

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**Second Appeal No.246 of 2019
With
Civil Application No.1397 of 2018
In
Second Appeal No.246 of 2019**

1. Ramchandra Vishnu Sable
R/at: Vitthalwadi,
Jambhudkhalil,
Taluka Malshiras,
District Solapur.

2. Mahadev Vishnu Sable
R/at: Vitthalwadi,
Jambhudkhalil,
Taluka Malshiras,
District Solapur.

... Appellants
(Orig. Defendant
Nos.1 and 2)

v/s.

1. Narayan Shankarrao Game Patil
R/at: Malkhambi, Tal. Malshiras,
District Solapur.

... Respondents
(Orig. Plaintiff)

And

2. Satyabhama Shankarrao Game Patil,
since deceased through legal heirs

2a. Harishchandra Shankarrao Game Patil
R/at: Malkhambi, Talukar Malshiras,
District Solapur.

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2b. Dadasaheb Shankarrao Game Patil,
R/at: Malkhambi, Taluka Malshiras,
District Solapur.

3. Popat Vishnu Sable
R/at: Vitthalwadi,
Jambhudkhalil,
Taluka Malshiras,
District Solapur.

... Respondents.
(Orig. defendants
4,4a, 4b & 3)

With
Second Appeal No.249 of 2024
With
Interim Application No.8038 of 2024 In S.A. No.249/2024

Popat Vishnu Sable
R/at: Vitthalwadi,
Jambhudkhalil,
Taluka Malshiras,
District Solapur.

... Appellants
(orig. defendant No.3)

v/s.

Narayan Shankarrao Game Patil
R/at: Malkhambi, Tal. Malshiras,
District Solapur.

2. Satyabhama Shankarrao Game Patil,
since deceased through legal heirs

2a. Harishchandra Shankarrao Game Patil
R/at: Malkhambi, Talukar Malshiras,
District Solapur.

2b. Dadasaheb Shankarrao Game Patil,
R/at: Malkhambi, Taluka Malshiras,
District Solapur.

3. Ramchandra Vishnu Sable

R/at: Vitthalwadi,
Jambhudkhalil,
Taluka Malshiras,
District Solapur.

4. Mahadev Vishnu Sable

R/at: Vitthalwadi,
Jambhudkhalil,
Taluka Malshiras,
District Solapur.

... Respondents

Mr. Machhindra A. Patil a/w. Vijay R. Gorad	Advocate for the Appellants in SA 246/2019 and for Respondent Nos.3 and 4 in SA No.249/24.
Mr. S.G.Deshmukh a/w. Mr. Rajaram Bansode and Advocate Sheetal M. Ubale	Advocate for Respondent No.1 in both appeals.
Mr. Kalpesh Patil	Advocate for the Appellants in SA 249/24, for applicant in IA No.8038/24 and for respondent No.3 in SA 246/2019.

CORAM : S.M. MODAK, J

**RESERVED ON : 02 August 2024.
PRONOUNCED ON : 30 January 2025.**

JUDGMENT:

The issue involved in both these appeals is “*whether both the Courts below were justified in awarding an amount of Rs.6,01,000/- along with interest @ 12% p.a. to the plaintiff on account of*

liquidated damages? Whether both the Courts below have considered “the parameters prescribed under Sections 73, 74 of Indian Contract Act while awarding that sum?”

2. This amount is awarded by the Court of Civil Judge Senior Division at Malshiras as per judgment dated 28 April 2010 passed in Spl. Civil Suit No.46/2004. This was confirmed by the Court of District Judge No.1 Malshiras in RCA No.50/2012 on 14 June 2018. These directions were given in a Suit for grant of damages filed by the purchaser of an agricultural land situated at Village Malkhambi, Tal. Malshiras, Dist.Solapur. This direction was given to Defendant Nos.1 to 3 (who are the legal representatives of one Vishnu Devaba Sabale who was owner/vendor). In pursuance to an agreement dated 8 May 2000, said Vishnu could not execute sale deed in favour of Narayan (though executed in favour of one Satyabhama – mother of Narayan-plaintiff) and that is why Narayan filed a Suit for liquidated damages on the basis of a term in that agreement (to pay double the amount of earnest money of Rs.3 lakhs).

Pendency of two second appeals

3. Initially, second appeal No.246/2018 was filed **by all the three defendants** (through their power of attorney Ramchandra-appellant No.1). Prior to disposal, there was some dispute amongst them and hence **appellant No.3 Popat was transposed** as respondent No.3. Subsequently, **he filed separate Second Appeal No.249/2024.**

4. Accordingly, I have heard Mr.Machhindra Patil learned Advocate and Mr. Kalpesh Patil for the appellants in both appeals and learned Advocate Shri Deshmukh assisted by learned advocate Shri Bansode for Respondent No.1/original plaintiff. Both the sides have consented for disposal of both the appeals at an admission stage. Respondent Nos.2a and 2b are few legal heirs of deceased respondent No.2/defendant No.4-Satyabhama. They were not represented in these appeals through any Advocate. She is the mother of plaintiff-Narayan. She filed written-statement pleading certain facts about sale deed in her favour. She has pleaded about separation with her son Narayan. She has not opposed decreeing the suit. She has neither given any evidence nor cross examined the

witnesses. Even her legal representatives were brought on record before the trial court has not given any evidence. Atleast it is not shown from the record.

5. Second appeal No. 246/2019 was argued before me and draft substantial question of law were also tendered before me. At that time second appeal remain to be disposed of. Again this appeal was assigned to me. In the mean time new second appeal was filed as mentioned above. On the basis of earlier draft, I have framed the following substantial questions of law :-

- (1) Whether both the Courts below were justified in awarding “damages of Rs.6,00,000/- (being double the amount of earnest money) from the defendants” in favour of the plaintiff without considering “the principles laid down in Section 73 and 74 of Indian Contract Act?”
- (2) Whether both the Courts below **were justified** in awarding interest for a period **prior to filing of Suit?**
- (3) What order and decree?

6. Prior to deciding those questions, it will be relevant to see the pleadings and evidence which are relevant.

Pleadings and evidence

7. There were two documents executed on 8 May 2000. It is in respect of land bearing Gut No.89 1 *Hectre* 41 *Are* situated at Village Malkhabi. The owner is Vishnu Devaba Sabale. He agreed to sale this land to the plaintiff-Narayan. The two documents are as follows:-

- a) an agreement recording the terms of sale dated 8 May 2000.
- b) receipt for payment of Rs.3 lakhs being part consideration of same date.

The terms are as follows:-

- a) The total consideration is Rs.9,80,000/-.
- b) Earnest money agreed is Rs.3 lakhs and paid also.
- c) time for payment of remaining consideration of Rs.6,80,000/- is upto 15 January 2001.
- d) time for execution of sale deed – 15 January 2001 in favour of purchaser/his nominee.
- e) **Consequences for breach.**
 - (i) **If breach is by the owner/vendor** in executing sale deed in time – then the purchaser gets right to ask for Rs.6,00,000/- (being double amount of

earnest).

This term was not part of an agreement but part of payment receipt dated 8 May 2000. **In these appeals, the dispute is about exercise of this right.**

- (ii) **In case of breach by the purchaser** in paying remaining consideration in time then the owner/vendor gets a right to forfeit the earnest money.

In these appeals, the issue is not about exercise of this right. The vendor/defendant Vishnu denied their execution.

Filing of Suit

8. The plaintiff/prospective purchaser-Narayan filed a suit making grievance of not executing sale deed in his favour by defendant-Vishnu. He demanded Rs.6,00,000/-. The grievance was sale deed was not executed in his favour and instead Vishnu executed sale deed on 27 June 2001 in favour of Satyabhama Patil (who happens to be his mother) without his consent. Owner Vishnu expired on 1 February 2002. **Hence, the suit was filed against his three sons-defendant Nos.1 to 3. Their defence is twofold :--**

- a. On one hand they have denied execution of any document by their father and
- b. on other hand, they have pleaded fulfillment of promises by their father as per the agreement. Their father have executed sale deed with Satyabhama- mother of Narayan. She has also filed written-statement. She expired on 11 November 2008. Her two sons were brought on record. They have also filed written-statement.

Evidence adduced

9. Both the sides contested the suit vigorously. Their focus was on proving their respective claims and denying execution of documents. But the defendants have failed before both the Courts. Even in present appeals their respective advocates have continued the same line of action. But the scope of second appeal is different from scope of first appeal.
10. Both the sides have adduced oral evidence. To prove execution, plaintiff-Narayan examined following witnesses:-

1.	<u>Tukaram Ishwar Madane</u>	the stamp vendor who has sold stamp paper of Rs.100/- each to
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		purchaser Narayan and vendor Vishnu.
2.	Narayan Game Patil	Plaintiff
3.	<u>Narayan Ganpat Pawar</u>	Working in bank who wrote the agreement on 8 May 2000 in the house of plaintiff – Narayan.
4.	<u>Popat Nivrutti Jamdade</u>	who was present on 5 May 2000 when meeting was held to discuss the transaction for sale and purchase of land.
5.	Vilas Game Patil	another witness who was present in the meeting dated 5 May 2000.
6.	<u>Retired Circle Inspector</u>	who issued ration card to plaintiff-Narayan.

11. The contesting defendants have given following evidence:-

1.	Ramchandra Vishnu Sabale	Defendant No.1.
2.	Bharat Uttam Bhanage	who has signed an agreement dated 8 May 2000 and sale deed dated 27 June 2000 in favour of mother. He is aware about joint residence of Narayan-plaintiff and his mother.

Findings by the trial Court

12. The trial Court concluded about proof of execution of agreement for sale. Trial Court concluded about payment of Rs. 3 Lakhs. Trial Court concluded about breach of an agreement by Vishnu-predecessor in title of Defendant Nos. 1 to 3. Trial Court

concluded “*execution of sale deed on the say of plaintiff in favour of Satyabhama by Vishnu*” was not proved. Ultimately trial Court directed Defendant Nos. 1 to 3 to pay Rs. 6,01,000/- alongwith interest @ 12% p.a. from date of sale deed i.e. 27/06/2000 till realisation. Trial Court also awarded interest on an amount of Rs. 6,01,000/- from date of agreement i.e. 8 May 2000.

Appellate Court

13. On all counts, the grievance of Defendant Nos. 1 to 3 were turned down by the Appellate Court. The findings were confirmed.

Submission on behalf of Appellants

14. Learned Advocate Shri Machindra Patil made a submission that the execution of agreement and payment receipts are not proved. He also emphasized on not claiming specific performance of the agreement. He relied upon the provisions of Section 21 of the Specific Relief Act. He quoted the observations in case of *Bhikaram Nathuji Vanzari Vs. Sara Swatibai Motilal Zarkariya*¹. The High Court refused to grant specific performance due to defect in pleadings. Plaintiff failed to aver readiness and willingness to

¹ 1996 (2) Mh. LJ 756

perform his part of promises. In case in these appeals Plaintiff-Narayan has not asked for specific performance. It is true that compensation can be asked by way of an alternate relief. However, there was a prayer to ask refund of earnest money and there was no prayer for compensation. It is true, compensation can be awarded only when it is asked for and not otherwise.

15. The facts are different. The observations do not suggest prayer for compensation has to be rejected if in case specific performance is not prayed. It cannot be. Because legislatures have prescribed the reliefs which can be asked through Court of law. The reliefs (of specific performance and compensation) are independent.

Scope of Second Appeal

16. There is vast difference between hearing of first appeal and second appeal. There is scope for appreciation of evidence in first appeal. It is a last fact finding Court. Whereas there is hardly scope for re-appreciation of evidence in a second appeal. The findings can be reversed only when they are palpably wrong. Otherwise, second appeal can be heard only on substantial question of law. Merely

because a point is raised on behalf of the Appellant, it does not become a substantial question of law. Substantial question of law is a question which is not settled earlier.

Consideration

17. With this view in mind, I have gone through the findings by both the Courts below. Trial Court had given its opinion on every piece of evidence adduced on behalf of both the sides. Trial Court believed the testimony of Plaintiff's witness (for short 'P.W.') No.1-stamp vendor. He sold stamp paper of Rs.100/- each to the Plaintiff and Defendant No.1 being son of Vishnu (Para No. 22). Trial Court also believed **PW No.2-Narayan**. Trial Court also concluded that Defendants could not prove that Plaintiff filed this suit to grab the property (Para no. 27).

18. Trial Court believed oral testimony of PW No. 3-scribe on the point of execution of agreement for sale (Para No.31). Trial Court has not believed testimony of PW No.4 in view of certain answers given by him during cross-examination (Para No. 32). **PW No. 5 is a witness** who attended the meeting on 05.05.2000. Trial

Court believed his testimony (Para No. 32).

19. Trial Court has also considered the account extract of Plaintiff (Exh. 69). It shows withdrawal of Rs. 3 Lakhs by the Plaintiff on 8 May 2000. This corroborates payment to Vishnu (Para No. 37).

20. Trial Court found lacunae in the evidence of Defendant's witness (for short '**D.W.**') **No.1**. Facts not pleaded in written-statement is discarded by the trial Court (Para No. 43). Trial Court gave due weightage to the admissions given by him during cross examination.

21. Defendant No.4-Satyabhama is a mother of Plaintiff. After sale deed, her name is mutated on 7/12 extract. After her death, being one of her legal representative, Plaintiff has not claimed right. Trial Court opined both rights are different (Para No. 47). That land is sold by brothers of Plaintiff subsequently to Tayyab Dohadwala (Para No. 50).

22. Trial Court discussed about the evidence of **D.W. No. 2**. He is a witness to agreement for sale and sale deed. Trial Court considered admission given by him that there is no reference of an agreement for

sale in the sale deed executed in favour of mother. Trial Court has not believed him.

23. Trial Court gave weightage to contents of documents as against oral evidence of D.W. No. 1 and D.W. No. 2. Trial Court also discussed **about two rival claims** one “about execution of sale deed in favour of Satyabhama with consent of Plaintiff” on one hand and Plaintiff residing separately from his mother since 1984-85. There is evidence of **Circle Inspector-Aalur Sampat Pawar**. He issued separate ration card to the Plaintiff. Trial Court believed him and also about issuance of separate ration card to Plaintiff (Para No. 38).

24. Learned Advocate Shri Kalpesh Patil laid emphasis on one aspect. According to him residing separately is one aspect and separation of status as a member of Joint family is a different aspect. According to him there was no evidence of separation from joint family.

25. While decreeing the suit, the trial Court has given weightage to the evidence of Plaintiff, his witness Circle Inspector and of witness Nos. 1 and 2 for the Defendants. Admittedly, Plaintiff was not

present at the time of sale deed with his mother. There is no reference about agreements executed with Plaintiff by Vishnu in that sale deed. The sale deed nowhere mentions it was executed in view of a clause of agreement for sale. Just because Plaintiff is the son of Satyabhama, we cannot infer about his consent for executing sale deed in favour of his mother (and need not be executed with him). It is for the contesting Defendants to prove consent of Plaintiff. It can be proved either by adducing evidence about consent or by adducing circumstantial evidence. Trial Court discarded the evidence of Defendant.

26. I do not find any fault in appreciation of evidence done by trial Court. I will also ascertain the findings given by the Appellate Court. Appellate Court may agree with the findings or may not agree. Even, Appellate Court can reverse the findings, if they are erroneous.

Findings by Appellate Court

27. There is emphasis by both the learned Advocates for Appellants that the Appellate Court has not framed any point in the judgment about the plea of “**Consent of Plaintiff to the sale deed**”

taken by the Defendants”. **I have seen those points. It is not there.**

However, Mr. Deshmukh, learned Advocate has invited my attention to the findings in Para No. 16. The Appellate Court has referred about the evidence of ration card showing that mother was not staying on that address. Appellate Court observed “sale deed do not suggest presence of Plaintiff”. Appellate Court observed “*Defendants could not bring on record the reliable evidence to prove execution of sale deed with consent of Plaintiff*”.

28. The above observations are on the basis of evidence. Those findings are not perverse. **So even if the Appellate Court has not framed any point, there are observations.** Hence, there is no prejudice. The Appellate Court has given findings on other aspect in favour of the Plaintiff. **I do not consider them erroneous.**

Not claiming specific performance

29. Admittedly, the Plaintiff has not claimed specific performance. When either of the party to the contract commits breach, other party gets bundle of rights. There can be acquiescence of breach. There can be an action through Court of law enforcing specific performance or

there can be a claim for compensation for damages sustained. Law gives choice to party which option he should opt. Law cannot compel a person to seek a particular relief only. Specific Relief Act governs specific relief which a party can enforce through Court of law. Section 21 of the said Act, gives an option to the party to seek compensation. Even the Court can award compensation as an additional relief . It is true there are no provisions in Specific Relief Act for determining the quantum of compensation. The Court is guided by the provisions of Indian Contract Act.

30. Similarly, if any of the party commits breach, there are provisions in Sections 73, 74 and 75 of the Indian Contract Act dealing with compensation. The observation in case of Bhikaram Vanzari nowhere opines about claiming specific relief mandatorily. It talks about insistence on pleading '*readiness and willingness*'. It talks about granting compensation, only when it is asked by the party.

31. For above discussion, I do not agree with the submission advanced on behalf of Appellants about not claiming specific performance. **I reject that contention.**

Satisfying parameters under Section 74 of Indian Contract Act.

32. Trial Court has referred about the provisions of section 74 of Indian Contract Act. Discussion finds place in para no. 52 to 63. Trial court opined “*when there is breach of agreement, as per the provisions of section 74 of Contract Act, the plaintiff is entitled to recover double the amount of compensation*” (para no. 63). While arriving at this conclusion trial court referred several judgments,

33. The appellate court also concluded about the breach of the agreement and confirmed the findings given by the trial court. Appellate court has also given weightage to the clause in the agreement about “*payment of double the amount of earnest*”. According to both the learned advocates for the appellants, both the court below have committed an error in granting compensation without considering the provisions of section 74 of Contract Act. According to Mr. Deshmukh, the findings of facts cannot be interfered by the second appellate court.

34. Already there is concurrent finding about “*proof of the agreement and its breach*.” The agreement lays down time limit for

execution of the sale deed that is up to 15.01.2001 and the receipt/bond provides for consequences (double the amount of earnest money) if owner fails to execute sale deed. I have framed substantial question of law on this aspect. It will be relevant to consider the said provisions.

Provisions of Indian Contract Act

35. Chapter VI of Indian Contract Act provides for “*OF THE CONSEQUENCES OF BREACH OF CONTACT*”. **There are three sections.** There are section **73, 74** and **75**. “*Execution of the agreement and its breach*” are the common issues as per all these sections. **But as per section 73 & 75,** compensation can be claimed for the “*actual loss or damage caused/sustained from the breach.*” So the party complaining of breach has to prove he caused loss or damage and how much. Whereas, **section 74** comes into picture when the contract provides for “*certain of money to be awarded by way of compensation in case of breach.*” **It does not insist upon ‘causing/sustaining loss or damage’.** Does it mean that, proving ‘causing of loss or damage and actual loss/damage’ is dispensed with.

For easy reference, it is reproduced below:-

*“When a contract has been broken, **if a sum is named in the contract as the amount to be paid in case of such breach**, or if the contract contains any other stipulation by way of penalty, **the party complaining of the breach is entitled**, whether or not actual damage or loss is proved to have been caused thereby, **to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named** or, as the case may be, the penalty stipulated for.”*

Section 74 also talks about stipulation by way of penalty. This clause was inserted by way of amendment made in the year 1899. This clause is not applicable. If we peruse the provisions of Section 74 (which is relevant for deciding the controversy), we may find following are the parameters:

- a) There is **breach** of contract.
- b) **sum is named** in the contract to be paid in case of breach.
- c) Party complaining of breach is **entitled**.
- d) Causing of **actual loss/damage is proved or not**.
- e) To receive from the Party **who has broken** the contract.
- f) **Reasonable compensation not exceeding the amount named**.

It will be relevant to consider the observations from the judgments relied upon by the trial court itself. Those details are as follows:-

Judgments referred by the Trial Court

36. *Maulana Bux V/s Union of India*². This judgment deals with the contingency of **forfeiture of earnest money**. The money was kept with the Government for due compliance of the terms of contract for supply of goods. The amount was not by way of part payment which the supplier owes from the Government. In fact, if terms are fulfilled, the supplier owes price for goods supplied from the Government. The supplier fails to supply goods in time and the purchaser/Government rescinded the contract and forfeited the earnest. Trial court referred it in para no.61. But the trial court has not considered the factual background. The amount forfeited by the Government is way of penalty. No doubt in case of *Maulana Bux* and in present appeal, there is a breach of the agreement. But the difference is '*the party complaining of the breach was holding the amount by way of deposit whereas in present appeal, the party*

2 AIR 1970 SC 1955

complaining of the breach/plaintiff intends, the defaulter/defendants should pay him double the amount of earnest hold by them by way of compensation'. That is how we are not dealing with this controversy as involved in case of *Maulana Bux*. Trial court has not addressed this aspect but blindly followed the observations.

37. Trial Court (Para No. 53) referred the observations in case of *Sukhdev Kaur Vs. Hoshiar Singh*³. It was a suit for specific performance and alternate relief for refund of earnest money at double rate. Specific performance was refused but earnest money at double rate was granted. High Court observed :

“proof of damages is required. But when party knew at the time of entering into contract damages are likely to occur in case of breach then no proof of actual loss/damage is required” (Para No. 23)

That is why decree of refund of earnest money at double rate was granted. It was on the basis of term in an agreement for sale (Para no. 9). The said observations by High Court of Punjab and Haryana are on the basis of facts and the relevant provisions of Contract Act are

3 AIR 2004 P & H 178

not discussed.

38. Trial Court also referred the observations in case of ***Surjit Kaur Vs. Naurata Singh***⁴ (Para No. 57). Specific performance was refused. However, the Hon'ble Supreme Court granted refund at double amount of earnest money(Para No. 17). However the provisions of Section 74 of Indian Contract Act were not referred. The observations are purely on facts. **All other judgments referred by the trial court are not on the issue of compensation under Section 74 of Indian Contract Act.**

39. Trial court simply referred the observations in earlier judgments. But has no where observed how the principles laid down therein are applicable to the facts and evidence. Any Judge deciding the dispute has to assess the evidence objectively. Whether he has done it or not can be ascertained only on the basis of reasoning given by him. They are absent.

40. **There is more and more tendency** to quote judgments and arrive at conclusion without considering how they are applicable. **Even the appellate court committed the same mistake.** I am saying

4 AIR 2000 SC 2927

this because the provisions of Contract Act are referred without considering the principles underlining them. What are the principles behind particular provision in any Act can be found on the basis of interpretations given by the constitutional courts. That is why this Court has done this exercise. _

41. On this background, *the issue is “merely because there is breach of a contract and there is a term providing sum of money to be paid, whether Court is bound to award that sum named in the agreement”?* We get guidelines from the observation in few other judgments delivered by the Hon’ble Supreme Court.

Other Judgments delivered by Supreme Court

42. In case of *Oil and Natural Gas Corporation Ltd. v/s. Saw Pipes Ltd.*, this issue has cropped up involving a contract to supply pipes. They could not be supply in time due to non procurement of raw materials. There was a strike. They were supplied belatedly. The purchaser paid the bill but by deducting an amount of liquidated damages (Para No. 34). It was observed:

5 2003 (5) SCC 705

“In such a case there may not be necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein.” (Para No. 46)

Further it is observed

“In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach

of the contract is not liable to pay compensation. It would be against the specific provisions of Section 73 and 74 of Indian Contract Act (Para No. 67)”

43. Whereas in case of *Kailash Nath Associates Vs. Delhi Development Authority*⁶ there was a bid for sale of plot. Part of bid price was paid. There was delay in paying remaining amount. Bidder filed a suit for specific performance. There was alternate prayer for refund of amount. After taking overview of the judgments, certain conclusions were drawn (Para No. 43). The relevant conclusions are as follows:

- a) **If liquidated amount is genuine pre-estimate** of damages fixed by both the parties and if found to be such by the Court, **it can be awarded.**
- b) **In other cases, reasonable compensation can be granted** not exceeding the amount mentioned therein.
- c) If the amount is **mentioned as a penalty**, only **reasonable amount can be granted** as a compensation.

⁶ (2015) 4 SCC 136

- d) The principles laid down in Section 73 of Indian Contract Act needs to be followed.
- e) Damage/loss is *sine qua non* for grant of compensation.
- f) The expression “*Whether/not actual loss/damage is proved to have been caused*” means :-
 - (i) **When it is possible to prove loss/damage** – such proof is not dispensed with.
 - (ii) **When damage is difficult/impossible to prove** – then only liquidated amount can be granted.

44. On the basis of above principles, the issue involved in these appeals needs to be decided. The relevant facts and evidence need to be considered. They are as follows :--

Date of Agreement	8 May 2000
Date of Receipt for Rs.3 Lakhs	8 May 2000
Date of proposed Sale Deed	15 January 2001
Total consideration	Rs.9,80,000/-
Amount to be returned	Rs.6,00,000/-
Date of execution of Sale deed with mother	27 June 2000
Consideration paid by mother	Rs. 1,87,000/-

Above are proved facts. It means sale deed with mother was executed

within one year and it is earlier to the period fixed for execution of sale deed. Even consideration for said sale deed executed is much less than Rs. 9,80,000/-. There is much emphasis on this aspect by both the learned Advocates for Appellants. But it is admitted fact that there is no reference of the agreement for sale in the sale deed with mother.

45. Mr. Machindra Patil, learned Advocate relied upon the observations in case of *Vasudeo Harchand Kolhe Vs. Bhaulal Nandersing Rajput*⁷. Plaintiff simply relies on reference in the receipt about payment of double amount. Plaintiff has not adduced any evidence to show rise in prices and how he caused damages due to non execution of sale deed with him. Plaintiff entered in to an agreement for sale on 8th May 2000 whereas the sale deed with the mother was executed within short period of time that is on 27th June 2000. **It will be relevant to consider the amount of consideration of both the documents. There is vast difference.**

46. The consideration mentioned in the sale deed is much less than the consideration mentioned in the agreement for sale. An amount

⁷ AIR 1994 Bombay 124

of Rs. 3 lakhs were paid on 8th May 2000 and the suit is filed in the year 2004. Herein, neither of the parties have adduced any evidence to show the quantum of damages caused due to non-execution of sale deed. There was no hurdle for the plaintiff to adduce evidence on the point of loss caused to him. It is very well true the Court has to recognize the intention of the parties.

47. Furthermore, the clause about “*double the amount of earnest money*” is incorporated in payment receipt and not in the agreement. This Court feels that awarding Rs.6,00,000/- is nothing but to penalize the Defendants. It is for the reason, Plaintiff has not sued for specific performance. Furthermore, he has not sued for cancellation of sale deed in favour of mother and further sale in his favour. If he wants that much compensation, he ought to have adduced evidence to show what loss is caused to him This is not such type of case wherein it is difficult to adduce evidence about loss. He could have laid evidence about contemporary sale transactions in those areas. The consideration mentioned in sale deed with mother is much less.

48. Above factors are not considered by both the Courts below.

Section 74 does not mention the liquidated amount is genuine or not. It does not say in which cases, evidence about loss/damage has to be given. It says about proof of loss/damage. **It is the judicial interpretation which lays down ‘*when proof of loss*’ is important.** Supreme Court has also said the principles laid down in Section 73 of Indian Contract Act are relevant.

49. For the above discussion, I hold that both the Courts below erred in granting Rs. 6,01,000/- as compensation. This Court feels the amount should be reasonable. This Court feels there can only be an order for refund of earnest money of Rs. 3,00,000/- only. Those findings need to be corrected.

About interest

50. Trial Court awarded three types of interest. They are:-

- (a) Pre-suit,
- (b) during pendency of suit and
- (c) till realisation.

It is @ 12 % p.a. It is awarded on two amounts. One at Rs.

3,00,000/- and another on **Rs. 6,01,000/-**. As held above, Plaintiff is entitled to get only Rs. 3,00,000/-. As such there cannot be interest on Rs. 6,01,000/-. **There are two legal provisions dealing with this aspect.** One is **Section 34** of Civil Procedure Code and another is **Interest Act.**

Provisions of Section 34 of the Civil Procedure Code

51. There can be:-

- a) reasonable interest on sum adjudged from date of suit till date of decree.
- b) interest prior to institution of suit.
- c) with further interest not exceeding 6% from date of decree till date of payment.

In case of Commercial transactions it can be more than 6% but should not exceed contractual rate of interest.

Interest Act 1978.

52. **The relevant provisions are:-**

- a) The provisions of Section 34 of the Civil Procedure Code are protected (Section 5 of this Act).

- b) As per Section 3, there can be interest not exceeding current rate of interest depending upon nature of liability. If it is debt or other than debt. The earnest money is not a debt. It is a sum adjudged by the Court. If it is other than debt, then interest can be charged from date of written notice till date of institution of suit. In this case, notice is given on 01.10.2001.
- c) current rate of interest means the maximum rates paid on deposits (Section 2(b))

53. Neither trial Court nor the Appellate Court has discussed about any provisions of law relating to interest. Though Section 34 of the Civil Procedure Code talks about pre-suit interest, it does not guide us from which date pre-suit interest can be granted. So we can get guidance from the wordings of Section 3 of the Interest Act only.

The following are relevant dates:-

Date of agreement and payment	08/05/2000
Date of Sale Deed with mother	27/06/2000
Date of notice	01/10/2001
Date of filing of suit	21/12/2001

54. The interest as awarded by the trial Court cannot be awarded

from the date of agreement i.e. 8 May 2000. It also cannot be awarded from the date of the sale deed dated 27 June 2000 executed with mother. The reason is “*when the agreement was executed on 8 May 2000, right to ask for return of compensation has not accrued.*” So also it cannot be said that “*it has accrued on 27 June 2000.*” No doubt, on 27 June 2000 it can be said that Vishnu by executing a sale deed with Satyabhama has made it clear not to execute the sale deed with plaintiff-Narayan.

55. In fact on that date two rights have accrued to the plaintiff-Narayan. They are:-

- a) To seek specific performance and cancellation of that sale deed and
- b) To ask for the refund of earnest money at double rate.

One can say that on 1 October 2001 (date of notice), the plaintiff has chosen the option to ask for refund of earnest money at double rate. In other words, he has waived the right to seek specific performance of the agreement dated 8 May 2000. **So the plaintiff can be awarded interest on an amount of Rs.3 Lakhs from 1 October 2001 only.**

56. No doubt, prior to filing of suit and after filing of a suit till date of decree, awarding of interest is justified so also it is justified from the date of decree till recovery. The appellate Court has not discussed about the interest component and about the interest to be awarded for different duration. He has simply confirmed the decision of the trial Court. Both the orders need modification in respect of sum adjudged and rate of interest.

Rate of Interest

57. The question is about rate of interest. Trial Court has awarded 12% interest rate for all duration mentioned in the operative order. Section 34 of Civil Procedure Code gives guidance for rate of interest. It is as follows:-

- (a) During pendency of the suit at such rate as found to be reasonable by the Court on the principal sum adjudged.
- (b) Interest prior to institution of the suit on principal sum adjudged.
- (c) That further interest at such rate not exceeding 6% on principal sum from the date of decree till such further date.

58. As per the proviso if the transaction is a commercial transaction, the rate of further interest (post passing of a decree) may be within range of 6% to contractual rate of interest or bank rate of interest. Certainly, this is not commercial transaction. Whereas, as per Section 3 of the Interest Act, the interest should not exceed current rate of interest. It means maximum rate paid on deposit (Section 2-b). Admittedly, parties have not adduced any evidence to show what was the interest granted by the Bank on the deposits. Neither the agreement or visar pavati gives us any guidance about the rate of interest. In fact, the visar pavati contains a clause about refund of earnest money at a double rate i.e. Rs.6 Lakhs. In this appeal, the claim of the plaintiff was accepted only for an amount of Rs.3 Lakhs and not Rs.6 Lakhs. So plaintiff is certainly entitled to get interest. The suit was filed in the year 2004. This Court feels the rate of interest should be 9% per annum. The division is as follows:

- (i) Interest at the rate of 9% on Rs. 3 Lakhs for the period 1 October 2001 till the date of filing of a suit and;
- (ii) Interest at the same rate on Rs. 3 Lakhs from the date of filing of suit till amount is deposited before Executing Court.

To that extent the decree needs to be modified. As separate compensation is not granted, interest @ 9% p.a. is granted for entire period.

59. The defendants have deposited certain amount before the Executing Court. Now it is for the Executing Court to do the calculation after hearing both the sides and if there is deficit, the defendants/appellants in both appeals have to pay that amount and if it is in excess then the Executing Court has to refund that amount to the party who has deposited it. In view of that, the following order is passed:-

ORDER

(i) Both the Second Appeals are **partly allowed.**

(ii) The order dated 28 April 2010 passed by the Court of Civil Judge Senior Division, Malshiras in Special Civil Suit No.46/2004 and confirmed by the Court of District Judge No.1, Malshiras in Regular Civil Appeal No.50/2012 on 14 June 2018 **is modified as follows:**

- (i) The suit of the plaintiff is partly decreed.
- (ii) The amount of return quantified is Rs.3,00,000/- and

defendant Nos. 1 to 3 Ramchandra, Mahadeo and Popat are directed to return the said amount of Rs.3 Lakhs (if not earlier deposited) with 9% interest from 1 October 2001 till the date of deposit before the Executing Court.

- (iii) They are directed to deposit the amount if still there is deficit after considering the amount deposited before Executing Court within time fixed by the Executing Court.
- (iv) After calculation, if any excess amount is found then the Executing Court to **return that amount along with interest accrued, if any, to the party who has deposited the amount before Executing Court.**
- (v) This exercise be done within eight weeks after appearance of the parties before Executing Court.
- (vi) The plaintiff and defendant Nos.1 to 3 are directed to file the calculation of interest as mentioned above **within four weeks** from today before the Executing Court.
- (vii) The Executing Court to verify the calculation and to pass appropriate order as mentioned above.

(viii) Decree be drawn up accordingly.

(ix) All the parties to appear before the Executing Court on 10th
February 2025.

60. Both the Second Appeals stand disposed of. Pending interim application(s), if any, also stand disposed of.

(S.M. MODAK, J.)