

IN THE HIGH COURT OF JUDICATURE AT MUMBAI  
CIVIL APPELLATE JURISDICTION  
SECOND APPEAL NO.237 OF 2014  
WITH  
CIVIL APPLICATION NO.18 OF 2013

Umakant Appasaheb Patil and others                      ...      Appellants  
Vs.  
Rajmati Chandrakant Vibhute (dec'd.)  
through Chandrakant S. Vibhute and others      ...      Respondents

Mr. Anand S. Kulkarni for Appellants.  
Mr. Surel S. Shah for Respondents 1b & 1c.

**CORAM : R. G. KETKAR, J.**  
**DATE : 31<sup>ST</sup> MARCH, 2015**

**P.C. :**

Heard Mr. Kulkarni, learned Counsel for appellants and Mr. Shah, learned Counsel for respondents No.1b and 1c at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the original defendants No.1 and 2 have challenged the judgment and decree dated 28.04.2003 passed by the learned Civil Judge, Senior Division, Solapur in Special Civil Suit No.6 of 1996 as also the judgment and decree dated 30.03.2012 passed by the learned District Judge-3, Solapur in Regular Civil Appeal No.219 of 2003. By these orders, the Courts below dismissed the Suit instituted by the respondents – original plaintiffs for specific performance of contract and directed the appellants to pay Rs.1,50,000/- along with interest thereon at the rate of 6% per annum from 11.04.1995 till realization to the respondents. The parties shall hereinafter be referred to as per their status before the trial Court.

3. In support of this Appeal, Mr. Kulkarni submitted that plaintiffs

instituted Suit for specific performance of contract dated 08.09.1992 inter alia contending that defendants No.1 and 2 had agreed to sell the property in dispute for a total consideration of Rs.2 lacs. Out of that, they had paid Rs.1,50,000/- as earnest money. He submitted that the learned trial Judge dismissed the Suit and directed defendants No.1 and 2 to refund amount of Rs.1,50,000/-. Aggrieved by that decision, defendants No.1 and 2 preferred Appeal. Plaintiffs accepted the trial Court's decree and did not challenge refusal of prayer for specific performance. He submitted that the Courts below committed error in directing defendants No.1 and 2 to pay Rs.1,50,000/- together with interests as the Suit was barred by limitation. He submitted that the agreement of sale was executed on 08.09.1992 and the Suit is instituted on 21.12.1996 that is to say beyond 3 years and therefore, it is barred by limitation. He invited my attention to paragraph 6 of the written statement dated 16.07.2002 filed by defendants No.1 and 2. In paragraph 6, defendants No.1 and 2 contended that Suit was not filed within limitation. The plaintiffs did not institute Suit within 3 years from the date of alleged execution of agreement of sale.

4. It is not possible to accept this submission for more than one reason. In the first place, defendants No.1 and 2 did not give details on the basis of which they claim that Suit is barred by limitation. Secondly, merely by saying that the Suit is barred by limitation will not serve purpose unless details thereof are given. That apart, defendants No.1 and 2 did not plead that time was fixed for performance and when the plaintiffs had notice that the performance is refused. In the absence of these details as contemplated by Article 54 of the Limitation Act, 1963, it is not possible to accept this submission.

5. Mr. Kulkarni further submitted that the plaintiffs did not establish

payment of Rs.1,50,000/- at the time of execution of agreement of sale. It is not possible to accept this submission as well. Perusal of oral evidence of the witnesses, and in particular, P.W.2 – Basavraj Apparao Deshmukh shows that on the date of execution of agreement of sale, plaintiffs had paid Rs.1,50,000/- in cash as earnest amount to defendants No.1 and 2 and their father. Basavraj Deshmukh is the attesting witness to the agreement of sale. Though he deposed about payment in paragraph 2 of the examination-in-chief, he was not confronted with the said statement. On the contrary, in cross-examination, he denied the suggestion that no amount was paid in his presence and that he is giving false evidence at the instance of the plaintiffs. The Courts below have concurrently found that the plaintiffs had paid Rs.1,50,000/-. In view thereof, it is not possible to accept this submission.

6. Mr. Kulkarni further submitted that during the pendency of the Appeal, defendants No.1 and 2 had filed application on 12.01.2009 for framing additional issues. Without deciding that application, the learned District Judge disposed of the appeal. It is not possible to accept this submission. Perusal of that application, and in particular paragraph 1 thereof, shows that defendants No.1 and 2 contended that “on going through the pleadings of the plaintiff and defence delivered by defendant, the following issues are required to be framed”. In paragraph 2, it is asserted that “on going through the issues framed at exhibit 18 in the lower Court, it is seen that the parties were not heard before framing the issues and hence, the issues proposed above remained to be framed”. No explanation is given in the entire application as to why after framing of the issues, defendants No.1 and 2 did not request the Court to frame the issues suggested in the application. Defendants No.1 and 2 did not challenge the said order. In view thereof, it is not open for defendants No.1 and 2 to now agitate point of non-framing of certain issues.

7. Finally, Mr. Kulkarni submitted that in any case, the Courts below were not justified in awarding interest at the rate of 6% per annum on Rs.1,50,000/- from 11.04.1995. He submitted that admittedly, the Suit was instituted on 21.12.1996. It is not possible to accept this submission in view of Section 34 C.P.C. as also having regard to prayer (b) in the Suit. Section 34 reads as under:

“34. Interest. - (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum as the Court deems reasonable on such principal sum from] the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I.-In this sub-section, “nationalised bank” means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 (5 of 1970).

Explanation II.-For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.]

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.”

8. Perusal of Section 34 shows that in appropriate cases, the Court is entitled to award interest on the principal sum so adjudged from the date of the Suit to the date of the decree as also in addition to any interest adjudged on such principal sum for any period prior to the institution of the Suit. In my opinion, the Courts below rightly exercised the

discretion in awarding interest even prior to institution of the Suit at the rate of 6% per annum. In view thereof, no question of law much less any substantial question of law arises in this Appeal. Hence, the Second Appeal fails and the same is dismissed. In view of the dismissal of the Second Appeal, nothing survives in Civil Application for stay and the same is disposed of accordingly.

**(R. G. KETKAR, J.)**

*Minal Parab*