# Hindurao Annasheb Patil Vs Yeshwant Laxman Yadav

## Second Appeal No. 75 of 1981

**Court:** Bombay High Court

**Date of Decision:** June 21, 1982

**Acts Referred:**
Civil Procedure Code, 1908 (CPC) â€" Section 148

**Citation:** AIR 1983 Bom 60 : (1983) 1 BomCR 106 : (1982) MhLj 794

**Hon'ble Judges:** D.M. Rege, J

**Bench:** Single Bench

**Advocate:** Ajit P. Shah, for the Appellant; Nitin V. Pradhan, for the Respondent

## Judgement

1. This Second Appeal by the heirs of a deceased decree- holder is against the order of the learned District Judge, Sangli, dated 12-3-1980,

dismissing his appeal against the order of the learned Civil Judge, Islampur, dated 13-9-1979 dismissing the decree-holder"s Darkhast No. 39

(Ex. 23) for condoning the delay in depositing the amount in time under a decree for specific performance made in his favour in his suit being Suit

No. 210 of 1960 for specific performance of agreement for sale of S. N. 273, village Bavachi, District Sangli, by the defendant in his favour.

2. The plaintiff-decree-holder had filed the said suit against the Respondent /Defendant for specific performance of an agreement for sale of the suit

land. On 15-1-1969 the Civil Court decreed the suit in plaintiff"s favour, directing the plaintiff to deposit an amount of Rs. 1,500/- in court within a

period of one month from the date of the decree and order the judgment-debtor-defend--and to execute the sale deed on the Decree-

holder/plaintiff making such deposit. In pursuance of the direction the plaintiff deposited the amount of Rs. 1500/- in court on 10-2-1969. The

judgment-debtor however preferred an appeal against the said decree to the District Court at Sangli being Appeal No. 114 of 1969 and obtained

an interim stay of the decree. The District Court dismissed the said appeal on 18-1-1971 but modified the decree of the lower Court by directing

the plaintiff to deposit Rs. 3,000/- (deducting costs of the lower court) within a period of 2 months from the date of the decree of the Appellate

Court. The decree further provided that if the said amount was not paid by the plaintiff as stated above his suit was to stand dismissed with costs in

both the lower courts. At the instance of the defendant, District Court by its order dated 2-4-1971 stayed the execution of the said decree.

Thereafter the defendant preferred a 2nd appeal to this court against the said decree being S. A. No. 427/71. This Court also till the hearing and

final disposal of the appeal stayed execution of the decree. On 26-6-1978 this Court dismissed the appeal and confirmed the decree of the

Appellate Court.

3. Thereafter the plaintiff deposited the amount on 1-3-1979 and filed a darkhast for execution being Regular Darkhast No. 39/79. The said

darkhast was opposed by the Respondent -judgment-debtor on the ground that the same was time barred as the deposit was not made within 2

months from 26-6-78 i. e. the date on which this Court dismissed the judgment-debtor''s S. A. No. 247 of 1977 and confirmed the lower

Appellate Court''s decree. The Appellant-plaintiff therefore on 23-7-1979 made an application for condonation of delay for making deposit.

4. As stated by the plaintiff in the said application he had already deposited Rs. 1500/- on 10-12-1969. The total costs awarded to him by the

lower court and the Appellate Court came to Rs. 566.30. Thus in reality he had to deposit only Rs.933.70. He however could not deposit the said

amount in court because of the stay order, till the dismissal of the defendant''s 2nd appeal by this Court con-firming the order of the Appellate

Court. He further stated that taking into consideration costs of Rs. 306/- awarded to him in 2nd Appeal he was required to deposit only Rs.

627.70 in the Court before 26-6-1978 i. e. within 2 months from the dismissal of the 2nd Appeal on 26-6-1978, which he could not do because

of illness and forgetfulness.

5. The learned Civil Judge firstly found that one of the reasons put forward by the plaintiff for delay, viz., being confined to bed due to illness was

not supported by evidence such as medical certificate. As regards the second reason viz., forgetfulness the learned Judge found that the plaintiff

should suffer for his lack of diligence and promptitude. The court further held that even if the said grounds for delay were held to be genuine, the

decree being condonation the court was not empowered to condone the delay and extend time. The court also held that there was no case also for

exercising its inherent powers under S. 151 of Civil Procedure Code.

6. In an appeal by the plaintiff against the said order of the Civil Judge refusing to condone delay, the learned District Judge dismissed the appeal

and confirmed the order of the learned Civil Judge by holding that in case of conditional decrees, time cannot be extended as provided under S.

148 of the CPC or S. 28 of Specific Relief Act as there was no case of recession of contract in this case. In doing so the learned Judge relied on

an unreported judgment of the Division Bench decision of this Court in the case of Sahadu Tathu Patil v. V. Nayansukh (Civil Appln. No. 3964 of

1958, D/- 19-8-1959) (S. T. Desai and Dater JJ.), followed in another decision of this Court (Vimadalal J.) Bhujangrao Ganpati Vs. Sheshrao

Rajaram, .

7. In his Second Appeal the learned counsel for the appellant has raised mainly two contentions.

8. his first contention was that since this court in Second Appeal did not fix time for payment, it was a mistake of the court, and the plaintiff in

depositing the amount on 1-3-1979 had not committed any breach of the condition of the decree. Therefore it was not necessary for the plaintiff

even to make an application for condonation of delay.

9. It is difficult to see how this contention could be sustained.

10. Firstly the plaintiff''s application for condonation of delay before the lower court was on the basis that the plaintiff ought to have deposited the

amount on or before 26-8-78 i. e. within two months of the dismissal of the 2nd appeal by this court on 26-6-1978, which he was not able to

documents.

11. On various decisions cited across the bar that also seems to be the position in law. the said decisions show that when the Appellate Court

confirmed the lower Court''s decree and dismissed the appeal, the decree of the Appellate Court must be taken to have incorporated the terms of

the decree of the court of first instance and the period allowed for payment of purchase money should be calculated from the date of the appellate

decree.

12. The first decision was of the Division Bench of this court in the case of Satvaji Balajirao Deshmukh Vs. Sakharlal Atmaramshet, .

13. In that case the plaintiff had brought a suit to recover possession of property as a purchaser from defendants 1-6 and to redeem the mortgage

of defendant No.7. The first court having dismissed the suit, the Appellate Court plaintiff''s appeal passed a decree directing the plaintiff to recover

possession on payment to defendants 1-6 a certain sum within 6 months from the date of the decree and then to redeem defendant 7 and on

plaintiff''s failure to pay within 6 months from the date of the decree he should forfeit his right to recover possession. The plaintiff preferred 2nd

appeal and defendants filed cross-objections. The High Court confirmed the decree and dismissed plaintiff''s Second Appeal and defendant''s

cross-objections. Within six months from the High Court confirming the decree the plaintiff deposited in court the amount payable by him and

applied for execution. Defendant No. 7 contended that the plaintiff not having complied with the terms of the decree of the 1st Appellate Court i. e.

not depositing the amount within 6 months from the date of the 1st Appellate Court decision, his right to recover possession in execution was

forfeited . The lower courts upheld the defendants" contention and dismissed the Darkhast. In Second Appeal by the plaintiff the High Court

reversing the order held that the time for executing a decree nisi for possession ran from the date of the High Court decree confirming the decree of

the lower court, for what was to be looked at an interpreted was the decree of the final Appellate Court.

(Underlining supplied)

14. The objection of the learned counsel for the appellate-plaintiff to follow this decision was that it did not lay down any ratio. It was difficult to

accept the said contention of the learned counsel. The ratio of the said decree was be found at Presidency-towns Insolvency Act. 181 of the

report. The court after following various decisions of this Court and one Full Bench decision of the All. High Court (Md. Sulaiman Khan v. Md.

Yar Khan 918890 ILR 11 All 267. reviewed the order of the lower courts and in terms laid down that "what was to be looked at and interpreted

is the decree of the final appellate court in this case the High Court " and has thus negatived the view of the lower courts following the decision of

the Madras High Court in Ramaswami v. Sundara ILR 1908 Mad 28 that the decree of the High Court confirming the decree of the District

decree cannot be interpreted to extend the time fixed in the decree of the District Court. The said decision was a clear authority for the proposition

that once the High Court confirmed the lower Courts" decree, the decree to be interpreted and executed was in all its terms a decree of the High

Court and if therefore the lower court"s decree as confirmed by the High Court laid down any period for payment, such period was to be

calculated from the date of the High Court confirming the decree.

15. Any further authority for the said proposition if needed was to be found in two decisions of the All. High Court. The first was a Full Bench

decision of that court in the case of Md. Sulaiman Khan v. Md. Yar Khan ILR 1889 11 All 267. There the court held that the effect of S. 579 of

CPC was to cause the decree of the appellate Court to supersede the decree of the 1st Court even when the appellate Court merely affirms the

original decree and does not revise or modify it.

16. The other decision of the All. High Court very close to the facts of this case was in the case of Rupchand v. Shamshi-U1Jejan ILR 1889 All

346. There in a suit for pre-emption the decree of the first instance was conditional upon payment of the purchase money within one month from its

date. After the said period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree

affirmed and no fresh period for payment, was expressly allowed by the decree of the Appellate Court. The court held that the decree of the

Appellate Court must be taken to have incorporated the terms of the decree of the court of the first instance. that the period of one month allowed

for the payment of the purchase money must be calculated from the date of the appellate Court''s decree and that payment by the decree holder

within one month from the date was in time.

17. These authorities leave no doubt that in this case the High Court having confirmed the decree of the lower court on 26-6-1978, the High Court

decree was to be interpreted and therefore the time of two months fixed in the 1st appellate court decree which was confirmed by the High Court,

was to be calculated from the date of the decree of the High Court. If that were so the same would expire on 26-8-1978 and so interpreting the

decree which was a conditional decree, as the plaintiff had admittedly failed to deposit the amount on or before that date, the suit was to stand

dismissed with costs.

18. The learned counsel for the plaintiff has however contended that since the High Court in Second Appeal while confirming the 1st Appellate

Court''s decree had not fixed any time, it was a mistake of the court for which the plaintiff should not be made to suffer and the plaintiff could

deposit the amount any time after the date of the High Court decree. The High Court not having fixed any period for depositing the amount the

Darkhast could not be dismissed on the ground that the plaintiff had not deposited the said amount within two months after the High Court had

confirmed the decree.

19. In support of his said contention the learned counsel for the appellant plaintiff has relied upon an unreported judgment of this court (Kantawala

J.) in S. A. No. 806 of 1973 dated 7th/8th November 1977. The appeal was against the order of the lower counts extending the date before

which the amount was to be deposited under a decree for specific performance of agreement to sale land made in plaintiff''s suit, he was required

to deposit Rs. 1500/-- on or before January 2, 1970, and in default of payment the suit was to stand dismissed with costs. Against the decree an

appeal was preferred and stay obtained by judgment-debtor. Appeal was dismissed on 9th Oct. 1970. However, the execution of the decree was

stayed at the instance of the judgment-debtor as he wanted to prefer 2nd appeal. On the 2nd appeal being preferred by him a further stay was

granted by the High Court. Pending the said second appeal, the Decree holder also made an application for extension of time to deposit money.

However, no date was fixed either at the time of disposal of appeal or at later stage within which the amount was to be deposited. The decree

holder deposited the amount of Rs. 1500/- on Jan. 23, 1971 and also made an application for extension of time which was granted by both lower

courts.

20. On these facts, the court observed that though an application for extension of time to make the deposit was granted, having regard to the

contract that had taken place strictly speaking such an application was not called for because it was the duty of the court to fix a date by which the

amount of Rs. 1500/- ought to be deposited in the trial court. The decree of the trial court was passed on 17th Dec. 1969 and the deposit was

required to be made on or before 2nd Jan. 1970. Prior to that the judgment-debtor preferred an appeal and obtained stay of execution of the

decree. Once the execution of the whole decree was stayed it will be an idle formality on the part of the decree-holder to deposit the amount in the

trial count but the judgment-debtor can get benefit of not executing the sale deed in favour of the decree-holder"".

21. This decision cannot help the learned counsel for the appellate in his contention. Firstly on facts, difference between that case and the present

case was, that in that case the 1st Appellate Court''s decree had fixed a specific date i. decree. 2nd Jan. 1970 by which time the payment was to

be made. while in this case a time was fixed by a period viz., 2 months. In that case therefore on the High Court confirming the lower court''s

decree, if the High Court decree were to be interpreted by incorporating therein the terms of the lower court''s decree, then by the time the High

Court confirmed the decree, the date fixed by the lower court for payment i. decree. 2-1-1970 was long over and the decree had become

unexecutable. That was why the court had to observe that it was the duty of the court to fix a date by which the amount was to be paid and strictly

speaking no application for extension of date on the part of the decree-holder was needed. On that very ground it negatived the contention of the

learned counsel for the judgment-debtor that, on the decree-holder not having deposited the amount on or before 2-1-1970 in spite of the appeal

being filed and stay of execution being obtained by the judgment-debtor, the decree holder had committed a default. The court also rightly pointed

out that if the contention of the learned counsel for the Judgment-debtor were right then he ought to have succeeded in appeal but in the appeal he

had failed. Apart from that the said decision does not deal with the point at, issue before me in this case nor does it seek to lay down any ratio as

contended by the learned counsel for the Appellant/plaintiff. In that view of the matter the said decision cannot help the learned counsel for the

plaintiff in his contention and his said contention cannot be accepted.

22. The other contention of the learned counsel for the appellate/plaintiff was that in any event although admittedly the decree in this case was a

conditional decree the court had jurisdiction to condone the delay. On the other hand it is contended by the learned counsel for the respondent that

the decree being a conditional decree the court had no jurisdiction to condone the delay.

23. In an unreported decision of the Division Bench of this Court in the case of Sahadu Tathu Patil v. V. Nayansukh (Civil Appln. No. 3964 of

1958, Dt. 19-8-1959) (S. T. Desai and Datar JJ.) this court has in terms held that in the case of a conditional decree the court had no jurisdiction

to extend time. Following the said decision and also certain observations of the Supreme Court in Mahanth Ram Das Vs. Ganga Das, excluding

the application of S. 148 of CPC to conditional decree, this court (Vimadalal J.) in Bhujangrao Ganpati Vs. Sheshrao Rajaram, has also held to

the similar effect.

24. The learned counsel for the plaintiff has drawn my attention to two decisions of the Bench of a single Judge of this court viz., Bhole J. in the

case of Babulal Vithoba v. Jagannath Sakharamji 1970 M LJ 481 and K. K. Desai J. in the case of Maruti Vishnu Kshirsagar Vs. Bapu Keshav

Jadhav, where it was held that the court had the power in such cases to extend time. However. in these two cases, the aforementioned Division

Bench decision of this court was not cited. In view of the decision of the Division Bench, it was not possible to follow the view taken by this court

in the said two decisions.

25. However as against the said decision of this court in Shahdu Patil"s case the learned counsel for the appellant in support of his contention has

relied on the decision of the Supreme Court in K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar, as laying down a proposition contrary

to the one laid down in the aforesaid decision of this court viz., that even in case of a conditional decree the court had jurisdiction to extend time.

As I will presently point out the said decision does not lay down any such proposition. In fact the court there was not even dealing with the

question of court"s power to extend time in conditional decree.

26. To appreciate the finding and/or observations in that case on which the learned counsel for appellant has relied, it would be proper to set out

somewhat in detail relevant facts of that case. There the facts were:

27. Initially a decree for specific performance of an agreement to sell a bungalow was passed by the trial court in favour of the plaintiff who was a

lady. The said property was subject to a mortgage in favour of a bank. In the decree the trial court had directed the plaintiff to deposit the

mortgage amount plus Rs. 5000/- with interest. The whole consideration, excepting the mortgage amount and a sum of Rs. 5000/- had already

been paid at the time of the agreement and possession had been made over to the plaintiff. The decree also provided that the amount should be

deposited into court by the time specified therein failure to documents so would result in the dismissal of the suit. The plaintiff did not deposit the

amount in time. but some months later she paid the mortgage money to the mortgage bank and took as assignment of its rights and got herself

impleaded as 2nd plaintiff in the suit which by then had been instituted by the bank against the defendant. Eventually the mortgage suit resulted in a

decree in favour of the plaintiff and by then the amount due had swollen to Rs. 11 lakhs. The plaintiff appealed to the High Court. However the

court rejected plaintiff"s most of the contentions except one. The court while affirming that the direction to make payment within 3 months was

valid vacated the default clause namely the dismissal of suit on non-payment within that time. The plaintiff thereafter moved the court by

interlocutory application for giving credit for the amount paid by her to the mortgagee bank and to pass a final decree in her favour. That was

refused by the court. Ultimately it appears two applications came to be made one by the plaintiff appellant for extension of time by way of

adjustment of the mortgage amount paid by her. This application was refused. The other was by the respondent/defendant for a decree for

rescission of the contract for sale for non-payment of amount in time. This application was granted and decree for rescission of contract and for

delivery of possession with mesne profits was passed. It was only this order of the court refusing to extend time by way of adjustment of the

mortgage amount, that was being dealt with by the Supreme Court . Before the Court. the decree or order that was for interpretation was a

decree/ order which had fixed a time of 3 months for depositing the amount in court without there being a default clause, which was earlier vacated

by the High Court. The court was not dealing with a conditional decree as in this case. but was dealing with a decree only fixing time for payment

and with the question how the court should exercise powers of extending time equitably even after the decree was passed, without necessarily

rescinding the contract on non-payment of the amount in time, at the instance of the judgment-debtor under S. 28 of the Specific Relief Act. In fact

the court in that case had in the end come to pass a fresh conditional decree providing inter alia that if the amount mentioned was not paid within 6

months from the date of the order the appeal was to stand dismissed.

28. In the light of the aforesaid facts the observations of the court on which the learned counsel for the appellant has relied may be looked at.

29. There the court, after stating, that read in the light of S. 28 of Specific Relief Act and rulings on the point, the proper course in this situation was

to pass a decree for specific performance which would for all purposes be a preliminary decree and the suit would continue and be under the

control of the court until appropriate motion was made by either party for passing a final decree observed at Presidency-towns Insolvency Act.

513 of the report as follows:

It is perfectly open to the court in control of a suit for specific performance to extent the time for deposit, and this court may documents so even

now to enable the plaintiff to get the advantage of the agreement to sell in her favour. The disentitling circumstances relied upon by the defendant-

respondent are offset by the false pleas raised in the course of the suit by him and rightly negatived. Not are we convinced that the application for

consideration and extension of time cannot be read, as in substance it is, as a petition for more time to deposit. Even so, specific performance is an

equitable relief and he who seeks equity can be put on terms to ensure that equity is done to the opposite party even while granting the relief. The

final end of law is justice, and so the means to it too should be informed by equity shall documents equity. Here, the assignment of the mortgage is

not a guileless discharge of the vendor''s debt as implied in the agreement to sell but a disingenuous disguise to arm herself with a mortgage decree

to swallow up the property in case the specific performance litigation misfires. To sterilise this decree is necessary equity to which the appellant

must submit herself before she can enjoy the fruits of specific performance"".

30. On that basis the court thought that an opportunity should have been given to the appellant to deposit into court the amount directed by the trial

court together with interest down to date at 11%, as a matter of equity, only after nullifying the advantage gained by the appellant by taking

assignment of the mortgage and thereafter again came to pass a conditional decree as mentioned above.

31. As pointed out above, the Supreme Court in that case was not considering the question of court''s power to extend time in the case of a

conditional decree as in this case, for there the default clause in the decree making it conditional was already vacated by the High Court when

question of extending time for deposit on equitable consideration came for consideration. The court was only concerned with the equitable

principles on which the court could extend time for the deposit even after the final decree for specific performance was passed and the amount was

not deposited in time, before rescinding the contract on that basis on judgment debtor''s application in the same suit u/s 28 of Specific Relief Act.

The court having found in that case such an equity existed in favour of the plaintiff it extended time to deposit the amount by her but at the same

time on equitable grounds deprived her of the advantage that she got, under the mortgage decree. The ratio of the said decision will have therefore

no application to the facts of this case.

32. In that view of the matter in this case the lower courts were right in holding that the decree being conditional the court had no jurisdiction to

extend time.

33. However, even if it were held that even in case of a conditional decree the courts were entitled to extend time on equitable grounds, still in this

case, as found by the first court the plaintiff had not made out any sufficient ground for exercise of such equity in his favour. The grounds on which

condonation of delay was sought were -- (1) being confined to bed due to illness, and (2) forgetfulness. So far as the ground of illness was

concerned, as the court has found, the plaintiff had not produced any material to substantiate the same. As regards forgetfulness which showed

lack of diligence and promptitude, it can hardly be any ground for exercise of equity in favour of the plaintiff.

34. The result therefore was that this appeal fails and is dismissed with costs.

35. Appeal dismissed.