



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.41 OF 2025

APPELLANTS :- Sarang S/o Omkarappa Jirvankar,
Ori. Plaintiff On R.A. Aged about 45 Years, Occ-Business and
Agri. R/o Civil Lines, Risod, Tq. Risod,
Dist. Washim.

..VERSUS..

RESPONDENTS :- 1 Nandkishor Shivdayalji Zanwar, Aged
Ori. Respondent On R.A. 59 Yrs. Occ-Business.

2 Rajendrakumar Shivdayal Zanwar,
Aged 50 Yrs. Occ-Business.

3 Sau. Sunitadevi Nandkishor Zanwar,
Aged 52 Yrs. Occ-Business.

4 Sau. Madhuri Vijay Zanwar, Aged 44
Yrs. Occ-Business,
Respondents No.1 to 4 R/o. Balaji
Galli, Risod, Tq. Risod, Dist. Washim.

5 Hanuman Kasturchand Chittarka,
Aged 50 Yrs. Occ-Business.

6 Mahavirprasad Poonamchand
Chittarka, Aged 47 Yrs. Occ-Business.

7 Arun Kasturchand Chittarka,
Aged 43 Yrs. Occ-Business,
Respondents No.5 to 7 R/o. Gajanan
Vasahat, Hingoli Road, Risod, Tq.
Risod, Dist. Washim

Mr. N. S. Badhe, Advocate for Appellant.

Mr. M. G. Sarda, Advocate for the Respondent Nos. 1 to 7.

CORAM : ROHIT W. JOSHI, J.

DATE : 19.11.2025

ORAL JUDGMENT :

1) With the consent of learned Advocates for the parties, substantial question of law (i) framed vide order dated 11.09.2025 is rephrased as under:-

“Whether the plaint can be rejected, having regard to the averments in the plaint with respect to alleged agreement for refund of sale consideration and payment of damages and alternate prayer for payment of the said amount made in prayer clause (iv) in the plaint? ”

2) Heard finally with consent of the learned Advocate for the respective parties.

3) Learned Advocate for the respondent, at the outset, states that the suit is not barred by limitation and the substantial question of law no.2, framed with respect to point of limitation, needs to be answered in favour of the appellant.

4) The parties are at contention with respect to maintainability of the suit filed for specific performance and

in the alternative, for refund of consideration and payment of damages. Since the appeal arises from an order passed under Order VII, Rule 11 of the Code of Civil Procedure, 1908, this Court is restricting itself to the plaint averments and the documents filed by the plaintiff alongwith the plaint on which he places reliance. This Court is not concerned with the defence of the defendants in the present appeal, having regard to the settled legal position that application under Order VII, Rule 11 of C.P.C. is required to be decided strictly on the basis of plaint averments and documents relied upon by the plaintiff, which are filed on record by the plaintiff.

5) The present appellant, who is the original plaintiff, had filed Special Civil Suit No.16 of 2013 before the Court of Civil Judge, Senior Division, Washim. The case of the plaintiff is that he had entered into an agreement of sale on 04.08.2009 for total consideration of Rs.63,39,929/- with respect to 16 plots in a layout over land bearing Survey No.208 of Risod District -Washim (hereinafter referred to as 'the suit property'). As per the plaint averments, the plaintiff had made payment of Rs.52,75,510/- to the defendants. The

plaintiff has stated that despite being ready and willing to perform his part of the contract, the defendants avoided to execute a sale deed with respect to the suit plots in his favour. The plaintiff has thereafter stated that a meeting was held between the plaintiff and defendants alongwith some other respectable members of the society, wherein defendant No.5 agreed to refund amount of Rs.47,08,658/- to the plaintiff towards refund of the sale consideration received by defendant No.5, 6 and 7 and damages. According to the plaintiff, this representation was made by defendant No.5 acting on behalf of himself as also on behalf of defendant Nos.6 and 7. The plaintiff has averred that similarly, the defendant Nos.1 to 4 also agreed to refund amount of Rs.47,08,658/- to the plaintiff. The plaint averments further indicate that the defendant no.5 had executed fresh agreement dated 30.06.2013 in favour of the plaintiff *inter alia* agreeing to refund amount of Rs.47,08,658/-. The plaintiff has stated that defendant No.5, acting on behalf of himself and also on behalf of defendant No.6 and 7 had issued post dated cheques for refund of the amount of

Rs.47,08,658/-. It is stated that in paragraph No.14 of the plaint that defendant No.1 to 4, although they had agreed to refund amount of Rs.47,08,658/- verbally, did not execute formal written agreement in that regard. In this backdrop the plaintiff filed the aforesaid suit for specific performance of the earlier agreement for sale of suit property executed on 04.08.2009 and in the alternative, praying for refund of amount of Rs.94,17,316/- as per the subsequent agreement dated 30.06.2013 executed by defendant No.5 acting for and on behalf of himself and defendant No.6 and 7 as also oral agreement between plaintiff and defendant Nos.1 to 4.

6) The defendants entered appearance in the matter and filed written statement opposing the suit. Apart from the written statement they also filed an application for rejection of plaint under Order VII, Rule 11 of the Code of Civil Procedure vide Exh.24. It is the case of the defendants that the plaint averments taken on a face value would indicate that the agreement of sale dated 04.08.2019 stood novated by subsequent agreement between the parties where under the defendants had offered to pay and the plaintiff had

accepted to receive monetary compensation in lieu of sale of the suit plots. In sum and substance, the contention is that the original contract was substituted by a subsequent contract and therefore, there was no cause of action to claim relief of specific performance of contract based on earlier contract. As regards the subsequent agreement dated 30.06.2013, the defendants stated that cause of action for filing the suit based on said agreement did not accrue till the date of filing of the suit. This contention is raised because the suit is filed on 01.07.2013 and the cheques issued by the defendant no.5 in terms of the agreement dated 30.06.2013 are dated 15.11.2013 and 25.11.2013. The contention is that since the suit was filed prior to the date stipulated for payment there was no cause of action and that the suit was premature.

7) The learned Trial Court has allowed the application for rejection of plaint, accepting the contention with respect to novation of agreement dated 04.08.2009 by virtue of subsequent agreement dated 30.06.2013. It is held that in view of novation of the contract, the plaintiff could not fall back on the earlier contract in order to seek relief of

specific performance. It needs to be stated that the learned Trial Court had not dealt with the alternate prayer for payment of consideration made by the plaintiff and the prayer for damages while rejecting the plaint.

8) Aggrieved by the said order of rejection of plaint, which amounts to a decree, the plaintiff filed first appeal being Regular Civil Appeal No.15 of 2017. The said appeal came to be dismissed vide judgment and decree dated 05.10.2023. The learned First Appellate Court has upheld the finding recorded by the learned Trial Court with respect to novation of contract. As regards the subsequent agreement the learned First Appellate Court found that the suit was premature with respect to the second agreement since it was filed prior to the dates of the cheques mentioned in the subsequent agreement under which amount was payable by defendant Nos.5 to 7 to the plaintiff.

9) Mr. Badhe, concedes to the position that the suit with respect to prayer for specific performance will not be maintainable in view of the subsequent agreement dated 30.06.2013 executed between the plaintiff and defendant

No.5, who has acted on behalf of himself and on behalf of defendant No.6 and 7. He further concedes to the position that having regard to the averments in paragraph no.14 of the plaint, the relief for specific performance also cannot be claimed against defendant Nos. 1 to 4.

10) Mr. Badhe, the learned Advocate for the appellant/plaintiff, contends that the learned Courts have ignored the settled legal principle that a plaint cannot be rejected in part and therefore, although suit may not be tenable qua the prayer for specific performance of contract, it was certainly maintainable with respect to the prayer for payment of money in terms of the subsequent agreement. He contends that the learned Courts have, therefore, erred in rejecting the plaint. He further contends that the dates specified in the written agreement dated 30.06.2013 are dates of payment agreed between the plaintiff and defendant No.5 to 7. He contends that defendant Nos. 1 to 4 had agreed to refund the amount alongwith damages, although they had not executed any written document in this regard and therefore the plaintiff certainly had cause of action for claim

the refund of amount and quantify damages against defendant Nos.1 to 4.

11) He further argues that the prayer for payment of money includes, the part of sale consideration paid by plaintiff to defendants and amount of damages in addition. He therefore contends that the suit is maintainable with respect to prayer for refund of sale consideration and damages.

12) Mr. M. G. Sarda, learned Advocate for the defendants supports the orders passed rejecting the plaint. His contention is that in a suit for specific performance of contract the plaintiff is not entitled to seek relief of damages based on subsequent contract which results in novation of earlier contract for sale of property. He contends that since both prayers for specific performance and damages are incorporated in the said suit, the suit is not tenable and the plaint is accordingly liable to be rejected.

13) Perusal of the plaint averments will indicate that according to the plaintiff, after having entered into agreement of sale dated 04.08.2009, the parties arrived at a

new arrangement where the defendants had agreed to refund the amount of sale consideration received by them from the plaintiff in terms of the said agreement in addition to certain additional amount towards damages. It is well settled that in a suit for specific performance, the plaintiff is entitled to seek relief of refund of part of sale consideration paid to the defendants as an alternate relief.

14) In the present case, the parties had entered into an agreement quantifying the damages and therefore, the amount of refund which is claimed by the plaintiff as an alternate prayer includes amount of sale consideration paid by him alongwith the quantified damages. In the considered opinion of this Court, since the parties have determined the amount of damages payable in lieu of specific performance, it was permissible for the plaintiff to seek alternate prayer for refund of consideration alongwith the damages as agreed.

15) Mr. Sarda has placed reliance on the judgment of the Hon'ble Supreme Court in the matter of *Jagdish Singh...Vs...Natthu Singh*, reported in 1992(1) SCC 647 and Privy Council decision in the matter of *Ardeshir H.*

Mama...Vs...Flora Sasson, reported in ***AIR 1928 PC 208***.

16) At the outset, it must be stated that both these cases do not deal with an application for rejection of plaint under Order VII, Rule 11. The issue that fell for consideration in both the judgments was with respect to grant of relief at the final hearing of the suits. Perusal of the judgment in the matter of Jagdish Singh will demonstrate that the Hon'ble Supreme Court, by referring to Section 21 of the Specific Relief Act has held that when the plaintiff by his conduct renders specific performance of contract impossible, then he is not entitled to seek damages under Section 21 of the Specific Relief Act. It is further held that if a contract fails for no fault on the part of the plaintiff and becomes impossible of specific performance, the said provision enables the plaintiff to seek compensation in lieu of specific performance of contract. Perusal of Privy Council judgment in the matter of *Ardeshir H. Mama* will also indicate that in the said suit the contract could not be specifically enforced for fault attributed to the plaintiff. The plaint averments indicate that the contract could not go through for reasons attributable to the

defendants and not to the plaintiff. Perusal of Section 21 of the Specific Relief Act clearly demonstrates that the plaintiff in a suit for specific performance of contract, can also pray for compensation for its breach in addition to such performance. The words 'in addition to' signify that both prayers can be made together in the same suit.

17) As regards the finding that the plaint was liable to be rejected also on the ground that the suit was premature with respect to the prayer for payment of money, it will be appropriate to refer to judgment of the Hon'ble Supreme Court in the matter of *Vithalbhai (P) Ltd., Vs. Union Bank of India* reported in *(2005) 4 SCC 315*. In the said judgment, the Hon'ble Supreme Court has referred to several decisions on the point of maintainability of a premature suit and has drawn conclusions in paragraph 22 of the judgment, holding that a suit disclosing cause of action may not necessarily be dismissed for the reason that it is filed before the date on which the plaintiff became entitled to the relief. It is further held that entertaining a premature suit does not go to the root of jurisdiction of a Civil Court. The test to be applied in

dismissing a suit which is premature is as to whether it causes any irreparable loss to the defendant. Apart from this, the Hon'ble Supreme Court has carved out certain other exceptions holding as under:-

“However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases: (i) when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency. (See Samar Singh v. Kedar Nath 13.) One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so

obtained.”

The contention of Mr. Sarda is that alternate prayer for damages could not have been made by the plaintiff, on the ground that the prayer is premature, therefore not acceptable in the facts of the present case. The reason that the suit is filed before the due date of cheques is therefore, not a good ground for rejection of plaint.

18) In view of the aforesaid legal position, in my considered opinion, the contention of the defendants that the suit for refund of money is not maintainable, is liable to be rejected.

19) It is again clarified that this Court has not adjudicated on merits of the rival claims and has made the above observations taking the plaint averments and the documents on which the plaintiff places reliance on their face value.

20) In view of the aforesaid, Second Appeal deserves to be **allowed** and is allowed in the following terms:-

I. Order dated 16.03.2017 in Spl. Civil Suit No. 16 of 2013 passed by 2nd Jt. Civil Judge, Senior Division, Washim and order dated 05.10.2023 in Reg. Civil Appeal No.15 of 2017 passed by Ad-hoc District Judge-1, Washim are quashed and set aside. Plaint in Civil Suit No. 16 of 2013 pending on the file of 2nd Joint Civil Judge, Senior Division, Washim is restored to file.

II. Parties to appear before the learned Trial Court on 08.12.2025. Parties to note that separate notice or summons for appearance will not be issued.

(ROHIT W. JOSHI, J.)

Tanmay...