



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

SECOND APPEAL NO. 438 OF 2023

1. Shri Rahul Devidas Rudrakar,
Aged 43 years, Occ. Pan Shop,
2. Smt. Lata Devidas Rudrakar,
Aged 70 years, Occ. Housewife,
3. Shri Bharat Devidas Rudrakar,
Aged 36 years, Occ. Pan Shop,

All R/o. Near Ashtbhuja Chowk,
Malgujaripura, Wardha,
Tq. And District Wardha.

. . . APPELLANTS
(Ori. plaintiffs)

// VERSUS //

1. Pradip S/o. Jayarampant Dodake,
Aged 71 years, Occ. Retired
R/o. Near Shyam Talkis,
Besides Bank of Baroda
Amravati, Tq. And Distt. Amravati.
2. Shri Satish S/o. Jayrampant Dodake,
Age 69 years, Occ. Retired
C/o. Eknath Vithalrao Jivkate,
R/o. Sudampuri, Wardha,
Tq. And District Wardha
3. Smt. Bhagyashri Vinayak Upadhye,
Aged 79 years, Occ. Housewife,
R/o. Astvinayak Apartment,
Awadhut Wadi, Yavatmal,
Tq. And District Yavatmal.
4. Smt. Ashwini Avinath Dodake,
Aged 67 years, Occ. Retired,
R/o. Uma Shiv Apartment,
Near Subhedar Medical, Godhani Road,
Yavatmal, Tq. And District Yavatmal.

5. Smt. Suvarna Avinash Dodake,
Aged 34 years, Occ. Education,
R/o. Near Shyam Talkies,
Besides Bank of Baroda,
Amravati, Tq. And District Yavatmal.

6. Smt. Prajakta Avinash Dodake,
Aged 35 years, Occ. Education,
R/o. Uma Shiv Apartment,
Near Subhedar Medical, Godhani Road,
Yavatmal, Tq. And District Yavatmal.

. . . **RESPONDENTS**
(Ori. defendants)

Shri S. K. Bhoyar, Advocate for appellants.
Shri D. R. Bhoyar, Advocate for respondents.

CORAM :- M. W. CHANDWANI, J.

RESERVED ON :- 08.10.2024

PRONOUNCED ON :- 09.01.2025

JUDGMENT :-

Heard.

2. **Admit.** With consent of the both the parties, the matter is taken up for final hearing at the admission stage.

3. The appeal takes an exception to the judgment and decree passed by the learned Civil Judge Senior Division, Wardha dated 09.10.2019 partly allowing Special Civil Suit No. 68/2013 and confirmed by the learned District Judge in Regular Civil Appeal No. 125/2019 by judgment and decree dated 17.12.2022.

4. The respondents are joint owners of the suit shop/block no. 2, admeasuring 129 sq. feet in a commercial building constructed on CTS No. 69/1 of Nazul Sheet No. 16 of the Ward No. 24, situated within the Municipal limits of Wardha (for short, “the suit shop”) whereas, the father of the appellants was a tenant of the respondents and was occupying the said suit shop on monthly tenancy. On 22.08.2008, the respondents agreed to sell the suit shop to late Devidas Rudrakar, the father of appellant nos. 1 and 3 and the husband of appellant no. 2 for a total consideration of Rs.5 lakhs. An earnest amount of Rs.2,50,000/- was paid at the time of the agreement. The sale deed was to be executed till 21.08.2009 after receipt of the balance consideration amount of Rs.2,50,000/- and also after obtaining prior permission of the the Sub-Divisional Officer, Wardha (for short, “the SDO”) to execute the sale-deed. Devidas Rudrakar died on 19.10.2011. It is the case of the appellants that, inspite of various requests, the respondents failed to obtain prior permission from the SDO for sale of the suit shop. They did not even apply for the permission. Ultimately, the appellants approached the SDO and started the procedure for obtaining the permission for execution of sale-deed of the suit shop and set the machinery in motion. Consequently, the respondents received the letter from the SDO granting permission to execute the sale-deed on 20.11.2012. Inspite of multiple requests, the

respondents failed to execute the sale-deed. The appellants issued notice dated 29.11.2012 to the respondents requesting to accept the balance consideration amount of Rs.2,50,000/- and execute the sale-deed but the respondents refused and therefore, a suit came to be filed before the Trial Court for specific performance of contract of the agreement to sell dated 22.08.2008. In the alternative, the appellants also requested the Trial Court for refund of the earnest money with interest @18% p.a. from the date of the agreement till its realization. The Trial Court refused the relief of specific performance of contract on the ground that defendant/respondent nos. 5 and 6 were not a party to the agreement to sell and therefore, a decree of refund of an amount of Rs.2,50,000/- with interest @11% p.a. from the date of agreement till realization of the amount came to be passed. The appellants made an unsuccessful attempt before the First Appellate Court and hence, the appellants are before this Court.

5. By the order dated 03.09.2024, the following substantial question of law came to be framed :-

“Whether the finding of the Court below that the agreement to sale was not binding on respondent Nos. 5 and 6 in the teeth of admission given by the Power of Attorney holder of respondent Nos. 5 and 6 that the agreement in question is acceptable to them ?”

6. Thereafter, by order dated 27.09.2024, an additional substantial question of law also came to be framed which is reproduced

herein as under:-

“Whether the Trial Court as well as the Appellate Court failed to consider that the suit is barred by law of limitation ?”

7. Mr. S. K. Bhoyar, learned counsel appearing on behalf of the appellants vehemently submitted that Raghav Dodke, the power-of-attorney holder of the respondents who has been examined on behalf of respondent nos. 5 and 6 as well has admitted in his cross-examination that respondent no. 5- Swarna and respondent no. 6- Prajakta also admitted the agreement to sell for which specific performance of contract has been sought by the appellants. Therefore, the findings recorded by the Trial Court that the agreement to sell is not binding on respondent nos. 5 and 6 is incorrect. According to him, the Trial Court has given findings in favour of the appellants in respect of their readiness and willingness. Further, the relief of specific performance of contract was refused only on the ground that respondent nos. 5 and 6 are not a party to the agreement to sell. According to him, the First Appellate Court did not consider this aspect of the matter and concurred with the findings of the Trial Court which is required to be set aside.

8. The learned counsel for the appellants vehemently submitted that the respondents have raised the plea of limitation for the first time in the Second Appeal which is not at all permissible.

According to him, there must be a foundation in the pleadings regarding such a plea and particularly, the said question is a mixed question of law and fact therefore, the argument that the suit is barred by law of limitation is to be discarded. According to him, even otherwise, there is a specific condition in the agreement to sell, wherein the respondents had to obtain permission to sell the suit shop from the SDO without which execution of sale-deed is not possible. Therefore, according to him, the period of limitation for filing the suit by the appellants will start from the date when the permission to sell the suit shop was granted by the SDO which has been granted on 20.11.2012, whereas the suit has been filed on 03.05.2013. Therefore, the suit is well within limitation.

9. Conversely, Mr. D. R. Bhoyar, learned counsel appearing on behalf of the respondents vehemently submitted that the suit is for specific performance of a contract which has not been signed by respondent nos. 5 and 6, the co-owners and the persons who are not a party to the agreement to sell cannot be asked to honour the contract. This fact is very well appreciated by the Trial Court as well as the First Appellate Court and therefore, the Courts below did not pass directions to the respondents to perform the contract in favour of the appellants. Hence, the Courts below rightly rejected the prayer of the appellants

for specific performance of contract and directed respondent nos. 1 to 4 to refund the part consideration i.e. Rs.2,50,000/- to the appellants.

10. Next, the learned counsel for the respondents submitted that since respondent nos. 5 and 6 were not a party to the agreement to sell therefore, the admission given by the power-of-attorney does not bind respondent nos. 5 and 6. Therefore, it cannot be said that respondent nos. 5 and 6 consented to the agreement to sell executed between the father of the appellants and respondent nos. 1 to 4. According to him, a power-of-attorney holder cannot depose in place of the principal and hence, his admission will not affect respondent nos. 5 and 6, the principals.

11. To buttress his submission, he seeks to rely on the decision in the cases of *S. Kesari Hanuman Goud Vs. Anjum Jehan*¹ and *Syed Abdul Khader Vs. Rammi Reddy*². Lastly, the learned counsel for the respondents submitted that even if it is presumed that respondent nos. 5 and 6 consented to the agreement to sell executed between the father of the appellants and respondent nos. 1 to 4, the suit is barred by law of limitation. According to him, inspite of the pleadings before the Trial Court, no issue came to be framed and the suit came to be dismissed on other grounds. According to him, the contract was to be

¹ (2013) 12 SCC 64

² AIR 1979 SC 553

performed within one year from the date of the agreement i.e. on or before 21.08.2009, which has been specifically mentioned in the agreement to sell, whereas the suit has been filed on 03.05.2013 and the period of limitation prescribed for filing of the suit for specific performance of the contract is three years from the date on which agreement was performed. According to him, just because there is a condition to obtain permission from the SDO for sale of the suit shop, the limitation will not get extend automatically. The suit ought to have been filed on or before 20.08.2012, whereas it has been filed beyond the said date and is hit by the law of limitation. To buttress his submission, he seeks to rely on the decision in the case of *Urvashi Aggarawal through LRs. Vs. Kushagr Ansal*³.

12. I have heard the learned counsel for the respective parties and have gone through the impugned judgments and depositions in particular agreement to sell dated 22.08.2008.

13. Indisputably, in the agreement to sell, the names of respondent nos. 1 to 6 are shown as executants but respondent nos. 5 and 6 did not sign the said agreement to sell. In the written statement it has been contended that the property is a joint property but the signatures of all the co-owners have not been taken by deceased-

Devidas Rudrakar and therefore, the contract is void and illegal and not binding on respondent nos.5 and 6. Whereas, Raghav Dodke, the power-of-attorney holder of respondent nos. 1 to 6, has testified on behalf of respondent nos. 1 to 6. In his deposition he did not whisper that the agreement to sell is not binding on respondent nos. 5 and 6. Rather, he specifically deposed that the agreement was executed between Devidas Rudrakar, the father of the appellants and the respondents. Rather, his cross-examination goes to show that the agreement to sell is accepted by respondent nos. 5 and 6 as well.

14. Undisputedly, a power-of-attorney holder cannot depose in place of the principal but certainly he can act on behalf of the principal. The principle laid down in the case of *S. Kesari Hanuman Goud* (supra) is that, essentially a power-of-attorney cannot depose for the act done by the principal unless he has personal knowledge in respect of the matter; then in place of such principal, he is entitled to be cross-examined. The purpose behind such principle is that direct evidence is required in the matter and other party must get the opportunity to cross-examine a person who has personal knowledge of the matter i.e. the principal. Here, it is not the case that an admission as to what transpired between the appellants and the respondents at the time of the agreement has been given by the power-of-attorney holder. Here, a specific question was put to the power-of-attorney holder that whether

the agreement to sell is accepted by respondent nos. 5 and 6, to which he answered in the affirmative. That apart, the respondents themselves examined the power-of-attorney holder and now they cannot take away the admission given by the power-of-attorney holder on their behalf in the cross-examination by taking a U-turn as they are estopped from raising this objection. Considering the matter in hand, the case of *S. Kesari Hanuman Goud (supra)* and *Syed Abdul Khader (supra)* will not be applicable to the present case.

15. Though, respondent nos. 5 and 6 had not put their signature on the agreement to sell but from the tenor of the version of Raghav Dodke (DW-1) as well as the fact of issuance of notice dated 27.01.2011 (Exh. 28) by respondent nos. 5 and 6 along with other respondent nos. 1 to 4 to the father of the appellants to get the sale-deed executed from themselves is self evident regarding their *ad idem* with respondent nos. 1 to 4 to sell the suit shop to the appellants. This aspect has not been considered by the Trial Court as well by the Appellate Court. Therefore, the answer to the substantial question of law no. 1 is required to be answered in the affirmative.

16. This takes me to the second substantial question of law. Evidently, the agreement to sell (Exh.27) speaks about the period of execution of sale-deed as one year i.e. till 21.08.2009. It is also one of

the conditions of the agreement to sell that the respondents had to obtain permission to sell the suit shop from the SDO which has been obtained on 20.11.2012. The present matter is covered under Article 54 of the Schedule to the Limitation Act, 1963 which prescribes the limitation for filing a suit for specific performance of contract as three years from the date fixed for performance of the contract. Needless to mention that, limitation prescribed in the Limitation Act is to be construed strictly. It was agreed between the father of the appellants and the respondents that the sale-deed will be executed on or before 21.08.2009. Thus, the date for performance of contract was fixed as 21.08.2009 and that limitation will start from the said date. Therefore, just because the responsibility of taking permission from the SDO was on the respondents and the said permission was obtained on 20.11.2012, the time for performance of contract will not get extended. Thus, just because some of the conditions of the agreement to sell were not complied with, the date fixed for performance of the contract cannot be said to be extended automatically without express mentioning of extension of the period/date fixed in the contract for performance.

17. A reference can be made to the case of *Urvashi Aggarawal* (supra), wherein in para no. 11 of the judgment, it is held as under:-

“11. On a detailed consideration of the evidence on record, the Courts below have come to the conclusion that the clauses in the Agreement have neither been amended nor varied. Merely because the Defendants were pursuing the application filed for permission before the L&DO, it cannot be said that the date fixed for performance of the Agreement stood extended. We agree with the findings of the Courts below that the suit ought to have been filed within three years from 31.03.1975 which was the date that was fixed by the Agreement. The submission made on behalf of the Plaintiffs that part II of Article 54 of the Schedule to the Limitation Act applies to this case and that the suit was filed within limitation as the refusal by the Defendants was only in the year 1987 is not acceptable. Moreover, the Plaintiffs have not performed their part of the Agreement within a reasonable period. As per the Agreement, the Plaintiffs were given the right to get the sale deed executed through the Court in case of failure on the part of the Defendants to execute the sale deed by 31.03.1975. The Plaintiffs filed the suit 12 years after the date fixed for performance. It is relevant to refer to the judgment of this Court in K.S.Vidyanadam v. Vairavan, 1997 (2) Mh.L.J. (S.C.) 642= (1997) 3 SCC 1, wherein it was held as follows:

“Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.”

18. Having held so in the judgment, let's turn to the notice dated 27.01.2011 issued by respondent nos. 1 to 6, whereby the respondents asked the appellants to make the arrangement of the remaining consideration for the sale-deed within a month from the date of notice i.e. till 27.02.2011. Thus, the respondents themselves extended the time for performance of the contract till 27.02.2011. Therefore, by notice dated 27.01.2011, the date of performance of the contract was extended to 27.02.2011 and the suit has been filed on

03.05.2013 within three years from 27.02.2011. Therefore, I have no hesitation to hold that the suit was filed within time.

19. There are concurrent findings of both the Courts below regarding readiness and willingness of the appellants to perform their part of the contract. The prayer for directions to the respondents to perform their part of the contract came to be refused on the ground that respondent nos. 5 and 6 were not a party to the agreement to sell and in wake of the answer to the substantial question of law no. 1, the findings of the Trial Court and the Appellate Court do not stand and are set aside. Consequently, it is held that the appellants are entitled for a decree of specific performance of agreement to sell dated 22.08.2008.

20. It is a matter of record that the agreement to sell is of the year 2008 and almost 16 years have passed. One cannot dispute that during this period, there is a stiff rise in the market value of immovable properties and the rates of the properties are sky-rocketing. Hence, asking the respondents to execute sale-deed at the same price as agreed upon 16 years ago will be against the law of equity. Therefore, considering the rate of inflation and stiff rise in the market rate of the suit shop, I am of the view that, apart from directions to the respondents to execute sale-deed, the appellants are also directed to

pay an additional amount of Rs.2,50,000/- to the respondents beside the agreed consideration as per the agreement to sell dated 22.08.2008.

21. In view of the aforesaid discussion, I proceed to pass the following orders:-

- i) The appeal is allowed.
- ii) The judgment and decree dated 09.10.2019 for refund of consideration passed in Special Civil Suit no. 681/2013 by the learned Civil Judge Senior Division, Wardha and confirmed by the learned District Judge, Wardha by judgment and decree dated 17.12.2022 in Regular Civil Appeal No. 125/2019 are hereby set aside.
- iii) The respondents are directed to execute the sale-deed in favour of the appellants within two months from today. The appellants shall deposit the balance amount of consideration along with an additional amount of Rs.2,50,000/- as directed above, before the Trial Court within a month from today.
- iv) In case of failure of the respondents to execute the sale-deed in favour of the appellants within prescribed time, the appellants may get the sale-deed executed through the Trial Court.
- v) No order as to costs.

(M. W. CHANDWANI, J.)