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

**SECOND APPEAL NO.43 OF 2016
WITH
CIVIL APPLICATION NO.67 OF 2016**

Javed Gulammohammad ShaikhAppellant.

V/s

Ajay Popatlal Patel Respondent.

Mr. Drupad Sopan Patil for the Appellant/Applicant.

Mr. Vijaysingh Thorat, Senior Counsel i/b Mr. Ashok B. Tajane for the Respondent.

CORAM : NITIN W. SAMBRE, J.

DATE : JANUARY 07, 2020

P.C.:

1] This appeal is against concurrent findings. Appellant/original Defendant entered into an agreement on 6/4/1998 for sale of suit property in favour of the Respondent for consideration of Rs 2,25,000/-. The said agreement-Exhibit-27 provides for payment of balance amount of consideration i.e. Rs 2,00,000/- at the time of execution of Sale Deed. On 21/5/1998, Respondent/Plaintiff paid balance amount of consideration of Rs 2,00,000/-. Since present Appellant/Defendant

refused to execute the Sale Deed, which fact Appellant has denied, the suit was brought in action for specific performance or in alternate for refund of the amount alongwith interest being Special Civil Suit No.184 of 2009.

2] Against the claim made, Appellant set up two-fold defence viz (a) that the suit claim is barred by limitation, as the claim is beyond the period prescribed under Article 54 of the Limitation Act and (b) that the transaction in question is arising out of the settlement of Accounts Partnership Firm between parties to the suit, which came to be dissolved on 1/4/1998.

3] Both the courts below held that the suit claim is within limitation as refusal was considered to be in the form of reply to the notice issued by the Respondent/Plaintiff. Apart from above, burden on appellant to prove the fact that transaction was not a genuine transaction for sale of immovable property but was in the form of carrying out settlement of Accounts of dissolved Partnership Firm was not proved by the Appellant.

4] In the aforesaid backdrop, the learned Counsel for the Appellant would raise the following questions of law viz (i) whether the suit claim is within limitation as prescribed under Article 54 of the Limitation Act and (ii) whether transaction in question was genuinely meant to be one for transfer of the property and is establishable under the provisions of the Specific Relief Act.

5] So far as second question of law about genuineness of transaction is concerned, upon appreciation of evidence with his assistance, it cannot be inferred from record that the Appellant/Defendant has discharged his onus of proving the fact that the transaction was not meant for transfer of the plot in question but was in the form of assurance in settlement of Accounts of Partnership Firm. The concurrent findings recorded by both the courts below on appreciation of evidence are in tune with the pleadings, evidence on record and as such, there is no substance in the second question of law.

6] So far as first question of law pertaining to the issue of limitation is

concerned, Article 54 of the Limitation Act reads thus :

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.

7] In a claim for specific performance of contract in the present case which is based on an agreement dated 6/4/1998, it can be inferred from the record that receipt of the total consideration was established by the Respondent/Plaintiff.

8] The last payment came to be made to the Appellant/Defendant on 21/5/1998. Exhibit-27 which is an agreement of sale dated 6/4/1998, does not prescribe any outer limit for execution of Sale Deed. The plain reading of the said document-Exhibit-27 which is produced on record depicts and take this Court upon analysis of the oral evidence, to infer that time was never an essence of the contract in the case in hand.

9] The notice issued by the Respondent/Plaintiff on 17/7/2009 in categorical terms speaks of denial on the part of the Appellant/Defendant to execute the Sale Deed and same came to be termed as cause of action for initiation of Special Civil Suit No. 184 of 2009.

10] While inviting attention of this Court to the evidence of Plaintiff, learned Counsel for the Appellant/Defendant submits that denial of execution of Sale Deed was much prior to issuance of notice dated 17/7/2009. However, the said cross-examination is too vague to stretch to mean that the suit claim was beyond the period of three years from the date of denial of execution of Sale Deed. Rather, by notice dated 17/7/2009, Respondent/Plaintiff has specifically come out with a case of denial of execution of Sale Deed and upon perusal of the reply to the said notice, it was the case of the Appellant/Defendant that denial was much prior to the date of issuance of notice dated 17/7/2009.

11] In the aforesaid backdrop, the claim put-forth by the Appellant/Defendant that suit claim is barred by limitation will be hardly

of any assistance. In the aforesaid background, both the courts below have concurrently held that the claim for specific performance needs to be granted. There are findings recorded that time was never an essence of contract and suit claim is within limitation as prescribed under Article 54 of the Limitation Act. In the backdrop of aforesaid findings recorded by both the courts below, reliance placed by the learned Counsel for the Appellant on the judgment of the Apex Court in the matter of *K.S. Vidyandam and Others vs. Vairavan*¹ will be hardly of any assistance. Apart from above, one more reason to dismiss the present Second Appeal is, decree passed in favour of the Respondent/Plaintiff is already taken to its logical end. Parties are in agreement that Sale Deed in the matter is executed through Court Commissioner on 30/10/2015 and the possession of the suit property is already handed over on 3/11/2015. That being so, no case of interference is made out. Second Appeal fails and the same stands dismissed.

¹ (1997) 3 SCC 1

12] In view of dismissal of Second Appeal, Civil Application No.67 of of 2016 taken out therein does not survive and the same is also disposed of.

(NITIN W. SAMBRE, J.)