

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO.194 OF 1994**

Shri. Suryabhan Janardan Shinde

...Appellant
(Original Defendant No.1)

vs.

Shri. Ashok Narahari Shinde & Ors.

...Respondents
(Orig. Plaintiffs & Defendant No.3)

....

Mr. S.M. Gorwadkar, Senior Advocate, i/b. Sujay Gangal, for the Appellant.

Mr. V.A. Thorat, Senior Advocate, i/b. P.J. Thorat, for Respondent Nos. 1 to 6.

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CORAM : S.C. GUPTE, J.**DATED : 2 FEBRUARY 2017****P.C. :**

. The Second Appeal raises two substantial questions of law, namely, whether or not a defendant can claim specific performance of an agreement by way of counter-claim and whether he can maintain a claim of part possession under Section 53-A of the Transfer of Property Act in the face of a bar of limitation to claim specific performance. On the first issue, the first appellate court observed that a counter-claim can only be allowed in a money suit and not in a suit for ownership and possession and held that the counter-claim for specific performance filed by the Appellant (original Defendant No.1) was not maintainable. This finding is clearly erroneous. The Supreme Court has clarified the law in this

behalf in the case of **Gurbachan Singh vs. Bhag Singh**¹, holding that there is no such restriction for maintaining a counter-claim, and that in a suit for injunction, a counter-claim for possession could well be entertained. On the second question, the impugned judgment and order of the District Court is based on the decision of this Court in the case of **Adinath vs. Policemant Housing Society**². The view expressed in **Adinath's** case, namely, that the protection under Section 53-A does not survive if the agreement, which is the source of such protection, cannot be enforced due to the bar of limitation, was subsequently dissented from and reversed by a Full Bench of our Court in the case of **Mahadeo Nathuji Patil vs. Surjabai Khushalchand Lakkad**³. The Full Bench held that the statutory protection granted under Section 53-A of the Transfer of Property Act to a transferee in possession is not lost by lapse of time to file a suit for specific performance, if he otherwise satisfies the requirements of Section 53-A, and that the law laid down in **Adinath's** case was, accordingly, not correct. In view of this position, the impugned judgment and order of the District Court will have to be set aside. Considering, however, that the order allowing the appeal and rejecting the Appellant's counter-claim was passed only on the two grounds noted above reflecting on the maintainability of the counter-claim and not by considering the merits of the matter, the Civil Appeal will have to be remanded to the District Court for a fresh consideration in accordance with law.

2. Accordingly, the impugned judgment and order passed by

1 (1996) 1 Supreme Court Cases 770

2 1991 MhLJ 256

3 1994 2 MhLJ 1145

the Additional District Judge at Nasik on 22 January 1993 is set aside and Regular Civil Appeal No.159 of 1988 is remanded to the District Court for a fresh consideration in accordance with law. All rights and contentions of the parties on merits are kept open.

(S.C. GUPTE, J.)