

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.14 OF 2010
ALONGWITH
CIVIL APPLICATION NO.43 OF 2010**

The Ghodganga Sakhar Karkhana	]	
A registered Corporate Body,	]	
governed under the Maharashtra	]	
Co-op. Societies Act, having it's	]	Appellant
office at Raosaheb Nagar, Nhavare,	]	(Ori. Plaintiff)
Tal. Shirur, District Pune.	]	
	]	

Thru' Shri. Sambhajirao Vasantrao Patil	]
Age about 55 years, Occ.: Service	]
R/at Nhavare, Tal. Shirur, Dist. Pune	]
duty authorised by the managing body	]
of Ghodganga Sakhar Karkhana	]

Vs.

Shri Sopan Sitaram Kokade	]
Age : 58 years, Occ.: Agriculture	]
R/at Nhavare, Tal. Shirur, Dist.Pune	]
(since deceased) thru' LRs.	]

1 Smt. Muktabai Sopan Kokade	]	Respondent/s
Age: Adult, Occ.: Housewife	]	(Ori. Defendant/s)
	]	
2 Shri. Sitaram Sopan Kokade	]	
Age : Adult, Occ.: Service	]	
	]	
3 Shri. Ramesh Sopan Kokade	]	
Age : Adult, Occ.: Agriculture	]	

4 Sou. Ujabai Choudhari]
Age : Adult, Occ.: Not known]
All resident of Kokadewadi,]
Nhavare, Tal. Shirur, Dist. Pune]

Mr. P.K. Dhakephalkar, Senior Counsel i/by Mr. Jaydeep Deo, Advocate for the Appellant.

Mr. M.S. Karnik a/w Ms. Leena Patil, Advocate for Respondent no.1.

Coram : Smt. R.P. SondurBaldota, J.

Date : 5th February, 2015

JUDGMENT :

1 The appellant is the original plaintiff, who had filed suit being Regular Civil Suit No.354 of 2001 for specific performance of agreement dtd.12th August, 1991 for sale of gat No.815, village Nhavare, Taluka Shirur, District Pune. The respondent is the original defendant. By the order dtd. 21st December, 2005, the trial court dismissed the suit for specific performance but directed the respondent to refund the amounts received by him on various dates, totalling to Rs.35,000/- together with the interest @12% per annum from the respective dates of payment. Being aggrieved by the denial of specific performance, the appellant challenged the order by preferring Civil Appeal No.92 of 2006 to the District Court, Pune. The respondent neither filed cross-appeal nor cross-objections. The appellate court

dismissed the appeal by its order dtd. 14th November, 2008 and set aside the order of refund. Hence, the appellant has approached this court by way of Second Appeal.

2 Mr. Dhakephalkar, the learned Senior Counsel appearing for the appellant submits that the substantial question of law required to be considered in the appeal is obvious from the record of the proceedings. He points out that the appellate court while dismissing the appeal of the appellant has set aside the order of refund of the amount and thereby modified the decree in favour of the appellant in the absence of cross-appeal or cross-objection. According to him, the order of the appellate court is beyond the powers conferred on it by Order 41, Rule 33 Code of Civil Procedure (“CPC”) and hence without jurisdiction. Mr. Dhakephalkar, submits that this interference by the appellate court has reduced the appellant to a situation worse than in what it would have been placed, if it had not preferred the appeal. Mr. Dhakephalkar draws attention of the court to the provisions of Order 41, Rules 22, 33 CPC and the decision of the Apex Court in Banarsi and Others vs. Ram Phal, reported in (2003) 9 Supreme Court Cases, page 606 in support of his argument. Mr. Karnik, the learned advocate appearing for the respondent on the other hand supports the impugned order with a submission that the order passed is in due exercise of the appellate powers of the District Court and amounts to only correction of the trial court's order. As such there is no substantial question of law arising in the appeal for interference by this court.

3 The brief statement of facts needed for deciding the appeal is that by the agreement dtd. 12th August, 1991, the respondent agreed to sell the land at gat no.815, new gat no.16, admeasuring 2 Hectare for the total consideration of Rs.52,323/- to the appellant. During the period 12th August, 1991 to 19th May, 1995, the respondent was paid a total amount of Rs.35,000/- towards consideration. Under the agreement, the sale deed was to be executed within two months from the date of permission from the Settlement Officer. But within a couple of years, the Government of Maharashtra by the notification published in the gazette dtd. 14th September, 1993 had removed the barrier of permission under the Resettlement Act. The appellant had thereupon sent notice dated 10th April, 1996 through it's Advocate to the respondent calling upon him to specifically perform the agreement of sale. By his reply dated 22nd April, 1996 the respondent refused to perform the contract for the reasons stated therein. More than five years thereafter i.e. on 8th August, 2001 the appellant filed suit for specific performance.

4 One of the grounds taken by the respondent to contest the suit for specific performance was that, the suit was barred by the law of limitation. It was contended on behalf of the respondent that, once the Government, by its Gazette Notification dated 19th September, 1993 released the condition of permission of the Settlement Officer to sell the suit land, the agreement became ready for specific

performance immediately. Therefore, the suit ought to have been filed within three years from the date of expiry of two months from 14th September, 1993. In any case, the respondent had, by his reply dated 22nd April, 1996 communicated to the appellant that, he would not be specifically performing the agreement of sale in it's favour. The appellant ought to have filed the suit within a period of 3 years atleast from that date. The Courts below accepted the contention of the respondent to hold that, the suit was barred by the law of limitation. The Appellate Court, while upholding the finding of the trial Court on the issue of bar of limitation, observed inter-alia that, since the suit was beyond the period of limitation the direction given by the trial Court of refund of part consideration received by the respondent, is bad in law and set aside the same.

5 Mr. Dhakephalkar, the learned Senior Counsel refers to Order 41 Rule 22 Civil Procedure Code (“CPC” for short) to submit that the respondent to an appeal who has not filed cross-appeal or cross-objections can, while supporting the decree, challenge only finding in the judgment against him in respect of any issue decided against him and if he desires to challenge any part of the decree, he must file cross-objections to the decree within the time provided under the Rule.

6 The language of Order 41 Rule 22 CPC supports the argument of Mr. Dhakephalkar. So does the decision of the Apex Court in Banarsi case relied upon by him. The decision cited draws distinction between an appeal against a decree and an appeal against judgment in following terms :-

“ . A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar and Anr. - (1970) 1 SCC 685 :[1971] 1 SCR 146 that the right given to a respondent in an appeal to file cross-objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said be aggrieved thereby. Taking any cross objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross objection though certain finding may be against him. Appeal and cross-objection - both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. this was well-settled position of law under the unamended CPC.” (*emphasis supplied*).

7 The Apex Court then refers to the decision of Division Bench of the Calcutta High Court in Jadunath Basak v. Mritunjoy Sett, reported in AIR 1986 Cal page 416, where the Division Bench has distinguished between the respondent's right to challenge an adverse

finding without filing an appeal or cross-objection and the respondent seeking to challenge a part of the decree itself without filing the cross-objection. The Division Bench had held that the latter was not permissible. The Apex Court agreed with the view taken by the Calcutta High Court. It then visualised three situations arising from a decree in a suit and considered the need to file cross-objections/ cross-appeal in each situation. The relevant observations read as follows:

“10. i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (I) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the

explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue.”

8 In same case, however, it was argued before the Apex Court relying upon the provision of Order 41, Rule 33 CPC that even in the absence of appeal preferred or cross-objections taken, the appellate court is not powerless to grant decree in the facts of the case. The Apex Court then considered the scope of Order 41, Rule 33 CPC in following terms:

“15. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice.”

9 The statement of law that can be drawn from the decision cited read with the provisions of Order 41 Rules 22 and 33 CPC would be that, a respondent to an appeal may challenge an adverse finding in the judgment without filing cross-appeal or cross-objection, such challenge amounting to challenge to the judgment and not to the

decree. If, however, the respondent desires to challenge part of the decree, he must necessarily file cross-objection or cross-appeal. The exception carved out to this statement of law is a situation where dismissal of the appeal filed by the appellant would result into any inconsistent, iniquitous, contradictory or unworkable decree coming into existence so as to warrant exercise of power under Rule 33 of Order 41.

10 In the case on hand, the trial court had dismissed the suit with a finding that it was barred by law of limitation. It is the contention of the appellant itself and rightly so that the relief of specific performance cannot be said to be independent or unconnected to the relief of refund of the amount of consideration paid to the respondent. Both the reliefs arise out of the same cause of action. Therefore once it is held that the suit of specific performance is barred by the law of limitation, the trial court could not have granted the relief of refund of the past consideration paid. Section 3 of the Limitation Act provides that every suit instituted, appeal preferred and application made after the prescribed period of limitation shall be dismissed although limitation has not been set up as the defence. There is no discretion in the court in this matter. The provisions of the Section are peremptory and impose a statutory obligation on the court to dismiss a suit, appeal or application, which is filed beyond the period of limitation. The court is bound to apply the law of limitation and the dismissal is automatic. In this position of law, the order of the

trial court granting refund of the consideration must be treated as non-est. It is no order in the eyes of law. Therefore, when the appellate court set aside that order, it was merely declaring the order as non-est. That cannot be said to be an order on merit. There can be one more justification. The nature of the impugned order is akin to the orders in respect of which exception has been carved out by the Apex Court i.e. inconsistent, iniquitous, contradictory or unworkable decree. Such an order would warrant exercise of power under Rule 33.

11 In the clear position of law as seen above under Section 3 of the Limitation Act, Order 41, Rules 22 and 33 CPC and the decision of the Apex Court, the question of law as submitted by Mr. Dhakephalkar does not arise.

12 Mr. Dhakephalkar next submits that findings of the courts below on the suit being barred by the Law of Limitation can also not be sustained, as the same is not in conformity with Article 54 of Limitation Act, which governs the suit for specific performance. The provision reads as follows:

Description of suit	Period of Limitation	Time from which period begins to run
54. For Specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

13 Mr. Dhakephalkar submits that the article provides for two starting points of the period of limitation. The first point is the date fixed in the contract for performance. The second point, in the absence of any such stipulation, is when the plaintiff has notice that performance is refused. The two periods are exclusive to each other and can be available only in succession. The court has to first see whether there is any date fixed for performance of the contract. If there is a date fixed, the cause of action would occur to the plaintiff on such date alone and the period of limitation would start running from that date. It is only when there is no date fixed in the contract that the court can look for the other date of notice of refusal as starting point for the period of limitation to run. He argues that since in the case on hand, the date of performance was fixed under the contract as receipt of permission of the Settlement Officer to sell the suit land, the period of limitation cannot start running until the permission was received and therefore the courts were in error in holding that the suit was barred by Law of Limitation.

14 The argument of Mr. Dhakephalkar cannot be accepted because the events subsequent to execution of the contract have rendered, the stipulation of date of performance of the contract inconsequential. As such the first starting point of period of limitation was not available to the appellant. The first event was publication of Gazette Notification dtd. 14th September, 1993 by the State of Maharashtra cancelling the condition of permission of the Settlement

Officer. With this, soon after execution of the contract, the condition stipulated therein of permission of the Settlement Officer to sell the suit land became redundant. The second event was the appellant himself had, by his advocate's notice dtd. 10th April, 1996 called upon the respondents to specifically perform the agreement. In his reply to the notice, the respondent had in specific terms refused to perform the contract. Consequentially even in the absence of Gazette Notification, the appellants own conduct of demanding specific performance of the contract even before permission of the Settlement Officer was obtained disentitled him to resort to the first starting point of limitation. Hence, the provision applicable was second period of limitation provided of subsequent notice of refusal. Since the respondent had refused to specifically perform the agreement of sale by his reply dtd. 22nd April, 1996, the period of limitation for the appellant to file the suit for specific performance started running from 22nd April, 1996 and the suit filed in the year 2001 was hopelessly barred by limitation.

15 In the circumstances aforesaid, there is no substantial question of law arising for consideration of the court. Hence, the Second Appeal is dismissed.

16 In view of dismissal of the Second Appeal, the Civil Application does not survive, the same is accordingly disposed off.

17 Mr. Deo, the learned Advocate for the appellant requests for continuation of ad-interim order directing the parties to maintain status-quo in respect of the property. The nature of the status-quo being unclear, the request is rejected.

(Smt. R.P. SondurBaldota, J.)