

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

**SECOND APPEAL NO.695 OF 2016
WITH
CIVIL APPLICATION NO.886 OF 2016**

Nandkumar Achut Sonawane ... Appellant/Applicant

Versus

Mallikarjun Vithoba Bagal ... Respondent

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Mr. Surel S. Shah for the Appellant/Applicant.

Mr. A.S. Kulkarni for the Respondent.

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CORAM : S.C. GUPTE, J.

DATE : 20 MARCH 2017

P.C. :

. Heard learned Counsel for the parties.

2 This second appeal challenges a judgment and order passed by the District Court at Solapur. By the impugned judgment and order, the learned District Judge dismissed the appeal filed by the Appellant herein and confirmed the decree passed by the Trial Court in favour of the Respondent. The decree of the Trial Court directs the Appellant (original Defendant) to hand over possession of the suit land to the Respondent (original Plaintiff).

3 The suit property consists of a plot of land admeasuring 155 sq. meters with construction of about 100 sq. meters therein. The Plaintiff claims to be the owner of the suit property and in actual possession of the

same. It is the case of the Plaintiff that by an agreement for sale executed between the parties on 20 May 2002, the Plaintiff agreed to sell and the Defendant agreed to purchase the suit property at or for a consideration of Rs.5,05,000/-. The Defendant paid Rs.1,05,000/- and the balance amount was agreed to be paid at the time of execution of the sale deed, which was to be within one month from the date of the agreement to sale. It is submitted that the Plaintiff had always been ready and willing to perform his part of contract by executing the sale deed in respect of the suit property against payment of balance consideration. It is submitted that the Plaintiff from time to time requested the Defendant to complete the sale, but the Defendant refused to do so. In the premises, the Plaintiff decided to cancel the agreement for sale and issued a notice to that effect to the Defendant on 17 September 2011. It is averred in the plaint that after execution of the agreement for sale, the Defendant requested the Plaintiff to allow the former to use the suit property as a licensee for a few days and accordingly, he was allowed to use the same. The Plaintiff, in the premises, prayed for a declaration of rescission of the contract and possession of the suit property. The Trial Court decreed the Plaintiff's suit, holding that the Plaintiff had been ready and willing to perform his part of the contract, but the Defendant failed to perform the agreement for sale and that the Plaintiff was, accordingly, entitled to cancel the suit agreement and recover possession of the suit property from the Defendant.

4 The decree of the Trial Court was confirmed in the appeal by the learned District Judge in the impugned judgment and order. The learned District Judge agreed with the finding of the Trial Court that the Plaintiff had proved that he was ready and willing to perform his part of the

contract, but the Defendant was not ready or willing to perform his part. The learned Judge also agreed with the finding of the Trial Court that the Defendant had failed to prove that he had paid the balance amount of the agreed consideration towards purchase of the suit property. The lower Appellate Court, in the premises, agreed with the finding of the Trial Court that the Plaintiff was entitled to cancel the contract and recover possession of the suit property, which was said to be given to the Defendant not in part performance of the suit agreement, but as a licensee on his request. These are broadly questions of fact. The two Courts below have come to concurrent findings on them. No substantial question of law arises in connection with the findings, which are possible conclusions supported by evidence and which cannot be said to have been arrived at by considering any irrelevant or non-germane material or failing to consider any relevant or germane material.

5 Learned Counsel for the Appellant submits that the Plaintiff's suit is barred by the law of limitation. Learned Counsel submits that this specific contention was negated by the lower Appellate Court on the basis that the Defendant had not claimed before the Trial Court that the suit was so barred. Learned Counsel submits that under Section 3 of the Limitation Act, 1963, it is the responsibility of the Court to consider whether or not the suit was within limitation, even if the Defendant had not specifically raised that issue. In a case like this, where the claim is for cancellation of an agreement for sale for its non-performance by the defendant, ordinarily it would be for the plaintiff-vendor to extend the time for performance by the defendant-purchaser. The cancellation may come after the defendant-purchaser fails to perform his part despite such extension. Both Courts

below have found that the Defendant was not ready and willing to perform his part of the contract, despite the Plaintiff having given him time and called upon him to do so. In the premises, finally by a notice dated 17 September 2011, the Plaintiff cancelled the suit agreement and sought recovery of possession of the suit property. The suit, being filed within about two months thereafter, cannot be said to be barred by the law of limitation. In any case, a plea of bar of limitation in a case like this requires a foundation to be laid in the pleadings of the parties. As the lower Appellate Court has rightly observed, there was none in the present case.

6 In the premises, there is no merit in the second appeal. The Second Appeal is, accordingly, dismissed. No order as to costs.

7 In view of the dismissal of the second appeal, the civil application does not survive and the same is also disposed of.

8 At the request of learned Counsel for the Appellant, the Respondent agrees not to execute the decree of possession for a period of six weeks from today.

(S.C. GUPTE, J.)