

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

**SECOND APPEAL NO.337 OF 2018**

Shri Vilas s/o Ganesh Asarkar,  
 Aged about 65 years,  
 Occupation-Nil,  
 R/o. Sudam Niwas, Sudam Road,  
 Itwari, Nagpur-440 002.

.. Appellant  
 (Ori. plaintiff on R.A.)

.. Versus ..

Smt. Deoyani w/o Harish Komalkar,  
 Aged about 60 years,  
 Occupation-Household,  
 R/o. C/o. Building No.6-D/202,  
 Gavanpada Road, Neelam Nagar,  
 Mulund (East), Mumbai-400 081.

.. Respondent  
 (Ori. defendant on R.A.)

.....  
 Shri S.P. Kshirsagar, Advocate for the appellant,  
 Shri S.N. Bhattad, Advocate for the respondent.

.....

**Coram : Smt. M.S. Jawalkar,**  
**Reserved on : 20.06.2022.**  
**Pronounced on : 11.07.2022.**

**JUDGMENT**

1. **Admit.** Heard the matter finally with the consent of the learned Counsel for the parties.

2. Present appeal has been filed by the appellant being aggrieved by the judgment and decree passed by the District Judge-4, Nagpur dated 13.12.2017 in Regular Civil Appeal No. 156/2015. The appellant is original plaintiff and respondent is original defendant.

3. Case of the plaintiff in nutshell as under :

The plaintiff in the capacity of developer/promoter executed development agreement/agreement to sale dated 29.07.1985 with landlord Nalinibai w/o Nilkanth Gaikwad and others and thereby constructed a ground plus three storeyed building named 'Rajnigandha Apartment' in 1986-87. It was constructed on Nazul Plot No.46 having total area of 4275 sq. ft. at Dhantoli, Nagpur after obtaining requisite sanction from Nagpur Municipal Corporation. Two residential flats bearing B/3 having the area of 462 sq. ft. and B/4 having the area of 531 sq. ft, total admeasuring 993 sq. ft. on the first floor of 'Rajnigandha Apartment' is the suit property.

4. The defendant on 25.09.1986 entered into unregistered agreement of sale of the suit property with transfer of 1/16th land

share in Plot No.46 for purchase of suit property. The agreement was time bound and time was essence of thereof. In the event of non-payment of the agreed amount on or before 01.02.1987, the parties had agreed to *ipso facto* cancel the agreement without payment of damages and compensations. The total amount of consideration agreed was Rs.1,60,000/-. On 12.09.1985 the defendant paid Rs.20,000/- by cash as earnest money and agreed to pay Rs.60,000/- on or before 30.09.1986, Rs.50,000/- on or before 20.12.1986 and remaining Rs.30,000/- on or before 01.02.1987. Despite such agreement, the defendant only paid Rs.20,000/- towards earnest money as a result of which the agreement stood cancelled *ipso facto*.

5. As per the terms and conditions agreed in the event of the defendant committing breach thereof the agreement was to *ipso facto* come to an end and on the payment of earnest money, she was put in possession as licensee on 01.07.1988. The lawful possession was with the plaintiff. The defendant has been occupying the property for last twenty years. On 01.07.1988, the defendant rented out the flat to different tenants for monthly rent of Rs.3,000/- + Rs.3,000/- of two flats. Thereafter, on 08.09.1999 and thereafter on 05.02.2001 the plaintiff issued registered notice to the defendant

calling the defendant to pay outstanding balance with 18% interest as agreed. The defendant did not take step thereafter. Thus, the plaintiff filed the suit for declaration of his ownership for restoration of possession for rents and profits and alternatively for recovery of agreed outstanding amount of Rs.1,40,000/- with interest.

6. It is the contention of the defendant in the written statement filed in the Trial Court that the suit was hopelessly time barred since the agreement entered into 25.09.1986. She had paid entire amount of consideration. The defendant also raised defence of not giving of proper Court fees and categorically denied rest of the contention of the plaintiff. It is further submitted by the defendant that the plaintiff did not execute sale deed in favour of any of the flat owners. Therefore, some flat owners obtained order from Consumer Forum in that regard. It is also contended by the defendant that the plaintiff had handed over the peaceful possession to the defendant not as licensee but as owner and despite several requests still plaintiff did not execute sale deed in her favour. The defendant specifically stated that he has been paying the municipal taxes of the suit property for last more than 20 years.

7. The learned trial Court held that the plaintiff had handed

over the possession to the defendant on 01.07.1988 and as the defendant has not made any payment as per the agreement, as such the possession of the defendant is illegal/trespasser. The plaintiff could have filed the suit for recovery of possession with a period of twelve years. However, the said suit appears to be filed by the plaintiff in the year 2007. The suit filed does not appear within period of limitation and is time barred and on this ground the trial Court dismissed the claim of the plaintiff.

8. Being aggrieved by the judgment of trial court, the plaintiff made appeal before the District Court and the District Court held that no fault seen in the order of Trial Court in dismissing the suit and confirm the order of Trial Court.

9. Shri S.P. Kshirsagar, the learned counsel for the appellant, in support of his contention, relied on the following citations :

- (i) **Vidhyadhar .vs. Mankikrao and another, AIR 1999 SC 1441.**
- (ii) **The State Bank of Travancore .vs. Arvindan Kunju Panicker and others, AIR 1971 SC 996.**
- (iii) **Smt. Shakuntala S. Tiwari .vs. Hem Chand M. Singhanian, (1987) 3 SCC 211.**

(iv) **Narayan Ganpat Bhoite .vs. Smt. Rampyari Suchitram Gupta, 2000 SCC Online Bom566.**

(v) **Fatehji and Company and another .vs. L.M. Nagpal and others, AIR 2015 SC 2301.**

10. Shri N.S. Bhattad, the learned counsel for the respondent, submitted that the orders passed by the trial court as well as the appellate court are perfectly justified and there is no need for interference by this court. The plaintiff was the developer and not the owner. The suit is barred by limitation and so rightly rejected.

11. The only substantial question of law framed by this Court, vide order dated 10.12.2021 is as under :

“Whether both the Courts below have rightly held that the suit was barred by limitation.?”

12. The learned Civil Judge, Junior Division, after appreciating evidence on record, answered issue of limitation in the negative against the plaintiff. It was admitted position on record that agreement of sale between the plaintiff and the defendant was entered on 25.09.1986 and the defendant has paid earnest amount of Rs.20,000/- by cash to the plaintiff on 12.09.1985. The plaintiff's contention was that after payment of earnest amount of Rs.20,000/-

the defendant was never ready and willing to perform her part of contract. It is observed by the trial Court that the defendant though contended that he has paid the entire consideration to the plaintiff and the plaintiff has issued possession letter in her favour, still nothing is filed on record by the defendant in support of her contention. The defendant even not cross-examined the plaintiff nor has led any evidence in rebuttal.

13. It is the contention of the plaintiff that as per agreement payment will be made by the defendant as per the agreed terms and the date fixed for payment of amount is there in agreement. The making of said payment within stipulated period is the essence of contract. On failure, it was agreed that the agreement would be *ipso facto* cancelled. As such, on his own admission, if payment is not made after 25.09.1986 before 01.02.1987, the agreement shall *ipso facto* stand cancelled. It has come on record that on 12.09.1985, the defendant paid an amount of Rs.20,000/- by cash, earnest money and agreed to pay Rs.60,000/- on or before 30.09.1986, Rs.50,000/- on or before 20.12.1986 and remaining Rs.30,000/- on or before 01.02.1987. It is claimed by the plaintiff that the defendant failed to make such payment. As such, the agreement of sale stood *ipso facto* cancelled by 01.02.1987. It has

also come on record that in spite of knowledge that by 01.02.1987, except earnest amount of Rs.20,000/- no payment was made and agreement *ipso facto* cancelled. In spite of this fact plaintiff had handed over the possession to the defendant on 01.07.1988. So declaration to the effect that since the said agreement was cancelled, plaintiffs have become absolute owner of suit property and restoration of possession ought to have filed within three years at least from 01.02.1987. However, the suit is filed in the year 2007. Even as pleaded by the plaintiff that the possession of the defendant is as trespasser could have filed the suit for possession within a period of 12 years, however, the suit is filed after 20 years. As such, the point of limitation is rightly decided by the trial Court as well as the appellate Court. There is concurrent finding recorded by the both the courts below.

14. So far as the reliance placed on **Vidhyadhar (supra)**, the facts involved in the said matter are different from the facts involved in the present matter. In Vidhyadhar's matter party to the suit does not enter into the witness box not stated his own case on oath nor offer himself to be cross-examined by the other side. Therefore presumption would arise that the case set up by him is not correct. However, in the instant matter, both the courts below, on the basis of

pleadings of plaintiff himself arrived at the conclusion that the suit is barred by limitation.

15. The reliance placed on **State Bank of Travancore (supra)** is misplaced as in the said matter, Hon'ble Apex Court held that a permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of the true owners for a period of twelve years or more. Admittedly, in the present matter, payment was not made within stipulated period as per agreement, therefore, the cause of action arose on that date only. In spite of knowledge that the defendant is not acting as per agreement, the plaintiff kept silent till 2007, except issuance of notice dated 08.09.1999 and 05.02.2001 that too for payment of outstanding amount.

16. The said notices itself issued beyond the period of limitation of 12 years i.e. the date on which contract terminated. Contract terminated on 01.02.1987 *ipso facto* which is the day from which limitation starts running. The defendant was put in possession on 01.07.1988 after termination of contract. There is no question of any adverse possession as the plaintiff is not the owner of the

property, but he is land developer. As such, the findings recorded by both the courts below are perfectly justified and needs no interference. Accordingly, I answer the substantial question of law in the affirmative and proceed to pass the following order :

O R D E R

The appeal stands dismissed with costs.

**(SMT. M.S. JAWALKAR, J.)**

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