

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO. 293 OF 1991
WITH
CIVIL APPLICATION NO. 6494 of 2015

Jayantilal s/o Vishrambhai Tahakkar,
Age 38 years, occup. Trade,
R/o Jalna, District Jalna, deceased, .. Appellant/
through legal representatives :- Orig. Defendant

- 1) Hansadevi Jayantilal Thakkar,
Age 63 years, occup. Household,
R/o Jalna, Dist. Jalna
- 2) Hasmukh Jayantilal Thakkar,
Age 42 years, occup. Business,
r/o Jalna, Dist. Jalna
- 3) Nilesh Jayantilal Thakkar,
Age 38 years, occup. Business,
R/o Jalna, Dist. Jalna
- 4) Mamta Harishkumar Roja,
Age 40 years, occup. Household,
- 5) Geeta Gagankumar Popat,
Age 29 years, occup. Household,
R/o Jalna, Dist. Jalna .. Appellants

versus

- 1) Vishrambhai s/o Madhavji Thakkar,
(died), through legal representatives:-
- A-1) Thikolchand s/o Vishramji Thakkar,
occupation : Trade, R/o Jalna,
(died), through legal representatives:

- A1/1) Smt. Lalitaben Trilokchand Thakkar,
Age 51 years, occup. Household,
R/o Swami Dyayanaod,
- A1/2) Umesh Trilokchand Thakkar,
Age 31 years, occup. Business,
R/o As above
- A1/3) Yogesh Trilokchand Thakkar,
Age 27 years, occup. Business,
R/o As above
- A1/4) Miss Manisha Trilokchand Thakkar,
Age 22 years, occup. Student,
R/o as above
- A1/5) Miss Harsha Trilokchand Thakkar,
Age 20 years, occup. Education,
R/o as above.
- A1/6) Sow. Smita Pareshkumar Bera,
age 29 years, occup. Service,
R/o Ganpati Galli Chowk,
Old Jalna
- A2) Vijaykumar s/o Vishramji Thakkar,
died, through legal representatives:-
- A2/1) Premataben w/o Vijaykumar Thakkar,
Age 34 years, occup. Household,
R/o Jalna
- A2/2) Paresh s/o Vijaykumar Thakkar,
Age 14 years, minor u/g of real
mother Premataben Vijaykumar Thakkar

A2/3) Bhavash s/o Vijaykumar Thakkar,
Age 11 years, minor, u/g of Premlataben,

A2/4) Neeta d/o Vijaykumar Thakkar,
Age 10 years, minor u/g mother .. Respondents/
Premlataben Ori. Plaintiffs

Mr. A. S. Bajaj, Advocate along with Mr. N.S. Jaju, Advocate for appellants

Mr. P. R. Katneshwarkar, Advocate for respondent No. A-1 (i)

CORAM : SUNIL P. DESHMUKH, J.
DATE : 8th December, 2016

ORAL JUDGMENT :

1. Heard learned counsel for the appearing parties.
2. The second appeal had been admitted on grounds no. V and XI as referred to in the memorandum of second appeal and during the course of hearing, looking at the events as those have occurred, learned counsel appearing for the parties concur that additional ground as appearing under item no. I of paragraph no. 2 of civil application no. 6494 of 2016 would involve a substantial question of law in the present matter.
3. In order to appreciate aforesaid, it would be worthwhile to note following factual matrix.
4. Vishrambhai Thakkar – original plaintiff had instituted special civil suit no. 71 of 1977 against defendant-Jayantilal,

seeking specific performance of agreement for sale dated 12-12-1966 in respect of suit property situated in Jalna, contending that defendant - his son had executed agreement of sale in respect of the property referred to in the plaint for a consideration of ₹ 11,500/-.

5. The original plaintiff and defendant were partners in the firm M/s Vishramji and Madhavaji Thakkar. There was an agreement between them referred to above that after retirement of plaintiff Vishrambhai from partnership or after its dissolution, defendant would execute sale deed in favour of Vishrambhai in respect of property under sale, namely, three godowns which have been specifically referred to therein and which were in possession of partnership firm as tenant save a small portion of one godown which was in possession of other partnership firm. Vishrambhai retired in 1974 from partnership whereafter, defendant had instituted two suits against Vishrambhai for perpetual injunction in respect of property under agreement for sale giving rise to present special civil suit no. 71 of 1977 by Vishrambhai against defendant for specific performance of agreement for sale dated 12-12-1966 and for delivery of its' constructive and/or actual possession.

6. During pendency of aforesaid special civil suit, Vishrambhai died and as such his other legal heirs (excluding

the defendant) were brought on record as his legal representatives and heirs.

7. The suit proceeded without written statement of the defendant and the plaintiff Vishrambhai had led evidence by filing affidavit and in support of affidavit, he had produced original agreement for sale. The court accordingly decreed the suit on 21-07-1979. The court found that the claim under the suit stands duly proved by the evidence on record and as such directed the plaintiff to deposit ₹ 11,500/- in the court to have the sale deed executed in his favour. Accordingly, it appears, said amount had been deposited.

8. It appears that an attempt to have the decree of the trial court set aside made earlier on by defendant had failed and thereafter regular civil appeal no. 129 of 1984 had been preferred, challenging the decree in the suit.

9. The appellate court, under its judgment and decree dated 07-01-1991, had considered the points as to whether the case can be remanded and whether the order passed by the trial court is legal and proper. The appellate court having considered the evidence on record, particularly affidavits at Exhibits 19 and 20, held that the execution of the agreement for sale has been duly proved; original has been on record and no fault can be found with the affidavits filed and the same were taken into

account as good evidence to prove all the relevant facts for passing decree of specific performance. Eventually, the appellate court dismissed the appeal. As such, the defendant is before this court.

10. Learned counsel for appellants has contended that specific performance could not have been granted having regard to clause (a) of sub section (2) of section 20 of the Specific Relief Act, 1963 since it is the defendant who would suffer hardship by the performance of agreement whereas its' non-performance would not cause any hardship to plaintiff.

11. Learned counsel for the appellant though has contended that having regard to relationship particularly fiduciary relationship and the agreement having been entered into, the court could have properly exercised discretion not to grant decree for specific performance relying on clause (a) of sub section (2) of Section 20 of the Act.

12. Although, it is being so submitted, yet it emerges that it would be a case which can safely be said to be covered by clause (a) of sub-section (2) of Section 20 of the Act and there does not appear any evidence to support said submission on behalf of appellants.

13. Similarly, the other contention as contained in ground No. XI about that the affidavits which have been considered while decreeing the suit do not comply with the provisions of the Code of Civil Procedure, 1908, appears to be a technical plea having regard to the facts and circumstances of the case and particularly that the defence which has been sought to be pointed out. Ostensible non-conformation as alleged to requirements of verification of affidavits as provided under Order VI, rule 15 of the Code of Civil Procedure does not appear to have caused any prejudice to the appellant, and much less grave. In any case, the defect which was sought to be urged before this court, apart from being technical, appears to be rectifiable defect. However, the courts on evidence have considered that the affidavits so filed do bear evidence for granting specific performance.

14. Having regard to aforesaid, it does not appear that the decision rendered by the courts hitherto can be faulted with on these grounds and as such both the aforesaid grounds stand answered accordingly.

15. It is not in dispute that the plaintiffs while being brought on record as legal heirs of deceased Plaintiff-Vishrambhai, are real brothers of the defendant and further that the specific performance had been sought by their predecessor in his

personal capacity and as the question then would emerge whether the property would be considered to have devolved only upon legal heirs brought on record of plaintiff or it would be open and liable to be shared with the defendants as well, him being also a son of a deceased decree holder.

16. As far as such a ground now being urged is concerned, taking into account a fair concurrence and concession of the respondents, it may require modification in the decree whereunder defendant would be able to have his legitimate share having regard to relationship between the parties to the litigation.

17. Having regard to that the plaintiff had sued defendant for specific performance of agreement of sale in his personal capacity and him having left behind legal heirs (brought on record as legal representatives of plaintiff) and original sole defendant had already been on record, the execution of sale deed in favour of legal heirs of original plaintiff will be required to be executed to the extent of shares of other legal heirs on record excluding the share of original defendant and the sale deed will have to be appreciated and treated to be restricted only to their legitimate shares devolving on them on death of original plaintiff as the property of deceased plaintiff also includes share of the sole defendant (who is also son of original

plaintiff) as well. The decree accordingly will have to be modified to that the sale deed shall be executed and shall be deemed to have been executed to the extent of and restricted to the shares of legal heirs of the deceased plaintiff excluding the share of deceased sole defendant. Legal heirs of original plaintiff including the original sole defendant as such would succeed to the suit property of deceased plaintiff in accordance with law.

18. With modification to that extent as aforesaid in the decree passed, the second appeal stands disposed of.

19. Civil application does not survive and stands disposed of.

SUNIL P. DESHMUKH,
JUDGE

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