

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.654 OF 2022**

Balakrishnan Somnath Lahoti,
Age: 64 years, Occ.: Agri & Business,
Resident of Nandurbar,
Taluka and District: Nandurbar.

..Appellant

Versus

Rupchand Dala Patil,
Age: 69 years, Occ.: Contractor,
Resident of Saraswati Colony,
Near Girivihar Society, Nandurbar,
Taluka and District, Nandurbar.

..Respondent

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Mr. J. R. Shah, Advocate for the Appellant.

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**CORAM : S. G. CHAPALGAONKAR, J.
DATE : 12th JULY, 2023.**

ORDER:-

1. The present appellant/original plaintiff takes exception to the judgment and decree dated 28.09.2021 passed by the Principal District Judge, Nandurbar in Regular Civil Appeal No.20/2014, by which the judgment and decree dated 06.02.2014 passed by the Civil Judge, Senior Division, Nandurbar in Special Civil Suit No.27/2007 has been confirmed and the suit of the appellant/original plaintiff for recovery of amount of Rs.5,00,500/- filed against respondent/original defendant has been dismissed. (Hereinafter, parties are referred as per their original status before the Tribunal for the purpose of convenience and brevity)

2. The plaintiff had instituted Special Civil Suit No.27/2007 before the Civil Judge, Senior Division, Nandurbar for recovery of amount of Rs.5,00,500/- from the respondent. The contention of the plaintiff is that he runs the business of sale of cement and construction material.

The defendant is a civil contractor and used to purchase the goods from the plaintiff on credit. As per the understanding between the plaintiff and defendant, defaulted credit bill shall carry interest at the rate of 1.5% per month. According to the plaintiff, in the year 2003 the defendant purchased the goods worth Rs.4,02,930/- on credit. On 12.07.2004, he made part payment of Rs.77,900/- keeping balance of Rs.3,25,000/-. However, till the date of institution of the suit, the defendant failed to pay the balance amount. As such, the plaintiff claims that he is entitled to the decree for the principle amount of Rs.3,25,000/- alongwith interest of Rs.1,75,500/- i.e. total amount of Rs.5,00,500/- from the defendant.

3. Although, the suit was instituted in the year 2007, the suit summon was served on defendant on 19.01.2011.

4. The defendant contends that his credit account with the defendant was settled after repayment of entire dues through five cheques issued during the period from 16.06.2010 to 25.10.2010. The amount of Rs.9,00,000/- has been parted to the plaintiff towards entire dues. The plaintiff admitted the said fact on his letter head, which is made part of record.

5. The Trial Court framed issues based on the pleadings of the parties. The plaintiff filed his evidence affidavit. Pertinently, he did not make any reference to the settlement and consequential payment of Rs.9,00,000/- to him by the defendant during the pendency of the suit. However, during the cross-examination conducted on behalf of the defendant, he admits the receipt of Rs.9,00,000/- in pursuance of document of settlement. The handwritten letterhead dated 24.04.2010 containing settlement is placed on record at Exhibit-48. It stipulates that the total amount of Rs.9,00,000/- is due and payable towards the defendant,

which shall be repaid within a period of six months. It further stipulates that except sum of Rs.9,00,000/-, there are no other dues with the defendant. Pertinently, the defendant paid the amount of Rs.9,00,000/- by issuing five cheques during the period from 16.06.2010 to 25.10.2010. This is exactly six months after execution of the documents at Exhibit-48. Therefore, the contention of the plaintiff that the document at Exhibit-48 and subsequent payment of Rs.9,00,000/- during the period from 16.06.2010 to 25.10.2010 relates to some different transaction, cannot be accepted. Both the Courts below have considered the aforesaid aspects and recorded concurrent finding of fact that the plaintiff failed to prove that the amount claimed by him is due with the defendant.

6. Mr. Shah, learned Advocate appearing for the plaintiff vehemently submits that it was burden of defendant to show that he has repaid the amount, which was due and payable in the year 2003 or the said amount was part and parcel of Rs.9,00,000/- that was paid in the year 2010.

7. It is difficult to accede such contention for simple reason that in the evidence affidavit filed by the plaintiff he did not whisper about any different transaction and receipt of Rs.9,00,000/- for that purpose. On the other hand, the document at Exhibit-48 clearly stipulates that except amount of Rs.9,00,000/-, there were no other dues with the defendant on 21.04.2010. Had the dues of 2003 were pending till 21.04.2010, such stipulation would not have been incorporated in the Exhibit 48.

8. Mr. Shah, learned Advocate appearing for the plaintiff further contends that the Courts below have failed to frame specific issue, thereby putting burden on defendant to show repayment of the amount, which is subject matter of suit. It is difficult to accept such argument

since the suit was instituted by the plaintiff for recovery of the amount and it was for him to prove that such dues were receivable from defendant. Although, the defendant has admitted the transaction as stated in the plaint, he has elucidated admissions during the cross-examination of plaintiff that the plaintiff has received the sum of Rs.9,00,000/- in the year 2010 in pursuance of document Exhibit 48 dated 24.10.2010. In that view of the matter, the burden of the defendant has been duly discharged.

9. It is trite that, the interference in the concurrent finding of the fact is permissible only when the finding of the fact is recorded dehors the pleadings, or is based on no evidence or misreading of material documentary evidence or contrary to the provisions of law. A perusal of the impugned judgments would show that the findings of fact are arrived after due appreciation of the evidence. No perversity is brought to the notice of this Court. The grounds of appeal sought to be canvassed are based on factual aspects of the matter. No substantial question of law arises for consideration.

10. Hence, Second Appeal sans merit and is accordingly dismissed.

(S. G. CHAPALGAONKAR)
JUDGE