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

**SECOND APPEAL NO.588 OF 2017
WITH
CIVIL APPLICATION NO.11705 OF 2017**

Mesaji s/o Laxman Ubare,
Age: 87 years, Occu: Agriculture,
R/o Basmat, Tq. Basmat,
Dist. Hingoli
Now presently residing at Aurangabad
Through General Power of Attorney
Holder, Rangnath s/o Kishanrao Ubare
@ Vasmatar, Age: 65 years,
Occu: Pensioner, Resident of Khadkeshwar,
Aurangabad, Tq. & Dist. Aurangabad

..APPELLANT
(Orig.Deft.)

VERSUS

Ataulla Khan s/o Faizulla Khan Pathan,
Age: 48 years, Occu: Agriculture,
R/o Mohalla Nasar Shahid,
Basmat, Tq. Basmat,
Dist. Hingoli

..RESPONDENT
(Orig.Plntff.)

Mr V. D. Gunale, Advocate for appellant

CORAM : NITIN W. SAMBRE, J.

DATE : 13th September, 2017

ORAL ORDER:

The present appellant, defendant in Special Civil Suit No.31 of 2011, is owner of land Gat No.28, ad measuring 2 Hectares and 96 R, which was allotted to him being protected tenant under the provisions of the Hyderabad Tenancy & Agricultural Lands Act, 1950 [for short "Tenancy Act"].

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2. Since the appellant-defendant was in need of money, on 26th April, 2006, vide notarized agreement Exh.59 he has agreed to sell the aforesaid property for total consideration of Rs.6,75,000/-.

3. It is then claimed that, of the balance amount of Rs.3,75,000/- on 23rd December, 2006 amount of Rs.75,000/- and on 1st November, 2008 amount of Rs.1,25,000/- was paid to the present appellant vide Exhs.60 and 61. As such, of the total consideration of Rs.6,75,000/-, the appellant has already received amount of Rs.5,00,000/-.

4. Since the appellant was avoiding to execute the sale deed in favour of the respondent, the respondent who is an old person, through his general power of attorney holder issued legal notice dated 17th August, 2011, calling upon the present appellant to execute the sale deed. Last notice to that effect was issued on 30th August, 2011 and suit, being Special Civil Suit No.31 of 2011 came to be filed on 8th September, 2011 seeking a decree for specific performance of contract.

5. Learned Civil Judge Senior Division, Basmatnagar decreed Special Civil Suit No.31 of 2011 vide judgment and order dated 4th July, 2015, thereby directing the appellant-defendant to execute the sale deed in respect of the suit property in favour of respondent-plaintiff after receipt of balance consideration of Rs.1,75,000/-. It was also directed that nazarana, pursuant to the provisions of Section 50-B of the Tenancy Act be also deposited. The present appellant was directed to execute the sale deed

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within three months after deposit of balance consideration of Rs.1,75,000/- in the Court within two months. The appellant was perpetually restrained from interfering in peaceful possession of the plaintiff over the suit property.

6. Feeling aggrieved, appellant preferred Regular Civil Appeal No.46 of 2015, which came to be decided by judgment and decree dated 20th June, 2017, whereby the appellate Court while allowing the appeal partly, substituted the decree by directing the respondent to deposit balance amount of consideration of Rs.1,75,000/- within two months in the Trial Court. It was further directed that the said amount be invested into term deposit by the Assistant Superintendent, Cash and Finance of the said Court with Nationalized Bank. The present appellant was further directed to make an application to the competent authority seeking sanction for transfer of the land under Section 50-B of the Tenancy Act in favour of respondent within six months from the date of the said order. Appellant was also directed to perform his part of contract with further liberty to the appellant to withdraw amount of Rs.1,75,000/- with accrued interest thereon. An order of injunction is passed against the appellant restraining him from disturbing the possession of the plaintiff over the suit property. Thus, the present second appeal.

7. Mr Gunale, learned Counsel appearing on behalf of the appellant would raise following grounds in the form of substantial questions of law :-

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(a) The agreement Exh.59 is dated 26th April, 2006 and the suit was instituted on 8th September, 2011. The Limitation Act prescribes limitation of three years from the date of the agreement and as such, the suit is barred by limitation;

(b) The transaction in question is barred by the provisions of Section 50-B of the Tenancy Act particularly in absence of permission for transfer of such property; and

(c) The respondent-plaintiff was never ready and willing to perform his part of contract. As such, the Trial Court has committed an error in decreeing the suit by ordering specific performance, instead of taking recourse to the provisions of Section 20 of the Specific Relief Act, should have directed refund of the consideration amount already paid along with interest.

8. With the assistance of Mr Gunale, I have perused the judgments rendered by the Courts below.

9. The respondent-plaintiff, so as to substantiate his claim in the suit, has examined himself as PW1 at Exh.36, PW2 Shaikh Habib, an attesting witness to the agreement to sell at Exh.65 and PW3 Balaji at Exh.67. In addition to above, certain documentary evidence was also produced by respondent-plaintiff, whereas the appellant-defendant has examined Kamalakar More, Sub-Registrar, Basmat.

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10. The Trial Court framed issues and amongst other, the issue in relation to execution of agreement was framed, so also payment of consideration, which was unserved against the present appellant. The lower appellate Court also framed points for determination on the same line and answered against the appellant.

11. So far as the first issue of limitation is concerned, the appellant has never raised such issue during the course of trial or first appeal, however, since the said issue is based on legal provisions, Mr Gunale is permitted to canvass the same.

12. It is not in dispute that the limitation prescribed for instituting a suit for specific performance is three years from the last date on which the performance was due. In the present case, agreement Exh.59 was executed on 26th April, 2006, however, the present appellant has received two payments thereafter, on 23rd December, 2006 and 1st November, 2008, respectively as proved vide Exhs.60 and 61 by the respondent-plaintiff by examining attesting witness. As such, the last payment is received by the appellant on 1st November, 2008 and the suit came to be filed on 8th September, 2011, i.e. within three years from the date on which the appellant has received last payment of Rs.1,25,000/-. As such, the claim of the appellant that the suit is not within the limitation is required to be rejected when the suit is filed within three years from the date of last payment received by the appellant.

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13. The next submission of the appellant is in respect of bar of permission under Section 50-B of the Tenancy Act. The said Section puts an embargo on the right of the person, who was allottee of the land from transferee or on the person who has purchased such property.

14. What is required to be noted from the observations made by the Courts below in the backdrop of submissions made by Mr Gunale is, the unregistered agreement to sell Exh.59 (notarized) was accepted by the Courts below in evidence after it was impounded and the respondent-plaintiff has paid court fee thereon. Not only this, the notarized document speaks of handing over of possession to the respondent, however, there is no absolute right or title vested in the respondent-plaintiff. As such, the same prompted him to file a suit for specific performance of contract.

15. Upon perusal of the judgments of the Courts below, it is required to be noted that the Courts below have considered equity in favour of both the parties; by directing the plaintiff to deposit balance consideration of Rs.1,75,000/- in the Court, which is ordered to be invested in term deposit, as also directing the defendant to apply for permission to transfer the land in question, before the competent authority. In that view of the matter, it can hardly be inferred that the Courts below were not sensitive to the provisions of Section 50-B of Tenancy Act and have rather put an embargo on the right of the respondent-plaintiff of having a permission from the competent authority, while getting sale deed executed. As such, the said submission of the appellant is also rejected.

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16. This takes me to the third submission of the appellant that the respondent-plaintiff was not ready and willing to perform his part of contract and pursuant to the provisions of Section 20 of the Specific Relief Act, discretion is vested in the Court, whether to pass a decree for specific performance or to order refund of the earnest amount.

17. What is required to be noted from the written statement of the present appellant and the evidence brought by him on record is, the appellant in toto has denied execution of agreement Exh.59 and also receipt of part consideration initially of Rs.3,00,000/-, thereafter Rs.75,000/- and Rs.1,25,000/- vide Exhs.60 and 61. This prompted the plaintiff to prove payment of the amount by examining himself and attesting witness to the said receipts Exhs.60 and 61. In the evidence of witness of plaintiff, particularly on the issue of Exhs.60 and 61, it is brought on record in categorical terms that the part consideration paid subsequent to execution of agreement Exh.59 is towards consideration of the amount for executing the sale deed of the suit property. From the aforesaid conduct of the appellant, it could be inferred that it was never a case of the appellant that he should be granted benefit under Section 20 of the Specific Relief Act, at the most by ordering refund of earnest money.

18. From the conduct of the respondent-plaintiff and his evidence, it is brought on record that he was always ready and willing to perform his part of contract and it is appellant-defendant, who has failed to obtain

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permission under Section 50-B of Tenancy Act. Rather, the conduct of the present appellant in accepting the amount vide Exhs.60 and 61 speaks of his intention to take the contract in question to its logical end and as such, he has accepted the amount of consideration, which was proved by the respondent. Apart therefrom, absence of a plea to that effect at the behest of the appellant-defendant in his written statement is also required to be taken a judicial note of.

19. In the aforesaid background and having regard to the fact that there are concurrent findings recorded against the appellant, in my opinion, no case for interference in exercise of jurisdiction under Section 100 of the CPC is made out. The appeal, therefore, fails and stands dismissed.

In view of dismissal of the appeal, pending civil application does not survive and stands disposed of accordingly.

(NITIN W. SAMBRE, J.)

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