to the plaintiff, the right to sue accrued when the plaintiff served a notice upon the defendants to execute the sale deed and the defendants refused to execute the sale deed. At this stage, it is required to be noted that under the agreement to sell it was for the vendor to settle all the disputes in the property. As the land in question was subjected to the

acquisition and thereafter the acquisition proceedings came to be quashed and set aside at the instance of the plaintiff in the year 1984/1985 and thereafter the plaintiff served a legal notice upon the defendants on 20.01.1986 calling upon the defendants to execute the sale deed which came to be refused by reply notice dated 31.1.1986 and thereafter the suit for specific performance was preferred, as rightly observed by the High Court, Article 113 of the Limitation Act would be applicable and not Article 54 of the Limitation Act as applied by the learned trial Court. We are in complete agreement with the view taken by the High Court in applying Article 113 of the Limitation Act. As observed hereinabove, the learned trial Court dismissed the suit solely on the ground that the suit is barred by limitation considering Article 54 of the Limitation Act though all other findings with respect to the execution of agreement to sell, the plaintiff was put in possession etc. were held to be in favour of the plaintiff.

6.3 Therefore applying Article 113 of the Limitation Act to the facts of the case on hand and the conduct of the plaintiff all throughout to protect not only his possession but to protect the property from acquisition and that he was always ready and willing to perform his part of the agreement to sell/contract, the High Court has rightly decreed the suit for specific performance. We are in complete agreement with the view taken by the High Court.”

43. In ***Vundavalli Ratna Manikyam*** (supra) the Plaintiff filed a suit after refusal of performance by the Defendants whereas in the present case the Suit is filed beyond the period of three years from the date of refusal by performance of the contract. Therefore the judgment in ***Vundavalli Ratna Manikyam*** is of little assistance to the present case.

44. I accordingly proceed to hold the Suit filed by the Plaintiff was barred by limitation both under Articles 54 and 58 of the Limitation Act.

D. 2 FAILURE TO SEEK DECLARATION WITH REGARD TO TERMINATION

45. The next issue raised by Mr. Kumbhakoni is that despite acquisition of knowledge about termination /cancellation of contract, Plaintiff failed to seek a declaration that termination of contract vide notice dated 3 December 1990 was illegal. According to Mr. Kumbhakoni, Plaintiff cannot be permitted to seek a declaration about subsistence of contract in absence of challenge to termination thereof.

46. By notice dated 3 December 1990, Defendants terminated the contract dated 11 January 1988 by accusing Plaintiff of failing to perform his part of the contract. Plaintiff contested the said claim of Defendants stating in paragraph 7 of his reply dated 17 December 1990 that cancellation/termination /rescinding of the Agreement dated 11 January, 1988 as well as forfeiture of earnest money was illegal, bad in law and unwarranted. Once Plaintiff asserted that termination of the Agreement was illegal, unlawful or bad in law, it was incumbent upon the Plaintiff to seek a prayer in that regard. However, the Plaintiff chose to raise following prayer in the plaint:

- a] It be ordered and decreed that and power of attorney dt.13.1.88 agreement dated 11.1.88 between the plaintiff and defendant is subsisting and existing and binding on the defendants in respect of the land mentioned under the schedule in the said agreement.

47. Thus, Plaintiff failed to seek a declaration that termination of contract by Defendants vide notice dated 3 December 1990 was illegal. The prayer that the Agreement was subsisting, existing or binding became meaningless as the contract itself was terminated. Furthermore, in absence of prayer seeking termination

to be illegal, there was no Agreement which could be specifically performed. Court cannot grant specific performance of Agreement, which is already terminated, and which no longer survives. Therefore, it is incumbent for Plaintiff to first seek a prayer that the termination of the Agreement is illegal. In absence of such prayer, specific performance of the contract could not have been prayed for.

48. In this connection reliance by Mr. Kumbhakoni on judgment of *I.S. Sikander* (supra) is apposite. In the case before the Apex Court, Plaintiff therein had filed a Suit for grant of decree of specific performance of Agreement for Sale dated 25 December 1983. However, the Defendants terminated the Agreement for Sale vide notice dated 28 March 1985. Plaintiff did not seek a declaration that termination notice dated 28 March, 1985 was illegal. In the light of this position, one of the issues before the Apex Court was as under:-

32.1 (i) Whether the original suit filed by the plaintiff seeking a decree for specific performance against Defendants 1-4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the agreement of sale vide notice dated 28-3-1985, rescinding the contract, is maintainable in law?"

49. The Apex Court has held in paragraphs 37 and 38 as under:

37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of agreement of sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on

the basis of non-existing agreement of sale is wholly unsustainable in law. Accordingly, Point (i) (see para 32.1) is answered in favour of Defendant 5.”

50. Thus in *I.S. Sikandar*, the Apex Court has held that without seeking a declaratory relief that termination of agreement was bad in law, the Suit for specific performance of the Agreement was not maintainable in law. The Apex Court has held that the Court cannot grant specific performance of a non-existing Agreement for Sale. In my view judgment of this Court in *I.S. Sikandar* (supra) is squarely applicable to the present case.

51. Mr. Naik has sought to contend that the prayer for declaring termination to be illegal was implicit in prayer clause (a) in the plaint, where Plaintiff sought a declaration that the Agreement dated 11 January 1988 was subsisting, existing and binding on Defendants. I am unable to agree. When the Plaintiff was clearly informed that Agreement for Sale dated 11 January 1988 was terminated vide notice dated 3 December 1990, it was incumbent on Plaintiff to seek a specific declaration that termination of contract effected by Defendants was illegal. Prayer for setting aside termination of contract cannot be read into the prayer where the Plaintiff sought a declaration that the Agreement was subsisting, existing or binding. In fact, the prayer clause (a) appears to have been cleverly drafted to get over the objection of limitation. If Plaintiff was to seek a declaration that cancellation /termination of contract vide notice dated 3 December 1990 was bad in law, the Suit filed by him on 30 April 1994 would have been clearly barred by limitation. This appears to be the reason why the prayer challenging termination was deliberately avoided and prayer seeking declaration

about the contract being subsisting, existing and binding was cleverly added in the plaint.

52. In ***Kanayalal Madhavji Thakkar*** (supra), the Division Bench of this Court has held that clever act of draftsmanship in omitting to challenge termination cannot escape the consequences of limitation. The Division Bench has dealt with a case where the Plaintiff instituted a Suit seeking the declaration that the Defendants did not have right, title or interest in respect of additional FSI consumed by the Defendant under Agreement dated 1 October 1989 and that the Defendants did not have right to sell units beyond 2455 sq.ft. granted under the said Agreement. Plaintiff's case was premised on an assertion that Agreement dated 1 October 1989 was terminated by letter dated 07 February 2000. Despite making an assertion about termination of the Agreement on 7 February 2000, the Defendants appeared in the Suit and filed a counterclaim seeking declaration that he was entitled to all rights, title and interest emanating from Agreement dated 1 October 1989 and that the Agreement continued to remain subsisting and binding. The Defendants also sought a counterclaim for specific performance of the Agreement. In the light of above factual position, His Lordship *Dr. D. Y. Chandrachud, J.* (as he then was), speaking for the Division Bench, held in paragraphs 7 and 8 as under:-

7. While dealing with the rival contentions, it is of some significance in the facts of this case that the counter claim was lodged by the Plaintiff on 9 August 2004 with clear notice and knowledge of the case which has been set out by the Defendant to the counter claim in the suit instituted before this Court. As a matter of fact, the counter claim contains in paragraph 1, a reference at the outset to the institution of the suit. The documents which are relied upon in the counter claim include all correspondence prior to the date of the filing of the counter claim. In the suit which was original instituted before this Court on 27

March 2000, the case of the original Plaintiff was that the agreement dated 1 October 1989 stood terminated on 7 February 2000. The letter dated 7 February 2000, which is annexed at Exhibit 'J' to the Plaint states in plain and unmistakable terms that the agreement as well as all Powers of Attorney stand cancelled. On 24 February 2000, the original Plaintiff addressed a further letter calling upon the original Defendant not to act on the basis of the Power of Attorney. The Defendant was intimated that the Plaintiff is entitled to terminate the agreement dated 1 October 1989 as well as Power of Attorney in view of the unauthorised consumption of FSI by the Defendant and that in any event the agreement as well as the Power of Attorney have automatically come to an end upon the completion of the construction by consuming FSI quantified at 2455 sq.ft. under the agreement. It was in this background that the relief that is sought in the Plaint is a declaration that the original Defendant does not have any right, title or interest in respect of FSI in excess of 2455 sq.ft. consumed under the agreement dated 1 October 1989 and that the Defendant would have no right to sell any units beyond the aforesaid extent under the agreement. Injunctive and other reliefs were also sought. The Defendant to the suit has, in the counter claim, in this background and with the knowledge of the termination and of the refusal to perform sought a decree for specific performance of the development agreement dated 1 October 1989 and a declaration that the agreement entered into between the parties continues to subsist. The Plaintiff to the suit has founded the suit on the termination of the original agreement dated 1 October 1989. Faced with the claim of the Plaintiff in the suit, the Defendant to the suit has filed his counter claim seeking a declaration that the agreement continues to subsist and for a decree for specific performance. The counter claim contains an averment in paragraph 17 that in 1998-99, an obstruction was caused by a newly inducted partner of the Defendant to the counter claim during the course of development. The Plaintiff to the counter claim relies upon the notice dated 23 June 2004. The notice dated 23 June 2004 refers to the prior termination of the agreement. As a matter of fact, the notice upon which reliance has been placed in the counter claim, states as follows:

“You are further aware that on account of various illegal acts done by you pursuant to the said power of attorney, our clients have terminated the power of attorney and called upon you to return the same.

It appears that in spite of the termination of the said power of attorney, you are representing before the Society and other people as constituted attorney of our clients.” (emphasis supplied).”

8. **The issue before the Court is as to whether the Plaintiff to the counter claim can by a clever act of draftsmanship**

escape from the consequence of the counter claim being barred by limitation by omitting to refer to the termination dated 27 February 2000. The answer to this is in the negative. Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 provides for the rejection of the Plaintiff inter alia whether the suit appears from the statements in the Plaintiff to be barred by any law. Now, it is a well settled position in law that it is the statements in the Plaintiff which have to be accepted on their face in arriving at a determination as to whether the suit is barred by any law. No amount of evidence can be let in for the purpose of making that determination. In this case, the Plaintiff to the counter claim has instituted the counter claim cognizant of the case of the Defendant who was the Plaintiff in the original suit and to the circumstance that it is the contention of the Defendant to the counter claim that the agreement of 1 October 1989 has been terminated on 7 February 2000. Both the letter dated 7 February 2000 as well as the very institution of the suit in this Court on 27 March 2000 constitute a notice of refusal to perform to the Defendant to the suit. **A suit for a declaration had to be filed within a period of three years of the accrual of a right to sue while a suit for specific performance had to be filed within a period of three years of a notice of the refusal to perform. The suit has been filed beyond a period of three years. Hence, on the basis of the counter claim as it stands, and without adding or detracting anything from it, it is ex-facie clear that the claim is barred by limitation."**

(emphasis supplied)

53. In my view the fact situation in *Kanayalal Madhavji Thakkar* (supra) is somewhat similar to the present case. In the case before the Division Bench, the Defendant, who had filed counterclaim was seeking a declaration that the Agreement dated 1 October 1989 was subsisting and binding. However, the Plaintiff had made a specific assertion in the Plaintiff that the said Agreement was terminated by letter dated 7 February 2000. Defendant was thus fully aware that the Agreement was already terminated. Despite knowledge of termination of Agreement, the Defendant therein failed to seek a relief in the counterclaim that the termination was illegal. The Division Bench therefore held that the clever act of

draftsmanship on Defendant's part in omitting to refer to the termination effected vide letter dated 7 February 2000 could not escape the counterclaim from the consequences of limitation. In the present case also, omission on the part of Plaintiff in not seeking prayer for setting aside termination effected vide letter dated 3 December 1990 cannot escape the Suit being barred by limitation.

54. Reliance by Mr. Kumbhakoni on judgment of the Single Judge of this Court in ***C. Padmawati Naidu*** (supra) also appears to be apposite to the present case as both the issues of limitation as well as failure to seek declaration about cancellation of agreement were involved in that case. The substantial questions of law framed in that case in paragraph 13 of the judgment are as under:-

13. This Court had framed the following substantial question of law in admission order dated 29.9.2015 which are three in number:

- “(i) Whether the civil suit filed by the respondent No. 1-Plaintiff was maintainable having been filed after three years of cancellation of the agreement dated 30.1.1975 ? (the appellants had given the notice dated 12.07.1982 (Exh. No.82) terminating the agreement dated 30.01.1975 and the civil suit was filed on 30.12.1985).
- (ii) **Whether the civil suit was maintainable having been filed beyond the period prescribed by Article 54 of the Limitation Act, 1961?**
- (iii) **The respondent no.1-plaintiff having not sought decree for declaration that the cancellation of agreement dated 30.01.1975 was illegal, whether the civil suit praying for decree for specific performance of the agreement was maintainable?”**

(emphasis supplied)

55. This Court decided the issue of applicability of Article 54 in ***C. Padmawati Naidu*** and held in paragraph 16 as under:

16. ... It is a trite law that limitation having once begun to run does not stop irrespective of the intervention of the statutory law or otherwise, since the law does not provide for arresting the limitation

or stopping it from its commencement. In other words, the provisions of the Limitation Act or the point of commencement of the limitation do not get automatically suspended because of coming into force of any special law. Perusal of Article 54 above, read in the context of the facts of the present case, shows that the second part thereof would have application in that the explicit refusal or cancellation of agreement by Exh.82 dated 12-7-1992 would be a notice or the point or rather a starting point for the commencement of limitation. Once the limitation started from the point of refusal on the part of the vendor, that is, the present appellant, it would stop only on the date of filing of the suit. The submission that making of application under section 20 jointly by the parties to the suit being under consideration of the Government would make the refusal or cancellation under Exh.82 nugatory or null and void, would be contrary to the very basic theme of the law of limitation. ...

...In my opinion, the extract of the refusal reflected through Exh. 82 and reply Exh.83 given by the plaintiff clearly denotes that the defendant clearly cancelled or refused to perform his part of contract in writing and the plaintiff in terms understood the said refusal but took the defence that the defendant could not cancel it because of the pending proceedings u/s. 20 etc. In the Supreme Court judgment in the case of Van Vibhag the answer is clearly given that the limitation would commence and the suit could be filed or should have been filed subject to Sec.20 of the Ceiling Act. Both the Courts below however have ignored the above position of law and they chose to rely on the notice that was given by appellant/defendant dated 16.12.1985 reiterating and denying the allegations in notice dated 09.12.1985 wherein the plaintiff asked for performance of contract but there was no reason for the courts below to keep aside the refusal by way of Exh.82 dated 12.7.1982 qua Art.54 and full and conscious understanding of refusal by the plaintiff which is clear from its reply Exh. 83 dated 3.8.1982. Thus, within the meaning of Article 54 of the Limitation Act, when the plaintiff had clear notice that performance was refused on 12.07.1992 Exh.82, the suit ought to have been filed on 11.7.1985 or, at the most on 02.08.1985; but the suit was admittedly filed in the court on 30.12.1985. The suit was thus clearly barred by limitation. Hence, I answer question Nos.1 and 2 holding that the suit was barred by limitation and thus was not maintainable, in view of the express refusal dated 12.7.1982 under Exh.82. Consequently the notice dated 9.12.1985 by plaintiff demanding execution of sale deed was of no consequence and was wholly irrelevant for examining the important question about limitation.”

56. Thereafter on the issue of failure on the part of the Plaintiff to seek declaration with regard to termination of the Agreement, this Court held in paragraph 18 of its judgment in ***C. Padmawati Naidu*** as under:

18. The next question is about the having challenged the refusal respondent/plaintiff not or cancellation of agreement dated 30/1/75 (Exh.65), whether the suit was maintainable in the light of the judgment in the case of I.S. Sikandar vs. K.Subramani and others : (2013) SCC 27. It would be appropriate to note the relevant paragraphs from the said judgment. In that case, the defendant nos.1 to 4 who were served summons had remained absent and were ex parte. The Apex Court while dealing with the similar question, observed as under :

* * * *

What is significant to note in the instant case is that, by refusal Exh. 82 dated 12.7.1982, the plaintiff was fully made aware about the intention to refuse the performance of contract for whatever reasons given in Exh.82. The submission made by Mr K.H. Deshpande that such a refusal has no place in law or is not a valid refusal in the eye of law is a matter of adjudication by the Court on facts and evidence. But then having been made fully aware about the cancellation of agreement by Exh.82 and its full understanding by plaintiff which is reflected in Exh. 83 dated 03.08.1982 by the plaintiff itself, it is difficult to fathom as to why the plaintiff failed to pose a challenge to the act of cancellation Exh.82 in the suit itself by saying that refusal was not valid in law. In paragraph 37 of the judgment cited supra, the Apex Court in clear terms held that in the absence of such a prayer by the plaintiff, the original suit is not maintainable in law declaratory relief since no declaring that agreement of sale as bad in law, was sought in the suit. I think the ratio of the above decision is as clear as it could be and there is no reason for me to hold that in the absence of any challenge to the act of termination of contract by Exh.82 the suit would be maintainable. To sum up, this Question No.(iii) will have to be answered by holding that the original suit was not maintainable, in the absence of challenge to the termination of agreement dated 31.07.1975 by termination notice Exh.82 dated 12.07.1982.

57. Thus, both the issues of limitation as well as consequences arising out of failure to seek declaration with regard to termination of the Agreement involved in the present appeal are fully and squarely answered by judgment in ***C. Padmawati Naidu***.

58. In my view therefore in absence of a prayer seeking declaration that termination/cancellation of Agreement dated 11 January 1988 vide Notice dated 3 December 1990 was illegal, it was impermissible for Plaintiff either to seek prayer that the Agreement was subsisting, existing or binding or to seek a prayer for specific performance of that Agreement. The Suit filed by Plaintiff therefore ought to have been dismissed on account of failure to seek declaration with regard to termination /cancellation of the Agreement dated 11 January 1988.

D. 3 DISCRETIONARY RELIEF

59. One of the questions of law framed by this Court while admitting the Appeal is about grant of decree of specific performance without considering the provisions of Section 20 of the Specific Relief Act. In my view, the discussion on this issue has been rendered academic on account of the finding recorded by me on the issues of limitation and maintainability of the suit on account of failure to seek declaration about validity of termination notice. I do not wish to burden this judgment by discussing the issue of permissibility of grant of discretionary relief of specific performance in Plaintiff's favour in the facts and circumstances of the present case.

D. 4 UNCONDITIONAL DECREE

60. The operative portion of the decree passed by the first Appellate Court is as under:

1. The Appeal is allowed.
2. The Judgment and order dated 30th March 1998 passed by Civil Judge S.D. Thane in Special Civil Suit No.454 of 1994 is hereby quashed and set-aside and consequently suit is decreed.
3. The Plaintiff is hereby entitled to specific performance of the agreement to sell dated 11th January 1988 (Exhibit-49) and further directed to deposit the balance amount of consideration of Rs.4,30,850/- in this Court within 30 days from today.
4. Defendant Nos.1 to 9 are directed to execute the conveyance deed in favour of the plaintiff in respect of suit lands i.e. S. No.62, H.No.2 and S.No.62 Hissa No.6 lying and situated at Village Ovala, Tal. And Dist. Thane.
5. Defendants, their servants, agents, family members, heirs, any other persons claiming through be restrained by an order of permanent perpetual injunction from alienating, transferring and/or creating third party interest in respect of the suit lands.
6. Decree to be drawn accordingly.
7. Parties to bear their own costs.

61. Thus, the first Appellate Court has directed Defendant Nos.1 to 9 to execute Conveyance Deed in respect of suit lands in favour of the Plaintiff. It is an admitted position that as on the date of passing of decree by the first Appellate Court on 15 January 2022, Defendant Nos.1 to 9 have no longer remained owners in respect of land bearing Survey No.62/6, which was initially sold by them to *Everest* on 13 May 2009 and *Everest* sold the same to *Harmony* on 2 August 2012. Additionally, the area admeasuring 4 Gunthas was already sold by Defendant Nos. 1 to 9 in favour of M/s. Rajbir Constructions vide Agreement dated 3 April 1982. M/s. Rajbir Constructions was not impleaded as party defendant to the Suit though the Plaintiff had apparently acquired knowledge about the said transaction, which is reflected in paragraph 3 of the reply dated 17 December 1990. The net effect of the decree of the first Appellate

Court is that in absence of M/s. Rajbir Constructions being impleaded in the suit /appeal, land admeasuring 4 Guntha owned by M/s. Rajbir Constructions since 3 April 1982 is directed to be conveyed by Defendant Nos.1 to 9 in Plaintiff's favour. Thus, the decree passed by the first Appellate Court is clearly faulty *qua* land admeasuring 4 Guntha in Survey No. 62/6.

62. So far as the balance land in Survey No. 62/6 is concerned, the same was purchased by *Harmony* on 2 August 2012 and Defendant Nos.1 to 9 were no longer owners in respect thereof. In such circumstances, could the first Appellate Court have directed Defendant Nos. 1 to 9 to convey Survey No.62/6 to Plaintiff when they were no longer owners thereof ? The answer to the question, to my mind appears, to be in negative. The proper course of action for the Plaintiff was to implead *Harmony* to the Appeal so as to enable the first Appellate Court to pass appropriate decree. The guidance in this regard is to be found in the judgment of the Division Bench of this Court in *M/s. Shree Kamal Constructions* (supra). This Court has held in paragraphs 8 to 11 as under:

8. In *Durga Prasad Vs. Deep Chand*, AIR 1954 SC 75 a Bench of three learned Judges of the Supreme Court dealt with a case where the Plaintiff was a purchaser; the first Defendant the vendor while the second and third Defendants were the subsequent purchasers. **The Supreme Court observed that though the practice of the Courts in India had not been uniform, there were three distinguishing lines of thought. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the Plaintiff and direct conveyance by the vendor alone. The second would consider that both the vendor and the vendee should join, while a third would limit the execution of the conveyance to the subsequent purchaser alone. The Supreme Court held after evaluating the three alternatives as follows:**

“42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in – Kafiladdin v. Samiraddin, A.I.R. 1931 Cal 67(C), and appears to be the English practice. See Fry on specific Performance, 6th Edn. Page 90, paragraph 207; also – ‘Potter v. Sanders’, (1846) 67 ER 1057 (D). We direct accordingly.”

9. The judgement in Durga Prasad was considered by another Bench of three learned Judges of the Supreme Court in Dwarka Prasad Singh v. Harikant Prasad Singh (1973) 1 SCC 179. The Supreme Court observed as follows:

“There appears to be some divergence between the High Courts on the question whether in a suit for specific performance against a purchaser with notice of a prior agreement of sale the vendor is a necessary party or not. In other words the conflict has arisen on the question whether the decree in a suit for specific performance when the property in dispute has been sold to a third party should be to only direct the subsequent purchaser to execute a conveyance or whether the subsequent purchaser and the vendor should both execute a conveyance in favour of the plaintiff : See Gourishankar & Others v. Ibrahim Ali and Kafiladdin & Others v. Samiraddin & Others. This Court has, however, held in Lala Durga Prasad & Another v. Lala Deep Chand & Others that in a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale the proper form of the decree is to direct specific performance of the contract between the vendor and the plaintiff and further direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. This was the course followed by the Calcutta High Court in the above case and it appears that the English practice was the same. Thus according to this decision, the conveyance has to be executed by the vendor in favour of the plaintiff who seeks specific performance of the contract in his favour and the subsequent transferee has to join in the conveyance only to pass his title which resides in him. It has been made quite clear that he does not join in any special covenants made between the plaintiff and his vendor. All that he does is to pass on his title to the plaintiff. In a recent decision of this Court in R. C. Chandiook & Another v. Chunni Lal Sabharwal & Others while passing a decree for specific performance of a contract a direction was made that the decree should be in the same form as in Lala Durga Prasad’s case (supra). It is thus difficult to sustain the argument that the vendor is not a necessary party when, according to the view accepted by this Court, the conveyance has to be executed by him although the

subsequent purchaser has also to join so as to pass on the title which resides in him to the plaintiff.”

Consequently, the Supreme Court was of the view that the vendor to an agreement to sell was a necessary party and the conveyance, if the Plaintiff was to succeed, was to be executed by him although the subsequent purchaser would also have to join so as to pass on the title which resided in him to the Plaintiff.

10. In a judgement of three Learned Judges of the Supreme court in *Kasturi v. Iyyamperumal* (2005) 6 SCC 733, it was held that under Order I Rule 10(2) of the Code of Civil Procedure, the parties to a contract for sale were necessary parties in a suit for specific performance as also a person who had purchased a contracted property from the vendor. However, a person who claims adversely to the claim of the vendor would not constitute a necessary party. A person who did not claim under the vendor but claimed a title adverse to the vendor was held not fall within any of the categories enumerated in Section 19 of the Specific Relief Act. If a person who claims independent of the vendor as distinct from the vendor was impleaded, the suit for specific performance shall be enlarged and practically converted into a suit on title. In that decision, the Supreme Court observed as follows:

“7. In our view, a bare reading of this provision, namely, second part of Order 1 Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are – (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party.”

In the case before the Supreme Court, it was an admitted position that Respondents 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance had been filed but based their claim on an independent title and possession of the contracted property. Since the claim was not founded under the vendor of the Plaintiff but was a claim to an independent title, the Supreme Court was of the view that the addition of the suit parties would enlarge the suit for specific performance into a

suit on title. The principles in the earlier judgements of the Supreme Court have been followed in a recent judgement of the Supreme Court in Thomson Press (India) Ltd. v. Nanak Builders & Investors P. Ltd. 2013 (3) Scale 26.

11. In the present case, the Appellants as the Plaintiffs have sought the addition of Respondents 29 to 55. The specific averment in the proposed paragraph 15A which is sought to be introduced into the plaint is that in all the conveyances subsequent to the agreement for sale in favour of the Appellants Defendants 29 to 34 are not bona fide purchasers but persons who were aware of the rights and claims of the Plaintiffs. The Appellants seek a declaration that the deeds of conveyance dated 1 December 2010, 15 December 2010 and 16 February 2010 would not bind them. The Appellants seek a decree to the effect that Defendants 29 to 34 be ordered and decreed to join Defendants 1 to 28 in conveying the suit property in favour of the Appellants. The relief as structured would clearly fall within the principle that was enunciated in the judgement of the Supreme Court in Durga Prasad's case as subsequently followed."

(emphasis supplied)

63. Thus, the proper course of action for the first Appellate Court was to either set aside the transactions of purchase between (i) Defendant Nos. 1 to 9 in favour of *Everest* and (ii) *Everest* and *Harmony*. To do so, it was necessary for the Plaintiff to implead *Harmony* as party to the Appeal and to incorporate a prayer for setting aside Sale Deed dated 2 August 2012. The second course of action for the first Appellate Court was to direct all three viz. Defendant Nos.1 to 9, *Everest* and *Harmony* to execute conveyance in the Plaintiff's favour. The third course of action was to direct *Harmony* to execute conveyance in the Plaintiff's favour. All the three courses of actions would have required impleadment of *Harmony* as party to the Suit/Appeal. Thus, the first Appellate Court could not have directed Defendant Nos.1 to 9 to convey land bearing Survey No. 62/6 to the Plaintiff. Thus, on both the counts of directing conveyance of land admeasuring 4 Guntha (owned by M/s.

Rajbir Constructions) as well as directing Defendant Nos.1 to 9 to convey balance land in Survey No.62/6, decree passed by the first Appellate Court is clearly faulty.

D.5 MAINTAINABILITY OF APPEAL DUE TO FAULTY POWER OF ATTORNEY

64. Mr. Naik has sought to question the maintainability of Second Appeal No. 350 of 2022 by contending that the Power of Attorney executed in favour of *Everest* by the other Appellants is no longer valid. Firstly, it is contended that only 6 out of 9 original Defendants have filed the present appeal. I do not see any reason why the same cannot be done in the light of specific provisions of Order XLI Rule 4 of the Civil Procedure Code. The second objection is that the Power of Attorney executed by the Appellants in favour of *Everest* expired with *Everest* selling the land in favour of *Harmony*. I am unable to agree. I have perused the Power of Attorney and the same contains specific authority to file or defend Suits, Appeals, etc. by *Everest* on Appellants' behalf. Mere sale of land by *Everest* to *Harmony* does not result in automatic revocation of such power. The Power of Attorney restricted original Defendants from revoking the same during ownership of the land by *Everest*. However, that does not mean that the power automatically stood revoked after sale of the land by *Everest* in favour of *Harmony*. There is nothing on record to indicate that the original Defendants revoked the Power of Attorney granted in favour of *Everest* after sale of the land by *Everest* in favour of *Harmony*. Therefore, objections about maintainability of the

Appeal sought to be raised by the Plaintiff is stated only to be rejected.

65. What remains is now is to deal with some more judgments cited by Mr. Naik. It must be observed that none of the following judgments cited on Plaintiff's behalf are of relevance to the issues of limitation and effect of failure to seek declaration about validity of termination of agreement.

- (i) ***M. Arul Jothi*** (supra) is relied upon on the aspect of protection of possession of Plaintiff. In my view, the judgment has no application to the facts of the present case where the first Appellate Court has not granted any injunction in favour of Plaintiff *qua* the aspect of possession. Since the Suit of the Plaintiff itself is held to be barred by limitation, no relief can otherwise be granted in Plaintiff's favour under Section 53A of the Transfer of Property Act.
- (ii) ***Chand Rani*** and ***Syed M.M. Rizvi*** (supra) are relied upon in support of contention that time being not the essence of the contract. In my view the Judgments would have no application as the Suit of the Plaintiff is held to be barred by limitation as well as not maintainable on account of failure to seek prayer for setting aside termination of contract.
- (iii) ***Kalandi Baburao Raut*** (supra) is relied upon in respect of condition relating to obtaining permission under the Tenancy Act for effecting sale deed. In my view the said issue has become irrelevant on account of finding

recorded by me on the aspect of limitation and maintainability of the Suit.

(vi) ***Gaddipati Divija*** (supra) is relied upon in support of the contention of Defendants' failure to undertake demarcation of property. Again, in the light of findings recorded by me on the issues of limitation and maintainability, it is not necessary to consider which party was responsible for conduct of survey and measurements for completion of purchase transaction.

(vii) ***Timblo Irmaos Ltd.*** (supra) is relied upon in support of submission with regard to maintainability of the appeal on account of faulty Power of Attorney. I have already rejected the objection with regard to maintainability by holding that *Everest* has power to file appeal on behalf of rest of the Appellants.

E. CONCLUSIONS AND ANSWER TO QUESTIONS FRAMED

66. I accordingly proceed to answer the substantial questions of law framed as under:

- | | |
|---|--|
| (a) Whether the suit filed by the plaintiff was barred by the Limitation Act, 1963. | The suit filed by the Plaintiff was barred by Limitation Act, 1963. |
| (b) Whether the decree for specific performance could have been passed without considering the provisions of Section 20 of Specific Relief Act, 1963. | The question whether decree for specific performance could have been granted in Plaintiff's favour without considering the provisions of Section 20 of the Specific Relief Act, 1963 is rendered academic in the light of my findings on the issues of |

limitation and maintainability of the suit on account of failure to challenge termination notice dated 3 December 1990.

(c) Whether the Appellate Court could have passed unconditional decree in respect of an agricultural tenanted land.

The unconditional decree passed by the first Appellate Court is faulty and could not have been passed.

((d)) Whether the original suit filed by the plaintiff for decree of specific performance was maintainable without seeking declaratory relief with respect to termination of the agreement vide notice dated 03/12/1990, was maintainable.

The Suit filed by the Plaintiff seeking decree of specific performance was not maintainable without seeking declaratory relief in respect of termination notice dated 3 December 1990.

F. ORDER

67. The appeals accordingly succeed, and I proceed to pass following order:

- (i) Judgment and Decree dated 15 January 2022 passed by the District Judge-2, Thane in Regular Civil Appeal No.188 of 2012 is set aside.
- (ii) Special Civil Suit No.454 of 1994 filed by Plaintiff is dismissed.

68. With the above directions, both Second Appeals are allowed. There shall be no orders as to costs.

SANDEEP V. MARNE, J.

69. After the judgment is pronounced, the learned counsel appearing for Respondent No.1 prays for continuation of *interim* order passed by this Court vide order dated 20 October 2023. By that order, this Court directed maintenance of *status quo* during pendency of the Appeals. This Court particularly directed *Harmony* not to create any third party interests in respect of the suit property. The request for continuation of *interim* order is opposed by Mr. Kumbhakoni and Mr. Thorat. Considering the fact that the impugned decree of the First Appellate Court did not direct *Harmony* to execute sale deed in favour of the Plaintiff coupled with findings recorded in the judgment that the decree of the First Appellate Court is faulty, in my view, it would not be appropriate to continue any restraint order against *Harmony* after dismissal of the Plaintiff's Suit. Therefore, request for continuation of the order of *status quo* is rejected.

SANDEEP V. MARNE, J.