



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 744 OF 2008**

1. Shriram S/o Madhav More,  
Since deceased through his L.Rs.
- 1A Anusaya Wd/o Ram More,  
Age : 74 Years, Occu. : Nil,
- 1B Baburao Ramrao More,  
Age : 36 Years, Occu. : Agril.,  
  
1C Khandu Ramrao More,  
Age : 35 Years, Occu. : Agril.,  
  
All R/o Tanaji Chowk, More  
Galli, Ausa, Dist. Latur.
- 1D Sangita W/o Mahadev Sathe,  
Age : 42 years, Occu. : Household,  
R/o Near Bharat Vidyalaya, Makani,  
Tq. Lohara, Dist. Osmanabad.
2. Pandurang Madhav More,  
Age : 48 Years, Occu. : Agril.,
3. Prabhakar Madhav More,  
Age : 52 Years, Occu. : Agril.,  
  
Both R/o Ausa, Tq. Ausa,  
Dist. Latur. .. Appellants

**Versus**

1. Abdul Halid Abdul Samad Patel,  
Age : 75 Years, Occu. : Agril. & Business,  
R/o Qutabshahi (Sutar Galli),  
Ausa, Tq. Ausa, Dist. Latur

(Died) through His L.Rs.

1A Abdul Samad s/o Abdul Khaleq Patel,  
 Age : 50 Years, Occu. : Business,  
 R/o Sutar Galli, Ausa,  
 Tq. Ausa, Dist. Latur.

1B Mohsin Sultana w/o Qurban Pathan,  
 Age : 40 Years, Occu. : Household,  
 R/o Damu Nagar, Kandewali,  
 Latur, Dist. Latur (Daughter)

1C Zarin Sultana w/o Abdul Gani Shaikh,  
 Age : 35 Years, Occu. : Household,  
 R/o Varli, Mumbai (Daughter)

1D Miskin Sultana w/o Ubed Faredi,  
 Age : 30 Years, Occu. : Household,  
 R/o Nizampura Bhiwandi,  
 Dist. Thane, (Daughter)

2. Imam Miraji Tamboli,  
 Age : 49 Years, Occu. : Agril.,  
 R/o Ausa, Dist. Latur.  
 His L.Rs.

2A Rabanee w/o Imam Tamboli,  
 Age : 70 Years, Occu. : Labour,  
 R/o Main Road, Ausa, Dist. Latur.

2B Anwarbee w/o Fattu Tamboli,  
 Age : 46 Years, Occu. : H.H. & Labour,  
 R/o Killari, Tq. Ausa, Dist. Latur.

2C Ismail Imam Tamboli,  
 Age : 41 Years, Occu. : Business,  
 R/o Killari, Tq. Ausa, Dist. Latur.

2D. Mehtab Imam Tamboli,  
 Age : 35 Years, Occu. : Business,

R/o Main Road, Ausa, Dist. Latur.

2E Mehboob Imam Tamboli,  
Age : 32 Years, Occu. : Business,  
R/o Main Road, Ausa, Dist. Latur.

3. Abdul Mahboob Abdul Samad Shaikh,  
Since deceased through his L.Rs.

3A Ajmunisa w/o Abdul Mabud Patel,  
Age : 68 Years, Occu. : Nil,

3B Bajid s/o Abdul Mabud Patel,  
Age : 41 Years, Occu. : Business,

3C Wajid s/o Abdul Mabud Patel,  
Age : 41 Years, Occu. : Business,

All R/o Near Virbhadr School,  
Sutargalli, Ausa, Tq. Ausa, Dist. Latur.

3D. Javed s/o Abdul Mabud Patel  
Age : 31 years, Occu. : Business,

3E. Muid s/o Abdul Mabud Patel,  
Age : 29 years. Occ. : Business,  
R. No. 3D to 3E, Both R/o  
Electrical rewinding, Shop Near  
Veterinary Hospital, Ausa, Tq. Ausa,  
Dist. Latur

3F. Wahid s/o. Abdul Mabud Patel,  
Age : 27 years, Occ.: Business,  
R/o. Near Virbhadr School,  
Sutargalli, Ausa, Tq. Ausa, Dist. Latur.

3G. Kashid s/o. Abdul Mabud Patel,  
Age : 43 years, Occ.: Business,  
R/o. Kalan Galli, Ausa, Dist. Latur.

3H. Sow. Sultana w/o. Rafiq Jahagirdar,  
Age: 45 years, Occ.: Household,  
R/o. Hashmi Chowk, Ausa, Dist. Latur.

3I. Sow. Shabana w/o. Mujaffar Ali Inamdar,  
Age: 37 years, Occ.: Household,  
R/o. Kaikadi Galli, Ausa, Dist. Latur

3J. Sow. Irfana w/o. Moij Borikar,  
Age : 34 years, Occ.: Household,  
R/o. Khakadpura, Ausa, Dist. Latur.

3K. Sow. Farana w/o. Fayyaj Patel,  
Age : Major, Occ.: Household,  
R/o. Hina Nagar, Near Airport,  
Chikalthana, Aurangabad.

4. Sayyed Osman s/o Khajasaheb  
Died during pendency of regular  
civil appeal.

5. Khadersaheb s/o Khajasaheb,  
Age : 79 Years, Occu. : Agril.,  
R/o Dastagir Galli, Ahmedpur,  
Dist. Latur.

6. Sayyed Wali s/o Khadarsaheb,  
Age : 53 Years, Occu. : Agril.,  
R/o Ahmedpuar, Dist. Latur. .. Respondents

Shri Balbhim R. Kedar, Advocate for the Appellants.  
Shri Dr. R. R. Deshpande, Advocate h/f Shri Sayyed Zoebumai  
Zulfequar, Advocate for the Respondent No. 2B to 2E.

**CORAM : SHAILESH P. BRAHME, J.**

**RESERVED FOR JUDGMENT ON : 16.12.2025**  
**JUDGMENT PRONOUNCED ON : 24.12.2025**

**JUDGMENT :-**

. Taken up for final hearing with the consent of the parties.

02. Aggrieved by the judgment and decree dated 10.11.2006 passed by Lower Appellate Court in Regular Civil Appeal No 123/2002 reversing the decree of trial court and thereby granting decree for specific performance of contract and possession, present appeal is preferred by original defendant nos. 3 to 5.

03. Respondent no. 2 is the original plaintiff, who had filed Regular Civil Suit No. 10/1980 for specific performance of contract and possession. Respondent nos. 1 and 3 are the real brothers, who are the owners of the suit land. Appellants are the subsequent purchasers, who were impleaded in the suit belatedly. The Trial Court vide judgment and decree dated 12.04.2002 dismissed the suit for substantial relief of specific performance of contract and possession but awarded alternate prayer of refund of earnest amount with interest. Respondent no. 1 preferred Regular Civil Appeal No. 123/2002 and simultaneously cross objection was preferred by respondent no. 2-original plaintiff, which is ultimately allowed by the lower Appellate Court. The parties are referred to by their original status in the trial Court.

04. The subject matter is land measuring 9 Acres 10 Guntha of Sy. No. 24 situated at village Pirangamwadi, Tq. Ausa. It is the case of the plaintiff that Sy. No. 24 measuring 19 Acres 23 Guntha was of belonging to defendants. An agreement to sale for

09 Acres and 10 Guntha from Sy. No. 24 was executed by defendant No. 1 on 11.04.1975 by accepting Rs. 8,051/- as an earnest amount out of Rs. 14,000/-. The balance amount was to be paid by October 1976 for executing a sale deed and handing over of possession. The plaintiff is stated to have persisted the defendants for execution of sale deed but it was not acceded to. Then notice was issued on 23.11.1978 calling upon the defendants to execute the sale deed. It is further contended in the plaint that mutation entry No. 144 was effected on 22.09.1976 showing partition between the brothers and allotment of Sy. No. 24 to defendant No. 2, which was bogus and concocted. It is contended that defendant No. 2 fraudulently executed sale deeds in favour of the defendant Nos. 3 to 5. In this backdrop, suit is filed for specific performance of contract and possession.

05. The defendant No. 1 contested the suit by disputing agreement to sale. It is stated to be money lending transaction and sign on blank stamp paper was being given to the plaintiffs. The defendant No. 1 is stated to be ready to repay the amount, but that was not accepted. It is contended that bogus agreement was got executed by the plaintiffs. The defendant No. 2 is owner of the suit land due to partition between them. It is further contended that the year of 1976 has been manipulated. It is further contended that the suit is not within limitation.

06. The defendant No. 2 filed independent written statement

to contend that there was partition in between the brothers in the year 1970 resulting into allotment of Sy. No. 23 to the defendant No. 1 and survey No. 24 to the defendant No. 2. The defendants are stated to have alienated their shares. He is stated to be exclusive owner of Sy. No. 24, which is further alienated by him to the remaining defendants with handing over of possession.

07. The defendant Nos. 3 to 5 were impleaded in the year 1994 in the suit. They claim to be bonafide purchasers for value of the suit land alienated by registered sale deeds by the defendant No. 2. It is stated that they were not aware of any agreement to sale or pendency of the suit when they purchased different parcels of the lands. They claim to be owner and in possession of the suit lands. They support the defendant No. 2.

08. Plaintiffs amended the and impleaded defendant Nos. 3 to 5. The claim of the defendant Nos. 3 to 5 is disputed. The defendant Nos. 1 and 2 are alleged to have been in collusion in alienating the suit lands vide sale deeds at Exhibit 235 to 238.

09. The parties led oral evidence before the Trial Court. The suit was dismissed for specific performance of contract. But decree of refund of amount with interest at the rate of 10% per annum was granted by the Trial Court on 12<sup>th</sup> April, 2002. The defendant No. 1 preferred R.C.A. No. 123 of 2002 and cross objection was preferred by the plaintiffs. Neither the defendant

No. 2, nor the defendant Nos. 3 to 5 preferred any cross objection or cross appeal before the lower Appellate Court.

10. Lower Appellate Court allowed the cross objection thereby granting decree of specific performance of contract directing the defendant No. 2 to execute the sale deed in favour of the plaintiff. The appeal of the defendant No. 1 was dismissed.

11. Learned counsel for the appellant submits that a bogus agreement was executed taking disadvantage of the signatures on the blank papers and the recitals are tampered to bring the suit within limitation. It is further submitted that agreement to sale Exhibit 174 has not been proved. No relief for specific performance of contract can be granted to the plaintiffs. It is submitted that the suit is barred by limitation. Time was the essence of contract. It is further submitted that the defendant No. 1 was not the owner of Sy. No. 24. In partition effected in the year 1970 the suit land was allotted to the defendant No. 2, hence no title can be transferred to the plaintiff.

12. It is further contended that after conducting due enquiry appellants purchased the suit lands and they were not aware of any agreement. They are in possession of the suit land. Considering undue hardship, decree for specific performance of contract is liable to be set aside. It is submitted that the impugned judgment of the Appellate Court is cryptic and liable to be set aside. It is further contended that it was not necessary

for the appellants to prefer cross objection or cross appeal before the lower Appellate Court. It is contended that equities can be adjusted by keeping their sale deeds intact.

13. It is further contended that decree passed by the lower Appellate Court is against the dead person, as no steps were taken to bring legal heirs of the defendant No. 2 on record, who died on 20.07.2004. It is further contended that the sale deeds executed in favour of the appellants have not been challenged in the suit, hence decree of specific performance of contract is unsustainable.

14. Per contra, learned counsel for the respondent No. 2 – plaintiff Dr. R. R. Deshpande submits that the theory of partition in the year 1970 and the consequential mutation entry No. 144 is bad in law and concocted. The defendants are unable to produce on record the partition deed. The certification of the mutation entry on 22.09.1976 creates doubt. It is submitted that defendant Nos. 1 and 2 are acting in collusion. Neither the defendant No. 2, nor the defendant Nos. 3 to 5 preferred any cross objection or cross appeal when substantive findings were recorded against them by the Trial Court. Those findings have been confirmed by the lower Appellate Court. It is submitted that no interference is called for in concurrent findings of facts U/Sec. 100 of the Code of Civil Procedure (for the sake of brevity and convenience hereinafter referred as to the “C.P.C.”) It is impermissible to reappreciate the evidence.

15. There is no perversity or patent illegality in the findings recorded by the lower Appellate Court. It is submitted that the suit land was not belonging to the defendant No. 2 and the defendant Nos. 3 to 5 are not bonafide purchasers for value without notice. Their sale deeds are hit by Sec. 52 of the Transfer of Property Act. It is further submitted that defendants have miserably failed to dislodge the execution of agreement to sale and they failed to make out any case of tampering of the date recited in agreement Exhibit 174. No expert was examined to prove the alteration.

16. Dr. Deshpande, learned counsel further submits that no proper inquiry was conducted by the defendant Nos. 3 to 5 and they are in collusion with defendant No. 2. The defendant No. 2 was aware of agreement Exhibit 174, despite that southern portion of land was sold to the defendant Nos. 3 to 5. It is vehemently contended that the substantial question of law framed by this Court have no foundation and those cannot be treated to be substantial questions of law. The decree passed by the lower Appellate Court is not vitiated for not bringing legal heirs of the defendant No. 2 on record as defendant No. 1 was the vendor of the suit land and decree is executable.

17. Dr. R. R. Deshpande, learned counsel informs this Court that decree passed by the lower Appellate Court has virtually been executed. The sale deed has been executed in favour of the

plaintiff on 24.07.2014 through Court. Only the possession remained to be handed over, which is subject to outcome of the present second appeal. It is submitted that present appeal is liable to be dismissed.

18. I have considered rival submissions of the parties. Agreement to sale was executed for 09 Acres and 10 Guntha by unregistered document by the defendant No. 1 in favour of the plaintiff on 11.04.1975. The plaintiff adduced evidence of four witnesses in support of his case. The defendant Nos. 1 and 2 adduced evidence of themselves. The defendant Nos. 3 to 5 adduced evidence of the defendant No. 4 and one Gurunath More as 04<sup>th</sup> witness. Four registered sale deeds are executed in favour of the defendant Nos. 3 to 5, which are at Exhibit 235 dated 07.12.1976, Exhibit 237 dated 28.02.1976 and Exhibit 236 and 238 dated 08.04.1982. The defendant Nos. 3 to 5 are in possession of the suit lands. The plaintiff is armed with sale deed executed in pursuance of decree for specific performance of contract, which is under challenge.

19. Following substantial questions of law have been framed in the matter on two different dates :

- i) Whether the first Appellate Court was justified in granting discretionary relief of specific performance of contract in place of decree of refund of amount granted by the Trial Court ?
- ii) Whether the First Appellate Court is justified in

granting decree in favour of the plaintiff when due to death of defendant no.2, during pendency of appeal, it stood abated as against him and no steps were taken to bring legal heirs on record ?

- iii) Whether agreement to sell at Exhibit-74 is admissible in evidence when its genuineness is doubted and when no recourse is taken to Section 73 of the Indian Evidence Act ?
- iv) Whether the suit filed by the respondent-plaintiff is within limitation ?
- v) Whether the judgment and decree passed in favour of the plaintiff is sustainable for overlooking hardship caused to the appellant ?

20. The substantial question of law at Sr. No. (ii) goes to the root of the matter. It is being emphasized by advocate Dr. R. R. Deshpande, that second appeal preferred at the instance of defendant Nos. 3 to 5 against concurrent findings of facts is liable to be dismissed. I propose to deal with these issues at the beginning.

21. The defendant No. 2 died on 20.07.2004 when R.C.A. No. 123 of 2002 was pending. He was respondent No. 5 therein. His legal heirs were not brought on record and the appeal stood abated. The decree passed by the lower Appellate Court is castigated to be decree against a dead person and nullity. The privity of contract in the present case is between defendant No. 1 and the plaintiff. The specific performance of contract is solicited

of the agreement dated 11.04.1975 at Exhibit 174. Plaintiff never accepted defendant No. 2 as the vendor. When plaintiff succeeded before the lower Appellate Court in securing decree for specific performance of contract, the defendant No. 2 had no role, albeit, he was dead. The defendant No. 1 was directed to execute registered sale deed by accepting remaining amount of consideration. It was executable decree and it cannot be said to be vitiated for not bringing legal heirs of the defendant No. 2 on record.

22. Learned advocate Mr. Balbhim R. Kedar has relied on the judgment of the Supreme Court in the matter of Gurnam Singh (Dead) through L.Rs. and others Vs. Gurbachan Kau (D) By L.Rs. and others reported in *(2017) 13 SCC 414* to support the submission that decree against the dead person is nullity. I have gone through paragraph Nos. 14 to 19 of the judgment. In that case, plaintiff had filed suit for specific performance of contract against the original owner i. e. defendant No. 1 and the subsequent purchasers defendant Nos. 2 to 4. The Trial Court dismissed the suit and awarded refund of earnest money, which was confirmed by the lower Appellate Court. The plaintiff preferred second appeal. The plaintiff, the defendant No. 2 and 4 died when the matter was pending in the High Court and no steps were taken to bring their legal heirs on record. In this backdrop, when the High Court allowed appeal, granting decree for specific performance of contract, the question which is as follows.

14) The short question, which arises for consideration in this appeal, is whether the impugned order allowing the plaintiff's second appeal is legally sustainable in law? In other words, the question is whether the High Court had the jurisdiction to decide the second appeal when the appellant and 2 respondents had expired during the pendency of appeal and their legal representatives were not brought on record?

23. In the backdrop of above facts, Hon'ble Apex Court recorded that it was judgment of nullity being passed against dead persons. The facts are distinguishable from the case at hand. No decree of specific performance of contract has been passed against deceased defendant No. 2. The cited judgment will be of no avail to the appellant.

24. Further reliance is placed on the judgment Coordinate Bench of this Court in the matter of Pandit Ramchandra Kulkarni Vs. Shrikant Ramchandra Kulkarni and others reported in *2015 (5) Mh.L.J. 725*. Learned Single remanded the matter for not bringing legal heirs of the deceased party on record. The facts are again distinguishable from the present case. This judgment will not help the appellant.

25. As against that, learned counsel Dr. Deshpande seeks to rely on the judgment of the Apex Court in the matter of State of Punjab Vs. Nathu Ram reported in *AIR 1962 SC 89*. I have gone through para Nos. 7 and 8 of the judgment. In the present case also the decree is not a joint one. Death of the defendant No. 2 has no repercussion on the executability of the decree of specific

performance of contract. The judgment is rightly cited by the learned counsel. I find no difficulty in holding that decree of specific performance of contract is not vitiated being passed against dead person. The substantial question of law No. (ii) is answered against the appellants.

26. Dr. R. R. Deshpande, learned counsel for the plaintiff has adverted my attention to the findings recorded by the Trial Court for issue Nos. 1 to 9, which are in favour of the plaintiff and obviously against the defendant No. 2. The findings to issue Nos. 10 to 12 are in respect of claim set out by the defendant Nos. 3 to 5. It has been categorically recorded by the Trial Court that the transaction was agreement to sale executed on 11.04.1975 and the plaintiff was ready and willing to perform his part of contract. Despite recording those findings against the defendant Nos. 2 to 5, no appeal or cross objection was preferred by them before the lower Appellate Court. Lower Appellate Court passed decree of specific performance of contract confirming the findings recorded against the defendant Nos. 2 to 5.

27. The suit is contested by all the defendants on different pleas. The defendant Nos. 1 and 2 claim that there was no agreement to sale as such. The defendant No. 2 additionally claimed to be owner of the suit land by virtue of partition which had taken place in the year 1970. The defendant Nos. 3 to 5 claim to be bonafide purchasers for value by registered sale deeds executed by the defendant No. 2. The findings to the issue Nos. 1

to 9 are in favour of the plaintiff and against the defendant Nos. 1 and 2. However, findings to further issues are against the plaintiff. The net result of the judgment of the Trial Court is that suit for specific performance of contract was dismissed and only decree of refund of amount was passed against the defendant No. 1. No decree is passed against the defendant Nos. 2 to 5. The plaintiff is non suited for substantive relief. An appeal U/Sec. 96 of the C. P. C. would lie against the decree or part of the decree. It is not necessary to file appeal against the findings or the observations of the Court. Therefore, there was no reason either for the defendant No. 2 or the defendant Nos. 3 to 5 to prefer any cross objection or cross appeal before the lower Appellate Court.

28. The respondents have placed reliance on the **judgment dated 14.10.2024 of the Supreme Court in the matter of Shingara Singh Vs. Daljit Singh and another in Civil Appeal No. 5919 of 2023** to buttress that it was mandatory to the defendant Nos. 3 to 5 to prefer appeal before the lower Appellate Court challenging decree of refund of money. In the matter before the Supreme Court, the defendant No. 2 the subsequent purchaser was the appellant. It was a suit for specific performance of contract filed against original owner defendant No.1, who subsequently sold the property to the defendant No. 2. In the trial Court the plea was raised by the defendant No. 2 that the agreement in question was fabricated and antedated. Accordingly issue No. 5 was cast as to whether

the agreement in question was bogus. The Trial Court held that the agreement was valid and defendant No. 2 failed to prove that it was result of fraud and fabrication. However, considering the subsequent alienations, the Trial Court dismissed the suit for specific performance of contract and only granted alternate prayer of refund of earnest amount with interest. Before the first Appellate Court no appeal or cross objection was preferred by the defendant No. 2. The Appellate Court confirmed the decree of trial court, but reversed the finding regarding nature of the agreement. Plaintiff preferred further appeal to High Court and succeeded in getting decree of specific performance of contract. Then the defendant No. 2 was before the Supreme Court and it was observed in para Nos. 9 and 10 of the judgment that the defendants had conceded the decree of refund and finding on that particular issue and in the absence of any cross appeal or cross objection by him the first appellate Court could not have recorded finding that the subject agreement was result of collusion.

29. The facts before the Supreme Court are distinguishable. In the case at hand the contract was in between plaintiff and defendant No. 1. Both of them have preferred appeals before the lower Appellate Court. It was specifically observed by the Trial Court that defendant No. 1 was the owner of the property who entered into contract. The decree of specific performance is denied by the Trial Court considering undue hardship and in the wake of execution of registered sale deeds in favour of defendant

Nos. 3 to 5. The plea raised by the defendant Nos. 3 to 5 before the Trial Court was accepted and the decree was passed which was not against them. In view of Order XLI Rule 22 (1) of the C. P. C., I am of the considered view that it was not necessary for them to prefer appeal or cross objection before the lower Appellate Court. The judgment cited will not help the respondents.

30. A useful reference can be made to the judgment of the Supreme Court in the matter of Saurav Jain and another Vs. M/s A. B. P. Design and another reported in *AIR 2021 SC 3673*. Para No. 24 of the judgment reads as follows :

“24. Order XLI Rule 22(2) of the CPC states that a “cross-objection shall be filed in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.” This Court in *S. Nazeer Ahmed v. State Bank of Mysore - (2007) 11 SCC 75* elaborated on the form of objections made under Order XLI Rule 22 CPC. In *Nazeer Ahmed* (supra), the respondent had filed a suit for enforcement of an equitable mortgage. In deciding the suit, the Trial Court rejected the argument of the appellant-defendant and held that the suit was not barred by Order II Rule 2 of the CPC. However, the court dismissed the suit on grounds of limitation. On an appeal filed by the respondent before the High Court, the High Court observed that although the suit was barred by Order II Rule 2 of the CPC, the appellant had not challenged this finding of the Trial Court by filing a memorandum of cross-objection. Thus, the High Court granted the respondent a decree against the appellant. When this finding of the High Court was assailed before this Court, Justice P.K Balasubramanyam held that a memorandum of crossobjection needs to be filed while taking recourse to Order XLI Rule 22 only when the respondent claims a relief that had been rejected by the trial court or seeks an additional relief apart from that provided by the

trial court. The court held that a memorandum of objection need not be filed when the appellant only assailed a ‘finding’ of the lower court:

“7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order 41 Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order 2 Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvas the correctness of the finding on the bar of Order 2 Rule 2 rendered by the trial court.”

(emphasis supplied)

31. In the wake of the reiteration of the law by the Apex Court as referred above, I find that there is no merit in the objection raised by the plaintiff regarding maintainability of the second appeal by the persons who did not prefer cross objection or cross

appeal. The Appellate Court passed decree of specific performance of contract in respect of self same subject matter, which is acquired by the defendant Nos. 3 to 5 by registered sale deed and that has given them cause of action to prefer second appeal. The second appeal is maintainable.

32. The findings on issue Nos. 1 to 9 recorded by the Trial Court are concurrent in nature. It is rightly contended by the respondents that those cannot be interfered with in the second appeal. Agreement dated 11.04.1975 has been proved by P.W. No. 1 as well as P.W. No. 2. It has been marked as Exhibit 174. There is no merit in the contention of the appellant that the contents have not been proved. Agreement Exhibit 174 shows that there is apparent tampering in figure 5 of the year 1975. Figure 6 is over written. The manner in which figure 5 is scribed in the entire document shows that there is apparent tampering. Even if it is held that the time for execution of sale deed was October 1975, which is also stated by P.W. No. 1, it cannot be said that time was the essence of contract. The substantial question of law No. (iii) is answered against the appellants.

33. The agreement Exhibit 174 does not refer to the recourse to the parties if the sale deed is not executed by the end of October 1975. The plaintiff called upon defendant No. 1 vide notice dated 23.11.1978 to execute the sale deed. Despite service of notice no reply was issued by the defendant No. 1. Considering the cause of action suit has been filed within limitation. Both the Courts

below have recorded concurrent findings of facts in respect of limitation which cannot be interfered with. Hence the alleged tampering in Exhibit 174 will not help the defendants. Simultaneously, it is to be held that the substantial question of law at Sr. No. (iv) needs to be answered in favour of the plaintiff.

34. The defendant Nos. 1 and 2 have put up a theory of partition effected on 15.05.1970. It is contended that land Sy. No. 24 was allotted to the defendant No. 2. Mutation entry No. 144 at Exhibit 158 has been certified on 22.09.1976. The plaintiff raised objection for the theory of partition on the ground that it is concocted and false. The defendant Nos. 1 and 2 have inconsistent claim regarding partition. Both these witnesses do not corroborate as to when and how the partition was effected. The mutation entry No. 144 certified on 22.09.1976 is long standing one and it shows that the defendant No. 2 was the owner of the suit land. The parties are Muslim. It has already come on record in the pleadings as well as depositions of defendant Nos. 1 and 2 that after demise of father, Sy. Nos. 23 and 24 devolved upon them. The defendant No. 01 alienated his share of Sy. No. 23. He also specifically admits that suit land was allotted to the defendant No. 2. Even in the absence of any partition deed Sy. Nos. 23 and 24 would devolve upon the defendant Nos. 1 and 2, as per the Muslim law after demise of their father. Hence mutation entry No. 144 cannot be over emphasized. By the conduct of the parties in all probabilities, the defendant No. 2 can be said to be the owner of the suit land.

35. If the defendant No. 2 is held to be the owner of the suit land then execution of the agreement Exhibit 174 by the defendant No. 1 proposing to sale the suit land to the plaintiff is without any authority. He is incompetent to enter into contract. Simultaneously, the defendant No. 2 is the owner and he has sold out parcels of suit lands to the defendant Nos. 3 to 5, which cannot be faulted. Both the Courts below have lost sight of vital aspect of the matter that there was no privity of contract between the plaintiff and the true owner and thus the lower Appellate Court has committed patent illegality in decreeing the suit for specific performance of contract.

36. Both the Courts below recorded that the defendants are unable to prove their plea that the transaction was money lending one and the signatures were taken on blank stamp paper. The execution of the agreement at Exhibit 174 is proved and the findings are concurrent in nature. I have already observed that the factum of partition cannot be given undue importance because the parties are Muslim.

37. Another facet of the matter is that it is not that the distribution of the assets after demise of their father cannot be reported to the revenue authorities. The partition occurred on 15.05.1970 either orally or through document has been effected in the revenue record in the year 1976. Such partition cannot be said to be impermissible or bad in law *ipso facto*. Interestingly,

the defendant No. 1 did not challenge the alienations made by the defendant No. 2 vide registered sale deeds Exhibit 235 to 238. By preponderance of probabilities, it can be said that the defendant No. 1 was never owner. I am of the considered view that findings of the lower Appellate Court the defendant No. 2 is not owner of suit land is patently illegal.

38. The defendant No. 2 sold different parcels of Sy. No. 24 to defendant Nos. 3 to 5 vide registered sale deed at Exhibit 235 to 238. Those sale deeds reflect that for valuable consideration the alienations were made and possession was also handed over to them. The first registered sale deed was executed on 07.12.1976. Second sale deed was executed on 28.02.1979. The suit is filed on 29.10.1979. It is incomprehensible as to why the plaintiff did not file the suit promptly. There is no justification as to why the notice Exhibit 210 dated 23.11.1978 was issued by the plaintiff belatedly calling upon the defendants to execute the sale deed when it was agreed between the parties to conclude the contract by October 1976. Before purchasing the property mutation entry No. 144 at Exhibit 158 was disclosing the name of the defendant No. 2 as owner of the suit land. It has come on record that considering the revenue record, the defendant Nos. 3 to 5 proceeded to purchase the suit land. In that view of the matter, I have no hesitation to conclude further that defendant Nos. 3 to 5 are *bonafide* purchasers for value without notice. They have acquired title lawfully and they are in possession of the suit land.

39. The Lower Appellate court is found to have committed perversity in holding that defendant No.2 was not the owner of the suit land and the defendant Nos.3 to 5 are not the bonafide purchaser for value. Consequentially, the issue of hardship and discretion in granting relief of Specific Performance of Contract have also been dealt with most pedantic approach. Defendant Nos.3 to 5 are in possession of the suit land since 07.12.1976 as per their respective sale deeds. They are in possession of the suit land since 1976 to 2025 i. e. 49 years. If the decree for Specific Performance is executed, they will be dispossessed after long span. As against that, plaintiff can be compensated by refunding the earnest amount with interest. Considering the comparative hardship, I find that the loss of defendant Nos.3 to 5 would be irreparable.

40. The reliance is placed by the subsequent purchaser on the judgment of V. Muthusami (Dead) by LRs. Vs. Angammal and others reported in [2002 (3) SCC 316]. The principles laid down in following paragraphs.

“20. Now the question is to what relief is plaintiff is entitled? It is settled position of law that grant of a decree for specific performance is a discretionary one. This court in K. Narendra versus Riviera Apartments (P) Ltd. [1999 (5) SCC 77] held that Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles. It was further held that if performance of a contract involve some hardship on the defendant which he did not foresee while non- performance involving no such hardship on the

plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance and the doctrine of comparative hardship has been statutorily recognized in India.”

“21. In Her Highness Maharani Shantidevi P. Gaikwad versus Savjibhai Haribhai Patel and others [2001 (5) SCC 101], a Bench of three learned Judges held as follows:

"The grant of decree for specific performance is a matter of discretion under Section 20 of the Specific Relief Act, 1963. The court is not bound to grant such relief merely because it is lawful to do so but the discretion is not required to be exercised arbitrarily. It is to be exercised on sound and settled judicial principles. One of the grounds on which the court may decline to decree specific performance is where it would be inequitable to enforce specific performance."

“23. Defendant Nos.3-6 purchased this suit land on February 21, 1975 and they are in possession of suit land by investing a considerable sum for improvement. On these facts, we are of the opinion that a decree for specific relief of the contract would involve hardship on the purchasers defendant Nos.3-6 and no hardship would be caused to the plaintiff and he can be compensated by a decree of compensation. We are also of the view that it will also be inequitable, on the facts and in the circumstances of this case, to enforce specific performance of the agreement, Ex.B-1.”

41. In the above judgment also, defendant Nos.3 to 6 were the purchasers and in possession since 1975. It was held that they would suffer hardship if the decree for specific performance is enforced. In the present matter also, I am of the considered view that decree of Specific Performance of Contract is totally inequitable.

42. Further reliance is placed on judgment in case of A.C.

Arulappan Vs. Ahalya Naik reported in **[2001(6) SCC 600]**. Supreme Court considered various judgments laying down the scope of Section 20 of the Specific Relief Act for exercising discretion for granting relief of Specific Performance of Contract. The principles are reiterated in paragraph Nos.7 and 15 which are as follows :

*“7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.”*

*“15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court. The trial court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses, considered the relevant facts and reached a conclusion. The appellate court should not have reversed that decision disregarding these facts and, in our view, the appellate court seriously flawed in its decision. Therefore, we hold that the respondent is not entitled to a decree of specific performance of the contract.”*

43. In the case at hand also, the Trial Court has rightly

refused decree for specific performance of contract in view of Section 20(2)(b) of the Specific Relief Act. Pertinently, sub section (b) of Sec. 20 of the Specific Relief Act is as follows :

*The specific Relief Act*

- 1. ....
- 2. ....

***“22. Power to grant relief for possession, partition, refund of earnest money, etc.—***

- (1) .....
- (2) .....
- (a) .....

*(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.”*

44. The word ‘defendant’ appearing in Clause (b) cannot be restricted to a person who is privy to the contract. The person who has created interest and subsequent purchasers are also covered by Clause (b). Their hardship has also to be looked into in assessing as to whether the decree of Specific Performance is equitable or not. The Appellate Court has lost site of this vital aspect of the matter. I am of the considered view that substantial question No. (i) will have to be answered in favour of defendant Nos.3 to 5.

45. Learned counsel Dr. Deshpande appearing for the respondent has placed reliance on **judgment dated 06.03.2025 of the Supreme Court in the matter of Rabindranath**

**Pangigrahi Vs. Surendra Sahu in S.L.P. (C) No. 19182 of 2022** to buttress that the substantial questions framed by this Court have no foundation and they cannot be treated to be substantial questions of law. I have gone through paragraph Nos. 7 to 9 of the judgment. The substantial questions were formulated considering the pleadings and evidence of the parties. Those are related to facts in issue which were dealt with by Courts below. The submission cannot be accepted.

46. I have gone through relevant part of depositions of defendant Nos.1 and 2. They have led evidence as per their pleadings. Similarly defendant Nos.3 to 5 led evidence as per their stand. No perversity has been surfaced in their deposition. Defendant Nos.3 to 5 are the subsequent purchasers. Therefore, they are not expected to depose in respect of transaction between the plaintiff and defendant No. 1.

47. For the aforesaid reasons, I am of the view that Lower Appellate court has granted inequitable relief to the plaintiff. Though sale deed has been executed on 24.07.2014 in favour of the plaintiff through court, possession has not been handed over. The defendant No. 1 was aware of the partition and allotment of suit land to the defendant No. 2, still he represented himself as owner and executed agreement Exh. 174. He misled the plaintiff and he is liable to reimburse expenses to plaintiff. The ends of the justice would be met if defendant No.1 is directed to pay earnest amount with interest and the expenses.

48. I therefore, pass the following order :

**O R D E R**

- (i) Second appeal is allowed.
- (ii) Judgment and decree dated 10.11.2006 passed by 3<sup>rd</sup> Ad-hoc Additional District Judge, Latur in R.C.A. No.123 of 2002 is quashed and set aside.
- (iii) The judgment and decree passed by Joint Civil Judge Junior Division, Ausa in RCS.No.10 of 1980 shall stand restored and upheld.
- (iv) The expenses incurred for the execution of the sale deed dated 24.07.2014 shall be recovered by the plaintiff from defendant No.1.
- (v) Decree be drawn up accordingly.

**[ SHAILESH P. BRAHME J. ]**