

JUDGMENT

PER MANJUSHA DESHPANDE, J.:

The Appellant herein is the Original Plaintiff who has filed Special Civil Suit No. 328 of 2001 before the Civil Judge, Senior Division, Thane. The Appellant's suit came to be dismissed by the judgment and decree dated 31 July 2004, therefore, being aggrieved by the dismissal of its suit, the Appellant/Plaintiff has approached this Court in its Appellate jurisdiction.

2 The Appellant had filed the suit against the Respondent/Defendant for payment of sum of Rs.01,06,07,528/-(Rupees One Crore Six Lakhs Seven Thousand Five Hundred Twenty Eight only) with interest at the rate of 24% per annum from the date of forfeiture of the said amount, till the payment of the said amount to the Appellant. The other prayer was payment of Rs.2,50,00,000/- from the Respondent for loss of business opportunity due to cancellation of allotment of Plot No. 2, Sector-2, Sanpada, Navi Mumbai. The prayers in the suit read as under:

a) That the Hon'ble Court may pleased to quash and set aside the impugned action of the Defendants of retraining an amount of Rs. 1,06,07,528/-(Rupees One Crore Six Lakhs Seven Thousand Five Hundred and Twenty Eight only) in addition to the forfeiture of the EMD paid by the Plaintiffs.

b) That the Hon'ble Court may pleased to direct the

Defendants to repay the sum of Rs. 1,06,07,528/- (Rupees One Crore Six Lakhs Seven Thousand Five Hundred and Twenty Eight only) with interest at the rate of 24% per annum to the Plaintiffs from the date of the forfeiture of the said amount has been retained till the payment of the said amount to the Plaintiffs.

c) That the Hon'ble Court may pleased to direct the Defendants to pay a sum of Rs.2,50,00,000/- (Rupees Two Crore Fifty Lakhs only) to the Plaintiffs for the loss of the business opportunity by cancellation of Plot No. 2, Sector-2, Sanpada, Navi Mumbai.

d) That the Hon'ble Court may pleased to direct the Defendants to the further refund to them a sum of Rs.15 Lakhs which they lost due to the forfeiture of the EMD in respect of the Plot No. 2, Sector-2, Sanpada, Navi Mumbai.

3 The suit was contested by the New Town Development Authority CIDCO who is the sole defendant in the suit. After considering the rival contentions and evidence on record, the learned Joint Civil Judge, Senior Division, Thane has been pleased to dismiss the suit by its judgment and order dated 31 July 2004.

4. The brief facts leading to the present appeal are as under:

According to the Appellant it is a company registered under the Companies Act, 1956. The Respondent is also a company incorporated under the Companies Act, 1956 who is duly empowered to dispose of the lands in exercise of its powers by its Board of Directions by virtue of Section 291 of the Companies Act, 1956. The Respondent is a New Town Development Authority for

new town of Navi Mumbai in terms of Sub-section (3A) of Section 113 of the Maharashtra Regional and Town Planning Act, 1966. In exercise of the powers as conferred on it, the respondent invited tenders for lease of commercial cum residential plots under B.U.D.P., Phase-III, Navi Mumbai. The Appellant applied for Plot No. A-05, Sector-7, New Panvel, Navi Mumbai and Plot Nos. A-22, A-23 and A-24, Sector 14, Kalamboli, Navi Mumbai. Since the Appellant was highest bidder, the Respondent issued a letter of allotment to the Appellant on 11 August, 1995.

5 According to the Appellant, they deposited Rs. 4,94,31,016/- towards the first installment of lease premium apart from EMD (Earnest Money Deposit) in respect of allotment of four plots. As per terms, the allottee could pay lease premium in two installments. Since the Appellant paid the first installment beyond the prescribed period, they had to pay Rs.14,38,834/- towards Delayed Payment Charges (D.P.C.). Even thereafter, they could not make arrangements for making payment of second installment of lease premium, due to financial crunch in the real estate market in Mumbai. Therefore, on 14 October 1996 the Appellant made a communication to the Respondent setting out the above facts and requested them either to cancel the allotment of the plots by forfeiting EMD and refund the balance or grant extension of time for payment of second installment. The Respondent has responded by its communication dated 19 March 1997 informing that the request of the Appellant has been accepted by the Board of Directors and

extension has been granted for making payment of second installment for a period of one year, subject to further approval by the State Government. Despite of the time granted, the Appellant could not make arrangement for making payment of the second installment of lease premium, therefore, they communicated to the Respondent on 12 August 1997 rescinding the contract in respect of allotment of plots and further requesting, to forfeit the EMD amount and refund rest of the amount.

Thereafter, on 2 September 1997 the Appellant requested the Respondent to transfer an amount of Rs. 1,50,00,000/- to the account of M/s. Citi Associates from the amounts payable to them in respect of the cancellation of allotment. Accordingly, the said request was accepted and it was informed to the Appellant that their request was considered, subject to forfeiture of EMD and the 25% of the lease premium. It was also pointed out that the Appellant had not paid an amount of Rs.14,38,832/- towards the interest on account of delay in payment of first installment of lease premium and the said amount was also to be deducted from the amount due and refundable. In response to that, the Appellant on 9 September 1997 informed the Respondent that they are accepting the amount under protest.

6 The Appellant relying on the Board Resolution No. 7517 dated 12 September 1997, claimed that they are entitled to refund of entire amount paid by them less only the EMD, being sum of

Rs.80,00,000/-. It was claimed that the Appellants were entitled to refund of Rs.4,94,31,016/-. However, in flagrant violation of the Board Resolution the Respondent has forfeited the EMD and also sum of Rs.14,38,834/- on account of DPC on the first installment of lease premium and Rs.91,68,694/- on second installment of lease premium, which came to tune of Rs. 01,06,07,528/-.

7. In the meanwhile, in the month of September 1997, the Respondent issued another tender for the disposal of plot at Sanpada, Navi Mumbai. The Appellant submitted its Bid, which was accepted by the Respondent and Plot No. 2, Sector-2, Sanpada, Navi Mumbai was allotted to them. Letter of allotment dated 22 December 1997, was accordingly issued to the Respondent.

The Appellant after acceptance of the allotment, requested the Respondent to adjust the amount due and payable by them in respect of Plot No. 2 at Sanpada to the tune of Rs.2,41,29,042.50/- from the balance amount lying with the Respondent. However, in spite of making their best efforts, the Appellant could not arrange to make payment of first installment of lease premium. Consequently, the said allotment, of plot came to be cancelled by the Respondent and the EMD of Rs. 15,00,000/- came to be forfeited.

8 Thus, according to the Appellant not only the Appellant suffered loss of Rs.15,00,000/- due to action of the Respondent but also suffered loss of business due to cancellation of allotment of said

plot. Therefore, the Appellant filed a complaint before the National Consumer Dispute Redressal Commission, Delhi and thereafter to the MRTP Commission, Delhi for redressal of its grievance, but both the complaints came to be rejected. According to the Appellant, the action of the Respondent in retaining the amount of Rs. 1,06,07,528/- in addition to forfeiture of EMD is unfair, illegal and in violation of the provisions of the New Bombay Disposal of Land Regulation Act, 1975. Therefore, the Appellant filed the Special Civil Suit with a prayer to decree the same in terms of the prayers made in the suit.

9 The Respondent has resisted the suit claim of the Appellant by filing the written statement, and denied all the material allegations made against them, claiming that the suit is hopelessly barred by limitation. It was further prayed to dismiss the suit on the ground of limitation. The Respondent accepted the factual position about floating of tenders accepting the bid of the Appellant and allotment of plots to the Appellant by issuing letter of allotment. It is the stand of the Respondent that the Appellant was under contractual obligation to make payment of lease premium within stipulated period, and in case of delay, the Respondent was empowered to recover the interest on delayed payment. It was admitted that the Appellant had sought extension of time of one year for making payment of second installment, the request was also considered and extension for one year was granted, subject to final approval by the State Government. Though the said request was accepted, however,

the Appellant quit their demand and surrendered the plot in favour of the Respondent. By communication dated 8 September 1997, the Respondent informed their decision to the Appellant, regarding acceptance of surrender, with forfeiture of EMD plus 25% of lease premium.

10 On this background, the Appellant has filed the suit for specific performance. Issues were framed by the learned Joint Civil Judge, Senior Division, Thane, which read as under:

<u>ISSUES</u>	<u>FINDINGS</u>
1. <i>Whether the defendant was entitled to forfeit any other amount over and above the forfeiture earnest money deposit ?</i>	<i>In the negative</i>
2. <i>Whether the Plaintiff prove that he has suffered any additional lossess due to the forfeiture of Rs. 1,06,07,528/-?</i>	<i>In the affirmative</i>
3. <i>Whether Plaintiff is entitled for the recovery of Rs. 1,06,07,528/-?</i>	<i>In the affirmative</i>
4. <i>Whether Plaintiff is entitled for the damages to the tune of Rs. 2,50,00,000/-?</i>	<i>In the negative</i>
5. <i>Whether suit is barred by law of limitation ?</i>	<i>In the affirmative</i>
6. <i>What order and decree ?</i>	<i>Suit is dismissed .</i>

The learned Counsel for the parties have argued on the basis of the above mentioned issues framed by the Joint Civil Judge, Senior Division, Thane. Therefore, we have also proceeded to consider the appeal on the basis of the same issues as framed by the trial Court.

11 The learned Judge has rightly, decided the issue of limitation as a preliminary issue and thereafter dealt with the other issues. While deciding the Issue No. 5, all the relevant dates and events for ascertaining the starting point of limitation, were taken into consideration by the learned Civil Judge, Senior Division. According to the Appellant, the detail statement of account at Exhibit 38 was given to the Appellant by communication dated 9 December 1999. The said communication would be the starting period of limitation. According to the Appellant, for the first time the breakup of all the amounts which have been paid and adjusted, have been communicated to it which also shows forfeiture of EMD and DPC on two installments of lease premium. Therefore, according to the Appellant, that would be the starting point of limitation. Till then there was only exchange of communication between the Appellant and the Respondent in respect of the amounts paid and adjusted towards the lease premium of other plots purchased by the Appellant.

12 As against the said assertion, the case of the Respondent herein is that the Appellant herein had requested the Respondent by communication dated 12 August 1997, which at Exhibit 24 to forfeit the Earnest Money deposited by them alongwith the deductions permissible as the Appellant was not in a position to make payment of the second installment. Immediately on 2 September 1997 the Appellant has requested the Respondent to adjust sum of Rs.1,50,00,000/- on account of Plot Nos. 8 and 9, Sector 2-A,

Koparkhairane for M/s. Citi Associates, thereby requesting the Respondent to adjust the amount towards the payments which were to be made by the M/s. Citi Associates for their allotment of plot before 6 September 1997, from the balance amount lying with them. In response to these two communications, a communication dated 8 September 1997 was addressed to the Appellant, wherein there was reference made to the communications of the Appellant, dated 12 August 1997 and 2 September 1997. In this communication it was informed to the Appellant that the request of the Appellant to forfeit the EMD of Rs.20,00,000/- each in respect of four plots which comes to Rs.80,00,000/- plus 25% of agreed lease premium of the four plots i.e. Rs.2,67,15,509/- is accepted. It was also informed that the Appellant have not paid the interest of Rs.14,38,832/- on account of delay in payment of lease premium, therefore, an amount of Rs.14,38,832/- will be deducted from the amount refundable to the Appellant. Hence, the net amount refundable to the Appellant comes to Rs.2,12,76,675/-, and as per the request made by the Appellant, Rs.1,50,00,000/- will be adjusted against the premium of Plot Nos. 8 and 9, Sector -2A, Koperkhairane allotted to M/s. Citi Associates.

13 It was further informed that, the Appellant should confirm the net amount refundable to them at the earliest so as to enable the Respondent to process the case of refund. Therefore, according to the Respondent, the starting point of limitation was 8 September 1997, whereby the amounts outstanding and the amounts which

were adjusted and to be adjusted were made known to the Appellant herein. The said communication is marked at Exhibit '26'. Relying on the said communication, the learned Judge has been pleased to record a finding that from, perusal of Exhibit 26 it can be safely gathered that, the plaintiff had knowledge that the defendant had intention to adjust the amount of lease premium deposited by them in respect of five plots referred as aforesaid and the plaintiff should have objected to the adjustment of amount disclosed by the Respondent at Exhibit '26', and should have immediately approached the Courts of law by filing suit. It is also observed that if Exhibits 38 and 26 are clubbed together and compared with each other, both these documents disclose, the factum of appropriation and adjustment of the amount in detail. Therefore, the subsequent issuance of Exhibit 38 on 9 December 1999 by the defendant office will by itself not help the plaintiff to extend the starting point of limitation from 9 December 1999. The communication at Exhibit 26 dated 8 September 1997 was issued two years prior to the submission of detail account at Exhibit '38'.

14 The suit has been filed for recovery of money and for compensation in respect of loss of business. The claim of the Appellant will be covered by Article 113 of the Limitation Act. The period of limitation would start when the right to sue accrues. Since Section 113 is a residuary Article which applies to cases for which specific period of limitation is not provided. Therefore, for filing suit in such cases it is always within three years of cause of action. In the

present case, the suit has been filed on 24 September 2001, which is absolutely beyond the period of three years. Therefore, the learned Judge has recorded his finding that the suit is barred by the limitation. Though the said issue has been answered by the learned Civil Judge, Senior Division by, holding that suit is not maintainable, being beyond the period of limitation, however, the learned Judge has also recorded findings in respect of other issues.

The learned Judge has given a negative finding in respect of Issue Nos. 1 and 4, and has given an affirmative finding in respect of Issue Nos. 2 and 3. However, considering that a finding is given in respect of suit being barred by limitation, the findings recorded in favour of the Appellant on other issues do not survive.

15 The learned Counsel for the Appellant has vehemently argued on the issue of limitation. According to him, the starting point of limitation cannot be the letter issued by the CIDCO dated 8 September 1997 at Exhibit 26 for the reason that, the Board Resolution of the CIDCO dated 12 September 1997 at Exhibit 28 provided for deduction of EMD only. The whole case of the Appellant is entirely based on the Board Resolution of the CIDCO which is later in point of time to the letter dated 8 September 1997, therefore, the communications prior to the Board Resolution dated 12 September 1997, become irrelevant if they are contrary to the Board Resolution and will have to be ignored.

It is further argued that the communication dated 8 September 1997, Exhibit 26 reflects that at that point of time the CIDCO intended to deduct EMD of Rs.80,00,000/- plus 25% of lease premium Rs.2.6 Crores plus DPC on first installment of Rs. 14,00,000/-. There was no mention about deduction of DPC on second installment of Rs.91,00,000/- and this deduction was an after thought.

16 The Appellant has relied on the alleged admission given during the cross-examination by the defendant witness wherein he has claimed to have admitted that, the refundable amount on surrender of plots has been refunded in phased manner. In the first phase, they have not deducted the DPC. He has further mentioned that in the letter at Exhibit 26 it is not mentioned that DPC will be deducted on the second installment of lease premium. He has admitted that the Board Resolution at Exhibit 29 provides for forfeiture of EMD only, much stress is given on the communication at Exhibit 38 which is the 'balance-sheet' according to the Appellant. According to the Appellant, the DPC from the first and the second installment is contrary to the Board Resolution. For the first time figure of Rs.1.06 Crores (i.e. DPC of 14.3+L+DPC of Rs.91 Lakhs) has been made known to the Appellant, which is also contrary to the Board Resolution dated 12 September 1997. The Appellant further contended that between 1997 to 1999, the CIDCO kept refunding the amounts in phased manner based on the legal opinion. The defendant witness has admitted that, the CIDCO has never

communicated about deduction of DPC, for the second installment after the Board Resolution.

17 The Appellant has claimed that, after the decision of the suit on 31 July 2004, the Appellant had been prosecuting other remedies before the National Consumer Disputes Redressal Commission and before the MRTP Commission from 16 December 1999 to 14 September 2001. Therefore, considering that the Appellant was bonafide prosecuting remedies available under law benefit of Section 14 of the Limitation Act ought to be extended to him.

18 The Defendant/Respondent has argued that they have a preliminary objection as regards limitation. According to the Respondent, the suit is barred by limitation. The Respondent had communicated on 8 September 1997, regarding forfeiture of EMD of Rs.20,00,000/- each in respect of four plots in addition to 25% of agreed lease premium of above four plots which came to Rs.2,67,15,509/-. Apart from that it was mentioned that the Appellant has not paid the interest of Rs.14,38,832/- on account of delay in payment of lease premium. Hence, amount of Rs.14,38,832/- will have to be deducted from the amount refundable to the Appellant and the amount refundable comes to Rs.2,12,76,675/-. With these clarifications about amount due and deducted it was informed that, as requested by the Appellant vide communication dated 12 August 1997 and 2 September 1997, wherein the Appellant had requested to forfeit the amount

permissible under the contract, as they were not in a position to pay the second installment, in spite of grant of extension of time and further requesting to adjust an amount of Rs.1,50,00,000/- on account of Plot Nos. 8 and 9, Sector 2-A, Koparkhairane for M/s. Citi Associates. Therefore, it was very much clear from the said communication dated 8 September 1997, that the Appellant had become aware about the deduction of 25% of lease premium as well as interest on delayed payment of lease premium, were to be deducted from the amount admissible to the Appellant.

In fact, in response to the said communication of 8 September 1997, the Appellant has responded by communication dated 9 September 1997 at Exhibit 27, wherein they have accepted the amount of refund under protest with right to claim the rest of the amount by making representation to the corporation. Therefore, so far as starting point of limitation is concerned, it would undoubtedly start from the date on which the Appellant got knowledge about the deduction made from the amounts due from the CIDCO.

19 It is further pointed out by learned Counsel for the CIDCO that in the communication dated 8 September 1997, it was informed to the Appellant that they should confirm the net amount refundable at the earliest in order to process the case of refund and it was further requested to furnish the original stamped receipts of payment etc. In response to the same, the Appellant has given the details about the plot numbers, original allotment letter number and payment made

against each plot in the communication dated 9 September 1997. Therefore, it is not correct that the Appellant was not aware about the amounts/payments made and whatever was balance and due.

20 The learned Counsel for the Respondent while opposing the other ground raised in the appeal regarding the impermissibility of any deduction except forfeiture of EMD, with reference to Board meeting dated 12 September 1997, has contended that, as per Clause- viii, Item No. 2, the scheme is not available to the Intending Lessee who has surrendered the land with appropriate forfeiture. Therefore, according to him the said Board Resolution dated 12 September 1997 could not have been made applicable to the case of the Appellant wherein request was made on 12 August 1997 to forfeit the amount paid by the Appellant, which was accepted by the Respondent on 8 September 1997. Therefore, the said resolution was not applicable to the concluded contract whereby the amount was requested to be forfeited for default of payments.

21 The learned Counsel for the CIDCO has further opposed the submission made by the Appellant that, the starting period of limitation for the suit would start on 9 December 1999, as it was for the first time the Appellant was informed about the amount which the Appellant has paid and deductions made from those amounts so also the various heads under which amount have been deducted. According to the Respondent, even prior thereto, there was exchange between the CIDCO, and the Appellant as stated above in the form

of communication dated 12 August 1997, 2 September 1997, 8 September 1997 and 9 September 1997, respectively whereby the Appellant was informed about the amounts of deduction made and also regarding deduction of interest on delayed payment for the installment of lease premium. In fact the Appellant vide communication dated 30 December 1997, has requested to refund the 25% of lease premium and delayed payment charges, which were deducted, which also refers to the communication by the CIDCO dated 8 September 1997. The said communication also requests the CIDCO to transfer sum of Rs.18,00,000/- in favour of M/s. Sonal Builders Pvt. Ltd. towards Plot No. 13, Sector-15, C.B.D. towards the EMD payable by them.

Therefore, according to the Respondent, the Appellant ought to have filed the suit for repayment of the amounts claimed by them within three years from the communication dated 8 September 1997 whereas the suit is filed much beyond the said period, hence, on the ground of delay and laches, the suit has rightly been dismissed by the trial Court.

So far as the issue of limitation is concerned, the learned Judge has rightly taken into consideration the letter at Exhibit 26 and details statement of account at Exhibit 38, which was given in response to the Appellant's letter at Exhibit 26, which contained the adjustment and forfeiture of amount due and recoverable from the Appellant towards abandonment of the claim for allotment of five

plots. From Exhibit 26 it could be gathered that, the Appellant had knowledge that Respondent, had every intention to adjust the amount of lease premium deposited by them in respect of five plots. Therefore, the Appellant ought to have objected to such adjustment of the amounts disclosed by the Respondent in pursuance to Exhibit 26 and approach the Court immediately. The Appellant had ample knowledge that Respondent is going to adjust the amounts deposited with them towards purchase of five plots.

22 As regards the application of Section 14 of the Limitation Act under, which the litigant is entitled to exclude the period spent in pursuing other civil proceeding, provided that the party agitating satisfies the Court that he was prosecuting the suit bonafide. In the present case, one of the proceedings was filed in 1999 and other was filed on 14 July 2000. Both the proceedings have been initiated after a period of two years from receipt Exhibit '26' dated 8 September 1997. Hence, considering that it is a suit for recovery of money and also for compensation in respect of loss of business. The Appellant should have shown due diligence in pursuing the other remedy. The learned Counsel for the Appellant has placed on record the judgment in the case of ***S. A. Co-Operative Housing Society Ltd. and Ors. V/s. Rivin Builders and Ors.***¹. The Appellant has placed reliance on paragraph 11 of this judgment wherein the Hon'ble Apex Court has observed that, in case the appellant chooses to file a suit, the period taken in pursuing the complaint under the Consumer

1 2016(2) Mh.L.J. 939

Protection Act is to be excluded in terms of Section 14 of the Limitation Act. Relying on the said observation, the Appellant has prayed that in the present case also the Appellant was pursuing remedy under the Consumer Protection Act, therefore, the said period should be excluded.

23 The Appellant has also placed reliance on the decision in the case of *Deokar Exports Pvt. Ltd. V/s. New India Assurance Company Ltd.*² on the point of limitation. The said judgment also pertains to the appellant therein approached the National Consumer Disputes Redressal Commission (NCDRC) prosecuting the said remedy bonafide. The other two judgments in the case of *Shangrilla Apartments Co-Op. Housing Society Ltd. and Ors. V/s. Rivin Builders and Ors.*³ and *Choudhary Sahu (dead) V/s. State of Bihar.*⁴ are on the point that the period spent while pursuing the remedy under the Consumer Protection Act has been excluded in terms of Section 14 of the Limitation Act.

The Appellant has cited three judgments wherein the party had approached the NCDRC and the said delay has been condoned. While in the present case as already stated above, the Appellant had approached the NCDRC itself belatedly. Therefore, all the three judgments would not be applicable in the present case. The Appellant had approached the NCDRC in July 2000 and started

2 2001 SCC OnLine Bom 216

3 2016(2) Mh.L.J. Page 939

4 (1982) 1 SCC 232

point of limitation was 8 September 1997. In view of the difference in this circumstances, the three case of laws are of no avail to the Appellant.

24 However, as already observed by the learned Civil Judge, Senior Division, the Appellant had spent time in pursuing two remedies before filing the suit, both the remedies were filed after lapse of more than two years after the receipt of Exhibit '26', which is the starting point of limitation. Therefore, the case of the Appellant would not be covered under Section 14 of the Limitation Act.

25 Admittedly, Section 14 itself provides that, in computing the period of limitation in any suit, the time during which the plaintiff has been prosecuting with 'due diligence' another civil proceeding, against the defendant, the said period shall be excluded, but in the present case the due diligence which is required to be shown as provided under Section 14 of the Limitation Act is nowhere reflected in the conduct of the Appellant. Resultantly the conclusion recorded by the learned Judge is correct.

26 The Issue Nos. 1, 2 and 3 being interlinked the learned Judge has rightly decided it together. The CIDCO has neither filed any appeal nor any cross objection.

27 The Respondent- CIDCO has placed reliance on the decision

in the case of *Panna Lal V/s. State of Bombay*⁵. The Hon'ble Supreme Court while dealing with Order 41 Rule 33 and Order 41 Rule 22 has explained the scope of power of the Appellate Court which can give relief to a respondent as against other respondents.

28 The Appellant has pressed into service two judgments on the issue of order 41 Rule 22 of the Code of Civil Procedure, 1908. The said Rule creates a right in favour of the Respondents, who may not only support the decree but may state, that finding against him in the Court below in respect of any issue ought to have been in his favour and may also take any cross-objection to the decree. However the said proviso requires that he can do so only if he has filed such cross-objection to the decree. The Appellant has placed reliance on the said judgments in order to oppose the submission made by the Counsel for the Respondent-CIDCO. It was relied only for the purpose of demonstrating, the limitations of the Respondents where they have not filed any cross appeal.

29 The sphere of operation and scope of both the orders are totally different. Order 41 Rule 22 provides that even if the Respondent in a suit has not filed any appeal against the decree, the Appellate Court can grant him relief, in case he has filed the cross-objection as if he has filed appeal against the decree. So far as Order 41 Rule 33 is concerned, it confers vast powers on the Appellate Court to pass any decree, which ought to have been passed in favour

5 AIR 1963 Supreme Court 1516

of any of the Respondents, even though they may not have filed any appeal or objection. It is a provision to do complete justice in a case, even in absence of any appeal or cross-objection by the Respondents. Though such powers have been conferred on the Appellate Court, it is sparingly to be used only to pass orders for doing substantial justice in the matter. Therefore, both the provisions as quoted above are not applicable in the present case for the reason that, the Respondent herein has not filed any cross appeal against the findings recorded against them because of the fact that suit has been ultimately dismissed on the ground of delay.

So far as the exercise of powers under Order 41 Rule 33 is concerned, it is settled position that only if circumstances warrant that in order to do substantial justice, the said powers have to be exercised, meaning thereby, it is the discretion of the Appellate Court, whether or not to be exercise such powers. We do not find any such circumstances, which would warrant exercise of powers as contemplated under Order 41 Rule 33. Therefore, the judgments cited by both the parties are not applicable in the present case.

Therefore, the issues regarding wrongful deduction of interest on delayed payment charges for first and second installment, which have been held in affirmative does not require any interference.

30 The issue No. 4 is regarding the claim for damages for loss of profit of Rs.2,50,00,000/- due to termination of the contract for

allotment of Plot No. 2, Sector 2, Sanpada. The said plot was sponsored by the respondents in 1997. The Appellant's bid was accepted and allotment letter was issued in respect of the said plot. As per terms of allotment first premium of lease has to be made within stipulated period. As per Exhibit '25' the Appellant requested to cancel the allotment of five plots and appropriate the amount refundable to them, in respect of Plot Nos. 8 and 9 at Koparkhairane, and Rs.15,00,000/- in respect of Plot No. 2, Sector-2, Sanpada. However, since the balance amount admissible from the amount to be refunded, was already adjusted towards the Plot Nos. 8 and 9, Sector- 2-A, Koparkhairane, as per the request of the Appellant; there was no balance for further adjustment of Plot No. 2 at Sanpada. Therefore, the Respondent cancelled the allotment for nonpayment of first installment of lease premium.

31 According to the Respondent, after release of amount of Rs.2,67,15,508/- on 20 April 1998, adjustment were already made towards other plots as per request of the Appellant. As a result, there was no balance available for adjustment and since the Appellant failed to make payment of first installment, the allotment was cancelled by forfeiting Rs.15,00,000/- towards EMD.

The Appellant had placed on record project report Exhibit 46 by M/s Ambike Consultants and also examined PW- 2 Prabhakar Ambike, who is a Government approved Valuer. According to him, estimated loss suffered due to cancellation of allotment of plot is to

the tune of Rs.2,50,00,000/-.

Though the Appellant has tried to prove the loss of business opportunity, however, the fact remains that, the Appellant has not paid either of the two installments of lease premium, and there was no balance to their account to be adjusted, as a result, the allotment was cancelled. The said property was never handed over to the Appellant; neither was there any execution of the lease agreement.

Since there was no proof of execution of lease agreement nor any handing over possession, there was no question of quantifying loss of future/prospective business, when no substantial rights had accrued in favour of the Appellant.

32 The learned Counsel for the Appellant has placed reliance on the decision in the case of *M/s. A. T. Brij Paul Singh and Ors. V/s. State of Gujarat*⁶ in support of his claim for damages. The said case is based on breach of contract by the Government. Reliance is placed on Paragraphs 8 and 9 of the said judgment. The said judgment is not applicable to the present case for the reason that the said matter was relating to breach of contract, part of which was already performed by the Appellant, whereas in the present case, the lease agreement was not even executed nor any possession handed over. Therefore, there is no breach of any contract. For the same reason the other case law in the case of *Dwaraka Das V/s. State of M.P. and*

6 (1984) 4 SCC 59

Anr.⁷ will not be applicable in the present case.

The Court below has after appreciating the evidence on record and the facts of the case has rejected the claim for damages. The said findings based on sound reasoning needs no interference.

33 Having considered the pleadings, record of the matter and the arguments advanced by the parties, at length, as discussed above, we hold that the suit is barred by law of limitation. As a result, the other claims in the suit will not survive.

In the above conspectus of the matter, the Judgment and decree passed by the Joint Civil Judge, Senior Division, Thane, is confirmed. The view taken by the trial Court is proper and correct, hence, the First Appeal stands dismissed.

(MANJUSHA DESHPANDE, J.)

(NITIN JAMDAR, J.)

⁷ (1999) 3 SCC 500