

Harish

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.825 OF 2022
WITH
INTERIM APPLICATION NO.30108 OF 2022
IN
SECOND APPEAL NO.825 OF 2022**

Malan Pandurang Lande

...Appellant/
Applicant

Versus

Ramesh Dayaram Shitole & Ors.

...Respondent

Mr. N. G. Rokade i/b D. K. Bhosle, for the Appellant/Applicant

Mr. Vivek V. Salunke, for the Respondents.

CORAM : MADHAV J. JAMDAR, J.

DATE : 1st MARCH, 2023

P.C.:

1. Heard Mr. Rokade, learned counsel appearing for the Appellant and Mr. Salunke, learned counsel appearing for the Respondent Nos. 1 and 2.

2. The Appellant is the Original Defendant No. 3 i.e. subsequent purchaser. The Respondent Nos.1 and 2 are the Original Plaintiff who agreed to purchase the suit land from the Respondent Nos. 2 and 3 and filed suit for the specific performance. The Respondent Nos. 3 and 4 are the Original Defendant Nos. 1 and 2 i.e. Vendors. The Defendant No. 4 is the son of the Defendant Nos. 1 and 2 and the Defendant No. 3 i.e. subsequent purchaser is the daughter of the Defendant No. 4.

3. The Appellant by way of the present Second Appeal is challenging the legality and validity of the impugned Judgment and Decree dated 13th August, 2004 passed in Special Civil Suit No. 553 of 1995 by learned 6th Civil Judge, Senior Division, Pune and the Judgment and Decree dated 6th October, 2022 passed by the Learned District Judge-6, Pune in Regular Civil Appeal No. 758 of 2012. The said Appeal was filed by the Original Defendant No. 3 i.e. the present Appellant.

4. Mr. Rokade, learned counsel appearing for the Appellant who is the Original Defendant No. 3 submitted that, following substantial questions of law are involved in the present Second Appeal.

- i] Whether the courts could have granted the decree which has not been sought in the plaint?
- ii] Whether the Decree of specific performance regarding the suit property could have been granted in the absence of partition of suit property by metes and bounds?

5. Before considering the substantial questions of law raised by Mr. Rokade, learned counsel appearing for the Appellant, it is necessary to set out certain admitted factual position.

6. Admittedly, the Defendant Nos. 1 and 2 i.e. the present Respondent Nos. 3 and 4 i.e. Baburao Bala Teli and Parvatibai

Baburao Teli executed the registered agreement of sale dated 14th September, 1994 in favour of the Plaintiffs i.e. the present Respondent Nos. 1 and 2 with respect to the half share of the property bearing Gat No. 300 situate at Vadgaon Rasai, Tal. Shirur, Dist. Pune. Total area of Gat No. 300 is 4H 78R as well as additional area of Potkharaba of 35 Guntha. In the registered agreement, it is specifically mentioned that 1/2 share of the Defendant No. 1 and 2 is 2H and 39R as well as Potkharaba area of 17.5R. Therefore, total land which has been purchased is 2H 56.5R.

7. It is also admitted position that, Defendant Nos. 1 and 2 have sold the suit property by executing registered sale deed dated 28th February, 1995 in favour of Defendant No. 3. Admittedly, Defendant No. 4 is the son of Defendant Nos. 1 and 2 and Defendant No. 3 is the daughter of Defendant No. 4 i.e. grand daughter of Defendant Nos. 1 and 2. It is also admitted position that, the Regular Civil Suit No. 70 of 1992 was filed by Defendant Nos. 1 and 2 against Defendant No. 4 seeking the partition and the said suit was decreed on 30th September, 1993 by which half share was allotted in favour of Defendant Nos. 1 and 2 and half share was allotted to Defendant No. 4. It is also admitted position that Darkhast for final decree proceeding are pending and the precept has been sent to the collector for partition of the property.

8. In these circumstances, the suit was filed by the present Respondent Nos. 1 and 2 seeking specific performance and for a declaration that the said sale deed dated 28th February, 1995 executed by Defendant Nos. 3 and 4 in favour of the Appellant i.e. Defendant No. 3 be declared as illegal and seeking possession from Defendant Nos. 1 and 2 after the same is received by Defendant Nos. 1 and 2.

9. It is significant to note that, all the Defendants filed common written statement and stand is taken that, the agreement of sale was executed without the consent of the Defendant No. 4 and when the land was not yet partitioned. Further contention has been raised that, the Defendant No. 1 and 2 had sold the land which has come to their share by registered sale deed dated 28th September, 1995 in favour of Defendant No. 3 and Defendant No. 3 is a bonafide purchaser without notice of the suit agreement. Both the Courts have recorded the finding that the Defendant No. 3 is not a bonafide purchaser. The Appellate Court has observed that the onus is always on the transferee to prove that the transferee had no notice of prior agreement and that can only be discharged by leading cogent evidence. In this particular case, Defendant No. 3 who is the transferee has failed to enter into the witness box to prove her case of bonafide purchase. She failed to prove that, she has purchased the property without having knowledge of the suit

agreement. The learned First Appellate Court observed that non examination of the Defendant No. 3 has the effect of drawing an inference against her as provided under Section 114 (g) of the Evidence Act, 1872. The First Appellate Court has also observed that Defendant No. 3 is the daughter of Defendant No. 4 and grand daughter of Defendant No. 1 and 2. All the Defendants are the members of same family and they have filed a joint written statement and therefore, it could not be believed that Defendant No. 3 is the bonafide purchaser.

10. The present Second Appeal has been filed by the Defendant No. 3 who has not been held as a bonafide purchaser. Therefore, in fact once finding is arrived at by both the Courts that the Defendant No. 3 is not a bonafide purchaser and when it has not been shown that the said finding is not a finding recorded on the basis of evidence on record, there is no substance in the Second Appeal filed by her.

11. Mr. Rokade, learned counsel appearing for the Appellant has submitted that the decree which has been passed by the learned Trial Court and which has been confirmed by the learned First Appellate Court by modifying the same to certain extent is beyond the prayers. To appreciate the said contention, it is significant to note certain aspects :-

(i) The Plaintiffs have inter alia sought the following prayer :

अ. यातील प्रतिवादी नंबर १/२ यांनी त्यांना दावा जमिनीचा कब्जा कोर्टाकडून मिळालेपासून ३० दिवसाचे आत वादींचेकडून रु. १८१२००/- घेवून त्या जमिनीची खरेदीखत वादीस करून देणेबद्दल आदेश व्हावा. प्रतिवादी नंबर १/२ यांनी तसे न केल्यास ते कोर्टामार्फत वादीस करून मिळणेबद्दलही यांच बरोबर आदेश व्हावा.

(ii). The learned Trial Court has decreed the suit *inter alia* in the following manner :-

“2. Defendant nos. 1 to 3 shall execute sale deed of suit property Gat No. 300, situated at Mouje Vadgaon Rasai, Tal. Shirur, Dist. Pune in favour of plaintiffs, within a month from the date of decree.

3. If they fails to execute sale deed, plaintiffs can get execute sale deed through the Court at the cost of defendant No. 1.

4. Plaintiffs are directed to deposit remaining consideration of Rs. 1,81,200/- in the court.”

(iii) The First Appellate Court has although dismissed the Appeal however, modified the decree passed by the learned Trial Court in the following manner :-

“3. Defendants no. 1 to 3 shall execute sale deed of half eastern portion of land block no. 300 situated at village Vadgaon Rasai, Tal.

Shirur, Dist. Pune in favour of the plaintiffs.”

12. Mr. Rokade, learned counsel appearing for the Appellant has relied on the decision in the matter of **Bachhaj Nahar Vs. Nilima Mandal & Anr.**¹. In the said Judgment, it has been held that, a case not specifically pleaded can be considered by the Court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. On the basis of said decision of the Supreme Court it is the contention of Mr. Rokade that the prayer as sought in the plaint is that, the Defendant Nos. 1 and 2 be directed to execute the sale deed within 30 days and after receiving possession and be directed to hand over the same to the Plaintiff. However, the decree passed by the learned Trial Court directing that, Defendant Nos. 1 and 2 shall execute the sale deed of suit property in favour of the Plaintiffs within one month period from the date of decree and the learned Appellate Court has directed the execution of the sale deed of half eastern portion of land bearing Gat No. 300 in favour of the Plaintiff which are beyond the prayers. According to learned counsel of the Appellant, this is impossible as the relief granted is not sought in

¹ (2008) 17 SCC 491.

the plaint. However, it is to be noted that, this has been done in view of the contention raised by all the Defendants in the joint written statement which they have filed on 15th February, 2002 in the Trial Court. In the said written statement in paragraph No. 4 it has been *inter alia* contended by all the Defendants as follows.

“४) दावा कलम ३ मधील मजकूर संपूर्णपणे खोटा असून या प्रतिवादींना कबूल नाही.

प्रतिवादी नंबर १, २ व ४ चे म्हणणे की, दावा—जमिनीचे वाटप झालेले नसतांना व प्रतिवादी नंबर ४ ची संमती नसतांना वादींनी करून घेतलेले साठेखत बेकायदेशीर आहे. प्रतिवादी नंबर १ व २ यांना कौटुंबिक गरज असली तरी प्रतिवादी नंबर ४ चे संमतीविना केलेले साठेखत पूर्णत्वःकडे जाणारे नव्हते. म्हणूनच प्रतिवादी नंबर ४ ने वाटप करून संमती देण्याचे ठरविले तेव्हा प्रतिवादी नंबर १ व २ यांनी वादींना कळविले की, “तुमचे साठेखत करार पूर्ततेकरीता प्रतिवादी नंबर ४ संमती देत नाही. त्यामुळे तुम्ही तुमची विसाराची रक्कम रुपये ३०,०००/- परत घऊन साठेखत रद्द करून द्या.” वादींनी त्यास प्रतिसाद दिला नाही. त्यामुळे वादींचा प्रस्तुतचा दावा करार पूर्ततेकरीता बेकायदेशीर आहे.

अशा परिस्थितीत प्रतिवादी नंबर ३ ने रोख रक्कम रुपये २,३१,१०१/- (रूपये दोन लाख एकतीस हजार एकशे एक) या रकमेस प्रतिवादी नंबर १ व २ चे हिश्यास व वाटपात आलेली पूर्वेकडील रहे. ३९आर. + खराबा ०=१७.५ आर. खरेदी घेण्याचे ठरवून ता. २०/२/१९९५ रोजी रजिस्टर खरेदीखत करून घेतले व जमिनीचा ताबाही त्याच दिवशी घेतला. तसेच सदर खरेदीखतास प्रतिवादी नंबर ४ ने संमती दिली आहे. त्यामुळे प्रतिवादी नंबर ३ ही दावा जमिनीची बाजारभाचे किंमतीने प्रामाणिक खरेदीदार (Bonafide Purchaser) झाली आहे.”

(Emphasis added)

13. Thus, all the Defendants by filing common written statement have come up with the case that 2H 39R + Potkharaba 17.5R of the eastern side suit property has been allotted in favour of Defendant Nos. 1 and 2 and the same has been sold by Defendant No. 1 and 2 to Defendant No. 3. Therefore, the decree that has been passed by the learned Trial Court which has been modified by the learned First Appellate Court is in consonance with the stand which has been taken by the Defendants in the common written statement filed by all the Defendants. Therefore, there is no substance in the substantial question of law raised by the Appellants that the decree has been passed which has not been sought in the plaint.

14. The present suit is for specific performance and therefore, it is settled legal position that, the Courts dealing with the suit for specific performance are exercising equity jurisdiction and therefore, no illegality or irregularity can be found in the decree which has been passed by the learned Trial Court as modified by the learned First Appellate Court.

15. As far as second substantial question of law raised by the Appellant that the suit properties are not yet partitional and therefore, the decree cannot be passed. It is significant to note that, in fact, it is the contention of all the Defendants which has been raised in the common written statement that, 2H 39R + 17.5R

of Potkharaba out of the said Gat No. 300 has been allotted in favour of Defendant Nos. 1 and 2 in the partition and the same has been sold by registered sale deed in favour of Defendant No. 3. Therefore, there is no substance in the second substantial question of law raised by the Appellant.

16. The fact that, all the defendants filed common written statement and that the Defendant No. 4 is the son of the Defendant Nos. 1 and 2 and the Defendant No. 3 is the daughter of the Defendant No. 4, clearly shows that the Defendant No. 3 is not the bonafide purchaser.

17. As there is no substantial question of law, the Second Appeal is dismissed with cost. In view of dismissal of the Second Appeal nothing survives in the Interim Application and the same is also dismissed.

(MADHAV J. JAMDAR, J.)