IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.155 OF 2026

Dr. Indu Patwardhan (deceased)
through legal representatives -
Mrs. Baurawa Sangappa Kadapatti and Ors. ... Appellants
versus
Major Fatesingh N. Thopte (Retd).
Deceased, through legal representatives
Shaliniraje Fatesingh Thopte and Ors. … Respondents

Dr. Abhinav Chandrachud with Ms. Aadil Parsurampuria, Mr. Darshan Patankar i/by Mr. Kunal H. Panjabi, for Appellants.
Mr. Prasad S. Dani, Sr. Advocate with Mr. Vivek Rane, Mr. Sumedh Modak i/by Mr. Aditya Bendre, for Respondent No.1.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 1 APRIL 2026
PRONOUNCED ON : 24 APRIL 2026

JUDGMENT :

1. This Appeal is directed against a judgment and decree dated 22 September 2025 passed by the learned District Judge, Pune, in Regular Civil Appeal No.1053 of 2012, whereby the appeal, preferred by the Appellants against the judgment and decree dated 4 July 2003 passed by the learned Civil Judge, Pune in Special Civil Suit No.202 of 1992, thereby passing a decree of specific performance of contract, came to be dismissed.

2. Shorn of superfluities, the background facts can be stated, as under :

2.1 Major Fatesingh Thopte – deceased Plaintiff, and Dr. Indu Patwardhan – Deceased Defendant No.1, were friends. Defendant No.1 was engaged in

the business of real estate development. The deceased Defendant No.1 agreed to sell Flat No.107, in the building known as “VIN’S SPA”, situated at Boat Club Road, Pune (the suit flat) to the deceased Plaintiff No.1. It was a verbal agreement.

2.2 The Plaintiff claimed that the Defendant No.1 had agreed to sell the suit flat at the rate of 540/- per sq.ft. aggregating to consideration of Rs.5,56,000/-. The Plaintiff claimed to have paid a sum of Rs.4,00,000/- to the Defendant No.1 during the period 28 November 1989 to 6 July 1990, towards the consideration. The deceased Defendant No.1 had issued receipts. The possession of the suit flat was agreed to be delivered on or before 28 May 1991.

2.3 The Defendant No.1 neither obtained completion certificate nor executed a registered agreement for sale of the suit flat in favour of the Plaintiff. Thus, the Plaintiff initially issued a letter on 23 November 1991, and followed it up with a legal notice dated 7 January 1992, calling upon the Defendant No.1 to perform his part of the contract. Defendant No.1 gave no reply. Hence, the Plaintiff was constrained to institute a suit for specific performance of the contract.

2.4 Defendant No.1 resisted the claim of the Plaintiff primarily on the ground of the consideration agreed to be paid by the Plaintiff to Defendant No.1. It was, inter alia, contended that, when the transaction was entered into

between the Plaintiff and Defendant No.1, the market rate of the suit flat was more than Rs.700/- per sq.ft., but having regard to the friendly relations between the Plaintiff and Defendant No.1, and due to persuasion by the Plaintiff, the Defendant No.1 had agreed to sell the suit flat for a discounted price of Rs.650/- per sq.ft. The Plaintiff had also agreed to pay the extra amount towards the additional work in the suit flat and also bear the expenses towards the registration and legal charges. However, the Plaintiff committed default in payment of the balance consideration within a period of three months from 28 November 1989 as was agreed between the parties. Thus, the transaction did not materailze. It was contended, since the Plaintiff had failed to perform his part of the contract within the stipulated period, the Plaintiff was not entitled to the discretionary relief of specific performance.

2.5 By a judgment and decree dated 4 July 2003, the learned Civil Judge was persuaded to decree the suit recording the findings that, the verbal agreement for sale of the suit flat for the consideration of Rs.5,56,000/- was proved; the Plaintiff had parted with the consideration of Rs.4,00,000/- and the Plaintiff was and has been ready and willing to perform his part of the contract, according to its true terms, the Defendant No.1 committed breach of contract, and, therefore, the Plaintiff was entitled to specific performance of the contract.

2.6 Being aggrieved, the Appellants – legal representatives of Defendant

No.1 preferred an appeal before the District Court. By the impugned judgment and decree, the learned District Judge dismissed the Appeal finding no substance therein. Learned District Judge concurred with the view of the trial court that the suit flat was agreed to be sold at the consideration of Rs.5,56,000/- and not at the rate of Rs.650/- per sq.ft., as was contended by the Defendant No.1.

2.7 Being further aggrieved, the Defendants are in second appeal.

3. Dr. Chandrachud, the learned Counsel for the Appellants, would submit that the impugned judgment and decree suffers from manifest error. The Courts below have drawn an unsustainable inference as to the terms of the contract, especially the rate at which the suit flat was agreed to be sold only on the basis of the failure on the part of the Defendant No.1 to give reply to the letter and notice addressed by the Plaintiff. It was for the Plaintiff to establish positively that the suit flat was agreed to be sold at the rate of Rs.540/- per sq.ft. The Courts below have, thus, completely misconstrued the evidence and that vitiated the findings recorded by the courts below.

3. To buttress the submission that the failure to give reply to the notice does not constitute admission of the statements of facts contained in the notice, Dr. Chandrachud placed reliance on the judgment of the Supreme Court in the case of **Union of India V/s. Watkins Mayor and Co.**[1] and a

1 1965 SCC Online SC 242

Division Bench judgment of this Court in the case of **Rajkumar V/s. Debt Recovery Appellate Tribunal, Mumbai and Ors.**[2].

4. Secondly, Dr. Chandrachud would urge, the trial Court committed a grave error in law in not considering the registered agreement for sale executed by the Defendant No.1 in favour of Mr. Sahani in respect of Flat No.104, which is identical in all respects, showing that the said flat was sold @ Rs.650/- per sq.ft. on the ground that the person in whose favour the said sale deed was executed, was not examined by the Defendants.

5. It was submitted that, a registered instrument carries presumptive value. To this end, Dr. Chandrachud placed reliance on a judgment of the Supreme Court in the case of **Jamila Begum (dead) through legal representatives V/s. Shami Mohd. (dead) through legal representatives and Anr.**[3], wherein it was enunciated that the registered document carries with it a presumption that it was validly executed and it is for the party challenging the genuineness of the transaction to show that the transaction is not valid in law.

6. Thirdly, Dr. Chandrachud would submit, the Courts below have misread the evidence of the Architects examined by both the Plaintiff and Defendant No.1, and that led to the passing of the impugned decrees. The evidence of Prakash Prashant Pujara (DW2) was unjustifiably discarded by the courts

2 2003 SCC Online Bom 517
3 (2019) 2 SCC 727

below.

7. Lastly, Dr. Chandrachud submitted that, at any rate, with the passage of more than 35 years time from the date of the alleged verbal transaction between Plaintiff and Defendant No.1, this court would be justified in enhancing the balance consideration to be paid by the Plaintiff to Defendant No.1. Thus, in the event, the Court finds that the Second Appeal is not worthy of consideration, the Respondents – Plaintiffs be directed to pay enhanced consideration as the Court may deem appropriate, submitted Dr. Chandrachud.

8. To support this submission, Dr. Chandrachud placed reliance on the judgment of the Supreme Court in the case of **Ferrodous Estates Pvt. Ltd. V/s. P. Gopirathnam (dead) and Ors.**[4.]

9. In contrast, Mr. Dani, learned Senior Advocate for the Respondents would submit that, none of the grounds sought to be urged on behalf of the Appellants are worthy of giving rise to a substantial question of law. Laying emphasis on the failure on the part of Defendant No.1 to give reply to the pre-suit communications (pages 117 to 119), wherein the Plaintiff had spelled out the essential terms of the contract between the parties, Mr. Dani would urge that the defence based on the rate at which the suit flat was agreed to be sold, was a creature of an after thought.

4 (2024) 13 SCC 456

10. Mr. Dani submitted that, reliance sought to be placed by the Appellants on the sale deed executed in favour of Mr. Sahani on 26 December 1990, is of no assistance as considerable time had elapsed from the date of the agreement for sale between the Plaintiff and Defendant No.1 and the said Agreement dated 26 December 1990. Defendant No.1 being the promoter could have placed on record the documents to show that the flats in the said building were sold to other occupants in the year 1989 at differential rates. On the contrary, a feeble attempt was made to question the very nature of the payment made by the Plaintiff to Defendant No.1 by terming it as deposit. The said wholly inconsistent defence works out the retribution of the primary defence that was sought to be set up by the Defendants.

11. Mr. Dani would urge, since the Courts below have recorded findings that justify the exercise of positive discretion to grant specific performance, no interference is warranted in exercise of the limited appellate jurisdiction as no question of law, much less a substantial question of law, arises for consideration in this appeal.

12. Evidently, there was no document to evidence the agreement for sale of the subject flat between the Defendant No.1 and the Plaintiff. Nonetheless, the factum of verbal agreement for sale of the suit flat can be said to be rather indisputable. The parties were at issue over the consideration which was agreed to be paid for the suit flat. The Plaintiff claimed that, it was at the rate

of Rs.540/- per sq.ft. For Defendant No.1, the considertion was to be paid at the rate of Rs.650/- per sq.ft. Thus, the agreed consideration is at the heart of the controversy. In the absence of any document to evidence the transaction for sale of the subject flat, the attendant circumstances and the contemporaneous conduct of the parties deserve to be taken into account to determine the controversy.

13. It emerges from the record that, the possession of the suit flat was agreed to be delivered on or before 28 May 1991. The Plaintiff addressed a letter on 23 November 1991 to the Defendant No.1, calling upon her to perform her part of the contract. Incontrovertibly, no reply was given to the said letter, though it was duly served on Defendant No.1. Legal Notice (Exh.119) was issued on 27 December 1991. It is a matter of record that even the said legal notice was not replied till the date of institution of the suit. Reply thereto came to be issued on 16 February 1992, after the institution of the suit.

14. The contemporaneous conduct of the parties, assumes significance in multiple ways. First, it underscores the readiness and willingness of the Plaintiff to perform his part of the contract. Second, Defendant No.1 did not controvert the claim of the Plaintiff as regards the agreed consideration. Had the real transaction between the parties was such that the consideration was to be paid at Rs.650/- per sq.ft., Defendant No.1 would not have missed to

state the same at the first possible opportunity. The stoic silence on the part of Defendant No.1, at that stage, therefore, cannot be said to be inconsequential or immaterial.

15. In the case of **Watkins Mayor and Co. (supra),** a submission was canvassed that, since the Plaintiff had given notice to the Defendant therein, claiming rent at a particular rate, and there was no protest on behalf of the Defendant, it must be taken that there was an implied agreement between the parties that the rent would be paid at that rate. In that context, the Supreme Court observed that the submission was untenable. Merely because the Plaintiff had claimed charges at particular rate and there was silence on the part of the Defendant, it cannot be deemed that there was acquiescence on the part of the Defendant and that there was an implied undertaking on its part to pay godown rent at that rate.

16. In the case of **Rajkumar (supra)**, in the context of a debt recovery claim by a bank, the Division Bench of this Court observed that, the failure to give reply to the notice issued by the bank certainly does not amount to admission of the claim or waiver of any objection. Reply or no reply to a notice would be only one of the factors to be considered at the time of decision of the matter. The mere fact that the appellant did not send reply to the notice served by the bank, does not justify a conclusion that the appellant was liable to pay to the bank on behalf of the principal borrower such a huge

amount of the debt.

17. Evidently, the aforesaid judgments turned on their peculiar facts. The fact-situation in the case at hand, is materially distinct. The Plaintiff was seeking performance of the contract to sell the property by putting terms of the verbal agreement in black and white; the consideration at which the suit flat was to be sold was the most significant term. It is in this context, the implications of failure to give reply to the notice were required to be assessed. Thus, Reliance by Dr. Chandrachud on the judgments in the cases of **Watkins Mayor and Co. (supra)**, and **Rajkumar (supra)**, does not seem to advance the cause of the submission on behalf of the Appellants, as in the case at hand, the only bone of contention appeared to be the rate at which the consideration was agreed to be paid. In that context and especially in the absence of any other document to evidence the transaction between the parties, the failure to controvert the claim of the Plaintiff cannot be brushed aside lightly.

18. In a case of the present nature, where the agreement is verbal, the element of preponderance of probabilities assumes even greater significance. The consistent stand and conduct of the Plaintiff before and after the institution of the suit, as regards the agreed consideration, makes the case of the Plaintiff highly probable. Conversely, the defence wavered from one end to another. On the one hand, an abortive attempt was made to contend that

the amount was paid by way of deposit. On the other hand, after the suit came to be instituted, reply was addressed contending that the consideration was to be paid at the rate of Rs.650/- per sq.ft.

19. Even if the inconsistency in the defences is discounted on the premise that the Defendant No.1 is entitled to take inconsistent defences, yet, it is imperative to note that the Defendant No.1 could not place on record any material to show that the consideration was agreed at Rs.650/- per sq.ft. The position of Defendant No.1 assumes importance. Neither the books of accounts nor any other document could be placed on record to show the rate at which the flats in the said building were sold in proximity to the time of the agreement for sale between the Plaintiff and Defendant No.1. Nor any other agreement for sale executed with another purchaser in the same project in proximity to the transaction between the Plaintiff and Defendant No.1 could be pressed into service.

20. Dr. Chandrachud strenuously submitted that the Courts below were clearly in error in discarding the sale Deed (Exh.125) executed on 26 December 1990 in respect of Flat No.104 for a consideration of Rs.6,50,000/- for non-examination of the said witness. This submission, even if taken at bar, appears to be of little assistance to the Appellants. The sale deed was executed on 26 December 1990. In contrast, the transaction between the Plaintiff and Defendant No.1 was that of November 1989. The sale of the

apartments at differential rates in the same project over a period of time, is a well-recognized feature of the transactions in the real estate sector. The time lag of almost one year in two transactions, thus, cannot be completely ignored. Even otherwise, a host of factors determine the price at which a particular unit is sold to a particular person. Thus, the Courts below justifiably declined to draw an inference that the consideration to be paid for the suit flat was at the rate of Rs.650/- per sq.ft. on the basis of the said sale deed executed in favour of Mr. Sahani in respect of Flat No.104.

21. In any event, all these points fall within the realm of thickets of facts. The Courts below have arrived at findings of facts on the basis of evidence appreciated on the touchstone of preponderance of probabilities. Neither there appears misconstruction of documents, nor misreading of evidence. Thus, such findings of facts are not open for interference in the second appeal.

22. Lastly, the submission of Dr. Chandrachud that this court may exercise discretion to direct the Plaintiff to pay enhanced consideration or interest on the balance amount so as to account for the huge escalation in prices, given the passage of time, deserves consideration.

23. Mr. Dani, learned Senior Advocate for the Respondents would, urge that, in the facts of the case, such exercise is not warranted.

24. Undoubtedly, the period of over 35 years has elapsed. There can be no

quarrel with the proposition that the Court may exercise discretion to balance the equities. In the case of **Ferrodous Estaes Pvt. Ltd. (supra)**, the Supreme court enunciated that, regard being had to the facts of each case, it is within the discretion of the Court, as to whether some additional amount ought or ought not to be paid by the Plaintiff once a decree of specific performance is passed in its favour, even at the appellate stage.

25. The material on record indicates that the Plaintiff had parted with a substantial consideration of Rs.4,00,000/-, out of the total consideration of Rs.5,56,000/-. The fact that, more than 2/3 consideration was parted with before 35 years, cannot be lost sight of. Thus the Defendants continued to have the use of the said money and also retain the suit flat with the potentiality of the earnings therefrom, also needs to be factored in. Conversely, the Plaintiff was deprived of the use of the said substantial amount. Thus, time value of money also deserves to be taken into account. On a cumulative consideration of all the relevant factors, a direction for payment of enhanced consideration or interest on the balance consideration does not seem to be warranted in the peculiar facts of the case.

26. The upshot of aforesaid consideration is that the Appeal deserves to be dismissed.

27. Hence, the Second Appeal stands dismissed.

(N.J.JAMADAR, J.)