

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 372 OF 2019
WITH
CIVIL APPLICATION NO. 7554 OF 2019

Arjun s/o. Dashrat Bhade .. Appellant
[original
Versus plaintiff]
Smt. Kalabai Kashinath Kothimbire & Ors. .. Respondents
[original
defendants]
Mr.S.B. Solanke, Advocate for the appellant.
Mr.R.A. Tambe, Advocate for respondent Nos.4A to 4C.

CORAM : S.M.GAVHANE,J.
RESERVED ON : 20.12.2019
PRONOUNCED ON : 29.05.2020

ORDER :-

. The appellant/original plaintiff has challenged the judgment and decree dated 25.01.2019 passed by the Adhoc District Judge-3, Ahmednagar, in RCA No.295 of 2013 filed by him against the respondents/original defendants, thereby dismissing the said appeal and allowing the cross-objection of the respondents and dismissing his suit, bearing Regular Civil Suit No.284 of 1998. The parties are hereinafter referred to by their position in the suit.

2. Facts relevant to decide this appeal in short are that one late Maruti Keru Kothimbire was owner of agricultural land Block No.162, admeasuring 7 Hectare 18 Are situated at village Shedgaon, Tal. Shrigonda, Dist. Ahmednagar. 1 Hectare 80 Are eastern side portion out of the said land block No.162 is the subject matter of the suit and the same is hereinafter referred to as "the suit property". Deceased Kashinath was son of deceased Maruti. Defendant Nos.1,2 and 3 are respectively the widow and sons of the deceased Kashinath. Defendant No.4 who died during pendency of first appeal was the purchaser of the suit property from the deceased Kashinath and defendant Nos.4A to 4C are his legal representatives.

3. The plaintiff filed aforementioned suit in the court of Civil Judge, Junior Division, Shrigonda for specific performance, declaration and perpetual injunction and alternatively for recovery of earnest money of Rs.500/- against the defendants on 10.06.1998.

It was the case of the plaintiff before the Trial Court that late Maruti executed registered agreement to sell dated 04.12.1974 in favour of the plaintiff on accepting Rs.300/- and further on accepting Rs.200/- from the plaintiff before the Sub-Registrar agreeing to sell the suit property to the plaintiff for consideration of Rs.700/-. At the relevant time of agreement to sell, as the permission of the competent revenue authority was necessary for alienation of the suit property, the sale transaction could not be completed. The remaining amount of Rs.200/- of consideration was agreed to be paid at the time of sale. According to the plaintiff on the date of agreement to sell and as a part of said transaction deceased Maruti handed over possession of the suit property to the plaintiff. However, said fact was not mentioned in the agreement to sell to avoid technical and other difficulties in obtaining the permission for alienation of the suit property. The plaintiff contended that since 1974, he is cultivating the suit property and crop entries to that effect have been recorded

accordingly and they are still intact.

4. It was further case of the plaintiff that within few days of the agreement to sell the deceased Maruti was absconded. Therefore, the transaction could not be effected. Therefore, the plaintiff issued public notice and the deceased Maruti was called upon to comply his part of the agreement to sell but the same was not complied. Deceased Kashinath s/o. Maruti by filing application before the revenue authority got mutated names of heirs of deceased Maruti in the record of rights. As there was disturbance into the possession of the plaintiff over the suit property by defendant No.4 and others, the plaintiff filed suit bearing Regular Civil Suit No.148 of 1989 and interim injunction was granted in his favour.

5. It was further case of the plaintiff that on 14.08.1990 deceased Kashinath with intention to abandon the right of the plaintiff to execute sale-deed, executed

sale-deed of the suit property in favour of defendant No.4. Thereafter, notice was issued by the plaintiff to the defendants calling upon them to execute the sale-deed, but they did not remain present for effecting the sale-deed. Therefore, the suit was filed by the plaintiff for specific performance of contract dated 04.12.1974 and ancillary reliefs stated earlier.

6. Defendant Nos.1 to 3 did not file written statement and suit proceeded without written statement against them.

7. Defendant No.4 by filing written statement at Exh.28 resisted the suit. On denying the plaintiff's possession over the suit property and execution of agreement to sell in favour of the plaintiff by deceased Maruti, defendant No.4 contended that the suit was not within limitation. He contended that he is in continuous possession of the suit property on the basis of registered sale-deed dated 14.08.1990 executed by

deceased Kashinath in his favour. The plaintiff is not party to the said sale-deed. Therefore, he has no right to challenge the said sale-deed. Defendant No.4 further contended that after purchase of the suit property by him, he incurred expenses for development of the suit property. He developed the suit property and thereafter the plaintiff started obstructing to his legal right and possession over the suit property. Contending that the plaintiff has no right over the suit property, defendant No.4 had claimed to dismiss the suit with costs.

8. The trial Court framed in all 11 issues arising out of the pleadings and the said issues with the findings recorded by the trial court, are as under:-

Sr. No.	Issues	Findings
1.	Whether the plaintiff proves sale deed executed by Kashinath in favour of the defendant No. 4 dated 14-08-1990 was without authority, illegal, sham or got executed without paying consideration amount as alleged?	No
2.	Whether the plaintiff proves he is entitled to get sale deed executed from defendants No. 1 to 3 on basis of agreement to sell alleged to have been executed by late Maruti dated 04-12-1974 by accepting earnest money Rs. 200/- as	No

	alleged?	
3.	Whether plaintiff proves he has got possession of suit property on basis of agreement to sell dated 04-12-1974?	No
3-A	Does plaintiff prove his lawful possession over the suit field ? If yes, does plaintiff further prove that defendant No. 4 has unauthorizedly caused obstruction to his possession?	Partly affirmative the plaintiff is in settled possession of the suit property.
3-B	Is plaintiff entitled to get relief of perpetual injunction as sought ?	Yes
4.	Is suit barred by limitation ?	Partly yes.
5.	Whether defendants prove suit is not properly valued?	No
6.	Whether defendant No. 4 proves he is bonafide purchaser for value without notice?	No.
7.	Is plaintiff entitled to get relief of declaration as prayed for?	No.
8.	Is plaintiff entitled to get sale deed executed from defendants No. 1 and 3?	No.
9.	What order and decree?	The suit is partly decreed.
10.	Whether the plaintiff proves that, he was and is ready and willing to perform his part of the agreement dated 04-12-1974?	No.
11.	Whether the plaintiff is alternatively entitled to recover earnest money of Rs. 500/- from defendant No. 1 to 3? If yes, to what rate of interest?	Yes, at the rate of 6% per annum.

. Accordingly the trial Court decreed the suit partly by the judgment and decree dated 03-08-2013, which reads thus:

"ORDER

1. The suit is partly decreed.

2. Defendant No. 4 or anybody claiming through him is hereby perpetually restrained from obstructing the possession of the plaintiff over the suit property till his eviction by due process of law.

3. Defendant No. 1 to 3 do pay earnest money of Rs. 500/- (five hundred rupees) with rate of interest 6% per annum from the date of decree till its realization, failing which the plaintiff is entitled to recover it through court at the costs of defendant No. 1 to 3.

4. Both parties to bear their own costs.

5. Relief of specific performance and declaration is hereby rejected.

6. Decree be drawn accordingly."

9. Aggrieved by the rejection of reliefs of specific performance and declaration, original plaintiff filed Regular Civil Appeal No.295 of 2013 and original defendant No.4 filed cross-objection aggrieved by the findings on issue Nos.3, 3(A), 3(B), 4,5,6,7 and 9 and relief of perpetual injunction granted in favour of the plaintiff in the District Court, Ahmednagar. The Appellate Court dismissed the appeal filed by the plaintiff and by allowing the cross-objection filed by defendant No.4, dismissed the suit of the plaintiff bearing Regular Civil Suit No.284 of 1998 and therefore the appellant/plaintiff is before this Court.

10. By order dated 16.07.2019, notice before admission was issued to the respondents/defendants, returnable on 04.09.2019 and till the said date the parties were directed to maintain status-quo in respect of the suit land and said interim relief has been ordered to be continued from time to time. Though served with notice, nobody appeared for respondent Nos.1 and 2/original defendant Nos.1 and 2. Respondent No.3/original defendant No.3 is reported dead.

11. Mr.Solanke, learned Advocate appearing for the plaintiff made submissions in the light of aforesaid contentions of the plaintiff. It is submitted that deceased Maruti had executed agreement to sell (Exh.57) dated 04.12.1974 in favour of the plaintiff agreeing to sell the suit property to the plaintiff for consideration as said earlier. It was condition in the agreement that the said transaction would be completed after obtaining permission of the competent authority for alienation of

the suit property and therefore time was not the essence of the contract. Deceased Maruti did not obtain permission as per the agreement to sell and therefore the sale-deed was not effected. It is submitted that both the Courts below have not considered the above aspect of the matter and they have not properly considered the agreement to sell. Therefore, according to the learned Advocate the findings of both the Courts below that the plaintiff is not entitled to specific performance of contract are not correct. It is also submitted that the plaintiff was ready and willing to perform his part of contract and therefore the findings of both the Courts below that the plaintiff was and is not ready and willing to perform his part of contract are incorrect. It is submitted that the plaintiff is in possession of the suit property. As the defendant No.3 and three others obstructed plaintiff's possession over the suit property, the plaintiff had filed RCS No.148 of 1989 for injunction and the Court had granted interim injunction in favour of the plaintiff. Civil Appeal No.103 of 1990 was also

dismissed on 07.04.1995. Therefore, it is submitted that the findings of the Appellate Court that the plaintiff is not entitled to perpetual injunction, is incorrect and the order of the Appellate Court setting aside decree for perpetual injunction granted by the Trial Court in favour of the plaintiff is not sustainable. So also, it is submitted that the reliefs claimed by the plaintiff are in limitation and therefore the findings of both the Courts below that the relief of specific performance claimed by the plaintiff is not in limitation are not correct. Thus, according to learned Advocate for the plaintiff, ground Nos.I to VIII in the appeal involve substantial questions of law to be considered by this Court and therefore the appeal may be admitted.

12. To support his submission that the plaintiff is entitled to decree for specific performance, learned Advocate for the plaintiff has relied upon the decision of the Apex Court in the case of Balasaheb Dayandeo Naik (Dead) through Lrs. and Ors. Vs. Appasaheb Dattatraya

Pawar, AIR 2008 SC 1205. In the said case, the appellant/plaintiff filed suit for specific performance of agreement dated 31.07.1985 against the respondent/defendant – owner of land, who entered into agreement for sell of land to the appellant for a consideration of Rs.85000/- per acre by the written agreement. As per terms of the agreement for sale, the sale-deed was to be executed by the respondent/defendant within a period of six months. It was agreed that possession of the lands was to be delivered at the time of execution of the sale-deed. The defendant has also undertaken the responsibility of obtaining necessary permission for sale of the lands, if required. On the date of execution of the agreement, an amount of Rs.20,000/- was paid by the plaintiff to the defendant as earnest money and balance amount of consideration was to be paid at the time of execution of the sale-deed. It was case of the plaintiffs that they were always ready and willing to perform their part of the contract, but the defendant avoided to receive the balance amount of

consideration and neglected to execute the sale-deed. The plaintiffs sent legal notice on 16.07.1988 to the defendant through their advocate calling upon him to perform his part of the obligation under the contract. The defendant did not comply with the requirements. Therefore, suit for specific performance or in the alternative refund of earnest money with interest thereon at the rate of 15% per annum was filed. The defendant does not dispute execution of the agreement to sell. According to the defendant, the sale-deed was to be executed within a period of six months from the date of contract, as he was in dire need of money for construction of his house and therefore time was the essence of the contract. It was contended by the defendant that he had called upon the plaintiff to pay balance amount of consideration and get the sale-deed executed, but the plaintiffs were not in a position to arrange the balance amount of consideration and complete the contract. As the market price of the agricultural lands have now gone up, the plaintiffs by purchasing the

lands are intending to dispose of the same to others at higher price. According to the defendant, the plaintiffs are not entitled to relief of specific performance. The Trial Court decreed the suit after finding that the defendant failed to prove that time was the essence of contract and the plaintiffs were and are ready and willing to perform their part of contract. The First Appeal filed before the High Court was allowed and the suit was dismissed. In the appeal by Special Leave before the Apex Court, two points arose for consideration, namely, (a) Whether time is the essence of contract? and (b) Whether the plaintiffs were ready and willing to perform the contract? The Apex Court held that the time was not essence of the contract and further on holding that the plaintiffs were ready and willing to perform their part of contract, allowed the appeal and set aside the order passed by the High Court and confirmed the decree passed by the Trial Court. In paragraph No.12 of the said decision, it was observed thus :-

"12. It is true that the defendant in his written statement has made a bald claim that the time was the essence of contract. Even if we accept the recital in the agreement of sale (Exh. 18) that the sale deed has to be executed within a period of six months, there is an express provision in the agreement itself that failure to adhere the time, the earnest money will be forfeited. In such circumstances and in view of recital pertaining to forfeiture of the earnest money makes it clear that time was never intended by the parties to be of essence. The Constitution Bench decision in Chand Rani vs. Kamal Rani (supra) also makes it clear that mere fixation of time within which contract is to be performed does not make the stipulation as to the time as the essence of contract. Further, we have already pointed out that the defendant has not bothered to prove his claim on oath before the Court to the effect that it was the plaintiffs who avoided performing their part of contract. All the above-mentioned material aspects were correctly appreciated by the trial Court and unfortunately the High Court failed to adhere to the well known principles and the conduct of the defendant. When the third plaintiff deposed before the Court explaining their case with reference to the recitals in the agreement of sale including the reference to the legal notice to the defendant, in the absence of contra evidence on the side of the defendant, we are unable to agree with the conclusion arrived at by the High Court in non-suiting the plaintiff. The High Court commented the conduct of the plaintiffs in praying for refund of the earnest money, namely, Rs.20,000/- paid as advance. As rightly pointed out, the claim for refund of earnest money is only their alternative claim. It is not in dispute that in all suits for specific performance, the plaintiff is entitled to seek alternative relief in the event the decree for specific performance cannot be granted for any reason, hence there is no infirmity in the alternative plea of refund."

13. Mr. Tambe, learned Advocate for defendant Nos.4A to 4C submitted that deceased Kashinath executed registered sale-deed of the suit property in favour of the deceased defendant No.4 on 14.08.1990 as per Exh.69 and since then deceased defendant No.4 was in possession

of the suit property and after his death, defendant Nos.4A to 4C are in possession of the suit property. It is submitted that both the Courts below have recorded concurrent findings that the plaintiff has failed to prove that he is ready and willing to perform his part of the agreement/contract, that the relief of specific performance of contract is not in limitation, that the plaintiff is not entitled for reliefs of specific performance and for declaration that the sale-deed executed in favour of defendant No.4 is illegal. So also, the Appellate Court found that the plaintiff has failed to prove his possession over the suit property, the Appellate Court held that the plaintiff is not entitled for perpetual injunction and refund of earnest amount and thus rightly dismissed the suit of the plaintiff by allowing the cross-objection filed by defendant Nos.4A to 4C by the impugned judgment and order. It is submitted that as defendant Nos. 4A to 4C are the true owners, the plaintiff, who has failed to prove his possession over the suit property is not

entitled to injunction against these defendants/true owners. It is submitted that in the above circumstances, no substantial question of law is involved in this appeal for consideration of this Court and therefore the appeal need not be admitted and the same is liable to be dismissed.

14. To support his submission that no injunction can be granted against true owner, Mr. Tambe learned Advocate has relied upon decision in the case of Premji Ratansey Shah & Ors. Vs. Union of India & Ors., 1995 AIR SCW 2425, wherein it has been held that issuance of an order of injunction is also absolutely a discretionary and equitable relief. In a given set of facts, injunction may be given to protect the possession of the owner or person in lawful possession. It is not mandatory that for mere asking such relief should be given. Injunction is a personal right under S.41(j). The plaintiff must have personal interest in the matter. The interest or right not shown to be in existence, cannot be protected

by injunction. It is equally settled law that injunction would not be issued against the true owner. Injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession, as against the owner. Pretext of dispute of identity of the land should not be an excuse to claim injunction against the true owner.

15. The learned Advocate for the defendant Nos.4A to 4C to support his submission that the plaintiff is not entitled to specific performance of contract, has relied upon the decision of the Apex Court in the case of Smt. Bismilla Begum (dead) by Lrs Vs. Rahmatullah Khan (dead) by Lrs, AIR 1998 SC 970. In the said case, the appellants – legal representatives of the deceased plaintiff did not make any effort to pay sale consideration to the respondent/defendant. It was held that the said finding of fact arrived by the Trial Court would be binding in the second appeal. It was further held that in the case of reconveyance of immovable property, time is essence of contract and option of re-purchase was not made within

stipulated time. It was held that the said option must be deemed to have lapsed.

16. I have carefully considered the submissions made by the learned Advocates appearing for the plaintiff and defendant Nos.4A to 4C. I have also perused the judgments of both the Courts below and the pleadings of the parties and perused the record.

17. On perusal of Exh.57, the copy of agreement to sell dated 04.12.1974, it is seen that the deceased Maruti Keru Kothimbire had agreed to sell the agricultural land i.e. the suit property to the plaintiff for consideration of Rs. 700/-. He had accepted Rs. 300/- from time to time from the plaintiff and before Sub-Registrar, Shrigonda he accepted Rs. 200/- and thus, total earnest money of Rs. 500/- has been received from the plaintiff. By the said agreement, it was further agreed that the plaintiff was to get the sale deed executed within two years of the agreement or within one

month of receiving permission to execute the sale deed by giving remaining consideration of Rs. 200/- to the deceased Maruti. It was further agreed that in case, amount of Rs. 200/- is not given within the stipulated time to the deceased Maruti, earnest money would be forfeited and after the said limit, deceased Maruti would not be bound to sell the suit property to the plaintiff and he would be at liberty to dispose of the suit property as per his wish. It is further stated in the agreement that complaint of the plaintiff would not be considered. In case, plaintiff would give remaining consideration to the deceased Maruti and in case, deceased Maruti avoided to accept the said amount or to execute the sale deed, plaintiff was to get the transaction done through the Court and deceased Maruti would be liable for the damages. It was further agreed that plaintiff was to incur expenses of sale deed and permission. It was further agreed that possession of the land would be given to the plaintiff as owner at the time of sale deed. Agreement further shows that the deceased

Maruti had taken responsibility to obtain permission within said limit to execute the sale deed. It is seen that the agreement to sell was registered agreement.

18. From the above contents of the agreement to sell (Exh.57), it is clear that deceased Maruti had executed said registered agreement in favour of the plaintiff and agreed to sell the suit property for Rs. 700/-. On accepting Rs. 500/-, this agreement was executed on 04.12.1974. Possession of the land was not given to the plaintiff. As per the said agreement, possession of the land was to be given at the time of sale deed. Sale deed was to be executed within two years or within one month of receiving permission to execute the sale deed of the land. So also, deceased Maruti had to obtain permission to sell the suit property within the above said period and plaintiff had to pay remaining consideration of Rs. 200/- to the deceased Maruti and to get the sale deed executed. So also, plaintiff had agreed to incur expenses of sale deed and permission to execute the sale deed of

the suit property.

19. There is no dispute that Maruti who executed the agreement to sell Exh.57, died on 17.02.1982, as per death extract (Exh. 58). There is nothing on record to show that within the period mentioned in the agreement to sell, deceased Maruti obtained permission to sell the suit land. There is also no record to show that within two years of the agreement to sell dated 04.12.1974, the plaintiff had gone to the deceased Maruti with the amount of expenses to be incurred for obtaining permission to sell the suit property. It appears that only in 1984, the plaintiff had given public notice on 15.07.1984, which was published on 22.07.1984 in the news paper calling upon Maruti to execute the sale deed stating that Maruti was absconding. It was further stated that Maruti had accepted Rs. 700/-. So, it appears that till the date of this public notice, no attempt was made by the plaintiff to get the sale deed executed from the deceased Maruti by paying him remaining consideration of Rs. 200/- as per

the case of the plaintiff. In the public notice, it is stated that at the time of agreement, permission was necessary for sale deed, but subsequently, that permission was not necessary. In the above circumstances, it appears that there is unreasonable delay on the part of the plaintiff to get the sale deed executed from Maruti, who executed agreement to sell in favour of the plaintiff.

20. According to plaintiff, in 1988, when deceased Kashinath son of deceased Maruti had recorded his name to the land suit Block No.162 stating that Maruti died in 1982, the plaintiff came to know about death of Maruti and thereafter, Kashinath also avoided to execute the sale deed. Admittedly, Kashinath also died on 22-01-1995. There is nothing on record to show that during life time of Kashinath, after public notice dated 15.07.1984 given to Maruti calling upon him to execute the sale deed till death of his son Kashinath on 22.01.1995, the plaintiff had given any notice in writing to Kashinath being heir

of Maruti calling upon him to execute the sale deed in favour of the plaintiff on the basis of agreement to sell dated 04.12.1974 (Exh.57). There is nothing on record to show that request was made by the plaintiff to Kashinath, during his life time to execute the sale deed saying that there is no need of permission to sell the suit property as stated in the public notice dated 15.07.1984. When the plaintiff has come with the case that during life time of Kashinath he made oral request to Kashinath in 1988 to execute sale-deed, when mutation entry of land Block No.162 was executed in the name of Kashinath, it was necessary for the plaintiff to file the suit within three years of said entry as it amounts to refusal of Kashinath for specific performance of agreement to sell (Exh.57) as per Article 54 of the Limitation Act. But, admittedly no such suit was filed by the plaintiff.

21. On perusal of the judgment of the trial Court, it has framed issue No.4 regarding limitation of the suit. It has held that the reliefs of specific

performance of contract, declaration that sale deed dated 14.08.1990, (Exh.69) executed by the deceased Kashinath in favour of defendant No.4 were not in limitation and that the reliefs of perpetual injunction and refund of earnest money were within limitation. On perusal of the judgment of the appellate court, it appears that the appellate court framed point No.1 regarding limitation of the suit and held that relief of specific performance of contract, refund of earnest money and declaration as claimed by the plaintiff, are barred by limitation and accordingly, answered point No.1, in the negative. While answering the said point in the negative, the appellate court referred suit bearing RCS No.148 of 1989, filed by the plaintiff against the defendant No.4 and one Ananda Bhosale and the judgment (Exh.137) in the said suit. The appellate Court observed that the defendant No.4 contested the said suit contending that Kashinath son of Maruti executed agreement to sell on 08.08.1989, of the suit land/property in his favour and thus, he became owner and possessor of the suit land/property. The

appellate court further observed that, in the judgment of the said suit the trial Court observed that it is the plaintiff's case that now Maruti is no more which shows that in the year 1989, or during pendency of the said suit, the plaintiff had acquired knowledge that Maruti was expired and therefore, even if the procedural declaration about the death of Maruti was not adopted by his legal representative, the plaintiff could have taken efforts to get the sale deed of the suit land executed through his son deceased Kashinath. Further, the appellate Court observed that it is the case of the plaintiff that in the year 1988, after mutation entry in the name of deceased Kashinath and others he had repeatedly asked Kashinath to complete the sale deed. Therefore, it seems that plaintiff learnt about mutation entry immediately but, did not file suit for specific performance of agreement against the deceased Kashinath in the year 1988, within three years thereafter. On the contrary, the plaintiff had chosen to file suit for injunction only against the defendant No.4 and one

another. Thus, according to the appellate court, suit for specific performance has been barred by limitation as it has not been filed within three years of agreement to sell dated 08.08.1989 executed by Kashinath in favour of the defendant No.4 as per Article 54 of the Limitation Act. So also, the appellate court in paragraph No.31, observed that when the plaintiff has got knowledge of refusal of the performance of contract by Kashinath in 1988, he ought to have filed suit within three years, therefrom at least up to 1991-1992. So also, in paragraph 32 of the judgment, the appellate court has observed that after the sale deed executed on 14.08.1990 in favour of the defendant No.4, there was inspection of crops for the year 1990-1991 and at that time also plaintiff could have filed suit against the Kashinath for specific performance of contract. So also, it is observed that there is nothing to show that the plaintiff had asked the deceased Kashinath in writing to execute the sale deed nor filed the suit for specific performance of contract against the Kashinath up to the year 1994.

22. The appellate court has observed in paragraph No.33 of the judgment that the suit land i.e. suit property was under category of Class-I as per Section 29 of the Maharashtra Land Revenue Code, 1966. Therefore, deceased Maruti and thereafter his son deceased Kashinath were occupants of Class-I category and were holding the suit land in perpetuity and without any restriction on the right to transfer. Therefore, though there was a condition of permission to be obtained by the deceased Maruti, it was not necessary. So also, as referred earlier in 1984, the plaintiff issued public notice to Maruti calling upon him to execute the sale deed saying that at the relevant time no permission is required to sell the suit land. Therefore, after death of Maruti in 1982, and after getting knowledge of the same, even as per the case of the plaintiff in 1988, the plaintiff could have asked Kashinath son of the deceased Maruti to execute the sale deed or could have given notice to him in this respect. But, no such notice was given and no

suit for specific performance of contract was filed. The appellate court thus concluded in paragraphs 34 and 36 of the judgment that the suit filed by the plaintiff for the reliefs of specific performance and ancillary or alternate relief of refund of earnest money and declaration that sale deed executed in favour of the defendant No. 4 on 14.08.1990, is not binding on the plaintiff on 10.09.1998, is not within the limitation.

23. On perusal of the judgments of both the courts below, both the courts have referred agreement to sell (Exh.57) and one of the conditions of the agreement that sale deed was to be executed within one month of permission of revenue authority to execute the sale deed and that said permission was to be obtained by the deceased Maruti original owner of the suit property. As mentioned earlier in the public notice issued on 15.07.1984, the plaintiff has stated that at the relevant time of agreement, permission of revenue authority to sell the suit property was necessary, but in 1984, such

permission was not necessary. Therefore, it is obvious that right from 1984, it was possible for the plaintiff to get the sale deed executed from the deceased Kashinath son of deceased Maruti during life time of Kashinath till his death in 1995. But, he did not do the same in any manner either by giving notice to deceased Kashinath or by filing the suit against him as observed earlier in detail.

24. When relief of specific performance of contract i.e. agreement to sell (Exh.57) was already barred by limitation, during life time of Kashinath son of deceased Maruti, the said relief cannot be enforced against the defendant Nos.1 to 3, who are legal heirs of the deceased Kashinath by filing the suit, by giving them suit notice (Exh.60) dated 10.08.1998, prior to filing the suit.

25. For the above reasons, I am of the view that merely because at the relevant time of agreement to sell (Exh.57) in 1974, permission to sell the suit land was

necessary, which permission was subsequently not necessary as per the case of the plaintiff from 1984, it cannot be said that both the courts below have erred in holding that the suit is not in limitation and that they have not considered the aspect of obtaining the permission of the competent authority for executing the sale deed, while deciding the point of limitation and therefore substantial question of law is involved as argued by the learned advocate for the plaintiff. There is unreasonable delay in seeking relief of specific performance by the plaintiff as the plaintiff filed suit for specific performance of agreement to sell (Exh.57) dated 04.12.1974, executed by deceased Maruti by filing the suit not against his son Kashinath but, defendant Nos. 1 to 3 LRs of deceased Kashinath on 10.09.1998. Therefore, even if it is said that time was not essence of contract in view of the decision of the Apex Court in the case of Balasaheb Dnyandeo Naik (supra) as action for specific performance has not been brought by the plaintiff within reasonable time and there is concurrent

finding of both the courts below that the suit is barred by limitation, particularly, as regards the relief of specific performance and declaration, the decision in the case of Balasaheb Dnyandeo Naik (supra) is of no help to the case of the plaintiff to state that the suit is within limitation or to state that substantial question of law regarding limitation of the suit arises in this appeal for consideration of this Court.

26. On perusal of the judgments of both the courts below, it appears that both the courts have recorded concurrent findings of fact that the plaintiff was not ready and willing to perform his part of contract, the plaintiff is not entitled to relief of specific performance of agreement to sell (Exh.57) and that the plaintiff is not entitled to relief of declaration that sale deed (Exh.69) dated 14.08.1990 executed by deceased Kashinath in favour of defendant No. 4 is not binding on the plaintiff. This Court in second appeal cannot interfere in the said concurrent findings of fact.

27. The trial Court issued injunction against the defendant No. 4 as per Clause-2 of the decree as referred earlier holding that the plaintiff has proved his possession over the suit land/suit property. The Appellate Court by allowing counter claim filed by the defendant dismissed the suit by impugned judgment and order. Thus, appellate court set aside the decree for perpetual injunction and refund of earnest money passed in favour of the plaintiff. The appellate court as referred earlier observed that the relief of refund of earnest money claimed by the plaintiff is also barred by limitation. When the said relief is barred by limitation and when there is a condition in agreement to sell (Exh.57) that in case the plaintiff failed to get the sale deed executed, earnest money will be forfeited, I am of the view that no substantial question of law regarding error committed by appellate court in not returning earnest money as per the ground in the appeal and argued by the learned advocate for the plaintiff is arising for

consideration of this Court.

28. As regards the order of the appellate court setting aside the decree for perpetual injunction in favour of the plaintiff by dismissing the plaintiff's suit is concerned, the appellate court observed that the plaintiff had filed RCS No. 148 of 1989 against the defendant No.4 and one Anant Bhosale for perpetual injunction to restrain them from obstructing his possession over the suit land/property contending that the plaintiff was in possession on the basis of agreement to sell dated 04.12.1974. The appellate court observed that said suit was decided on 11.07.2000. It appears that said suit was dismissed. The appellate Court observed that in the said suit plaintiff has failed to prove his lawful possession over the suit property/suit land and said finding is given in the year 2000 i.e. during pendency of the present suit, which finding is not yet set aside. The appellate court further observed that in the present suit, there is no evidence when the plaintiff

came in possession of the suit land/ suit property afterwords. Thus, appellate court held that plaintiff has failed to prove his lawful possession over the suit land. The appellate court further held that in these circumstances, findings of the trial court that the plaintiff is in settled possession is not sufficient to state that plaintiff has proved his possession over the property. It is seen that on issue No. 3, "whether plaintiff proves that he has got possession of the suit property on the basis of agreement to sell?". The trial court recorded finding in the negative. It is pertinent to note that no specific ground is taken in this appeal about the above findings recorded by the appellate court or the trial court regarding the possession over the suit property.

29. For the aforesaid reasons, when the plaintiff is found not entitled for the relief of specific performance of agreement to sell Exh.57, I find that the Appellate Court has rightly refused to grant relief of specific

performance to the plaintiff as well as it has rightly set aside the perpetual injunction granted in favour of the plaintiff by the Trial Court by allowing the counter-claim. Thus, in the above circumstances, when there are concurrent findings of both the Courts below against the plaintiff and in favour of defendant Nos.4A to 4C, in respect of the main relief of specific performance of contract claimed in the suit, I am of the view that no substantial question of law, as argued by the learned Advocate for the plaintiff, is arising in this appeal for consideration of this Court, so as to admit the appeal. As such, I hold that it is not a fit case to admit the appeal and it is liable to be dismissed. Accordingly, the appeal is dismissed. No order as to costs.

30. In view of dismissal of the appeal, Civil Application 7554 of 2019 for stay and injunction, does not survive and it is disposed of.

[S.M.GAVHANE,J.]