

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

**SECOND APPEAL NO. 537 OF 2017
WITH
CIVIL APPLICATION NO. 717 OF 2016
AND
CIVIL APPLICATION NO. 718 OF 2016
IN
S.A. NO. 537 OF 2017**

Karim Mahammad Mulani ... Appellant/Applicant.

V/s.

Ekbal Mohammad Mulani & Ors. ... Respondents.

Mr. Vijay Kumar R. Garad, Advocate for the Appellant / Applicant.

Mr. Umesh R. Mankapure, Advocate for Respondent Nos. 1, 2, 3A, 4 to 6.

CORAM : A. M. DHAVALA, J.

DATE : SEPTEMBER 25, 2018.

PC :

1 The Respondents' Regular Civil Suit No.651 of 2008, filed for specific performance of the contract was decreed by the trial court vide judgment dated 05.03.2013, the Appellants herein were directed to deposit the balance amount of Rs. 5000/- for execution of the sale deed in respect of 2/9th share. There was an alternative relief, that in case, there was no permission from the competent authority for transfer of

share, Defendant No. 1 was directed to refund Rs. 70,000/- with interest at the rate of Rs. 6% from 30.12.2002.

2 The original plaintiff challenged the said judgment and decree as no specific performance was granted for remaining 7/9th share of the other defendants. That appeal came to be dismissed by judgment dated 10.12.2014. The aggrieved original plaintiff, has preferred the second appeal. As there was delay of 371 days in filing the present second appeal, civil application no. 717 of 2016 is filed for condonation of the said delay.

3 Learned Advocate Mr. Mankapuare, appearing for the Respondents, raised preliminary objections that the original plaintiff has filed Execution Proceeding No. 65 of 2013 before the Kadegaon Civil Court, Dist. Sangli and in response to the notice, the judgment debtor had deposited Rs.70,000/- alongwith interest at the rate of 6% in the court and the said amount of Rs.1,30,000/- has been received by the appellants herein on 08.07.2015 and that he has also applied vide application at Exh. 29 for deposit of additional interest, which was rejected by the executing court. He, therefore, argued that the appellant cannot prosecute the second appeal, as he has received the entire sum granted as alternate relief to the specific performance. The learned counsel for the applicant submits that amount of Rs. 1,30,000/- has been received by

the appellant, as per the direction of the court and he is ready to deposit the said sum in the court. I find no substance in the contention that the amount was received, as directed by the executing court. When the execution for recovery for the amount was filed, the appellant has received the amount deposited and has also applied for additional interest, it shows that the appellant has accepted the money decree granted as alternate relief granted and the execution proceedings has been disposed of, as the decree is fully satisfied.

4 In the light of this fact, the second appeal for specific performance would not be tenable. The appellants cannot be permitted to take summersault and claim specific performance by ignoring the fact that he has executed the money decree granted in his favour.

5 In view of the above, as a result, the second appeal is not maintainable and deserves to be dismissed.

6 The learned counsel for the Respondents also argued that the delay of 371 days cannot be condoned, as the appellant was regularly attending the executing court. But this point is not required to be decided and hence, the civil applications and the second appeal stands disposed of as not maintainable.

7 The appellant shall be entitled for half of the court fee refund paid on appeal memo.

8 In view of the dismissal of the Second Appeal, the civil application no. 717 of 2016 for the delay and civil application no. 718 of 2016 for stay, both do not survive and they shall stand disposed of.

(A.M. DHAVALE,J.)

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