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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.280 OF 2021
WITH
INTERIM APPLICATION NO.3358 OF 2020**

Dilip Dagdoba Zadbuke & Ors. ... Appellants
V/s.
Sadanand Arvind Khandagle ... Respondent

Mr. S. N. Chandrachood for the Appellants.
Mr. Sujay H. Gangal for the Respondent.

CORAM : S. M. MODAK, J.

DATED : 22ND AUGUST 2022.

JUDGMENT :

1. Heard learned Advocate Shri Chandrachood for the Appellants/legal representatives of Original sole Defendant-Dagdoba and learned Advocate Shri Gangal for the Respondent-Plaintiff.
2. I heard both of them at great length on various dates on the point whether the Appeal needs to be admitted. After hearing them earlier I have made certain observations on 25th July 2022 and 1st August 2022.
3. Today, Mr.Chandrachood submitted that he is insisting upon framing of substantial question of law at Serial No.4 from the memo of Appeal and additional substantial question of law No.4(A) which is suggested on 22nd April 2022 and which is reiterated on page 1 of the compilation filed today. They are as follows :

“4. The First substantial question of law is whether both the Lower Courts erred in not framing issue on section 53A – Part Performance (Transfer of Property Act, 1882) despite clear pleadings of the appellants in their additional written statement dated 16th of October 2008 to amended plaint of the plaintiff ? (Exh – E2, pages 47 to 54 of the appeal memo to which even written statement is filed by the plaintiff and produced from pages 66 and 67 as Exh – E3 to this appeal) ?

4(A) Whether the order dated 3rd of July 2009 on Exhibit-54 of Hon’ble M.G. Chilbule Saheb excluding counter claim of part performance is PER INCURIAM in view of later view of the Hon’ble Supreme Court reported in (2007) 10 Supreme Court Cases 82 Sumtibai and Others ... Appellants Vs. Paras Finance Co. and Others ... Respondents decided on 4th of October 2007 than the cited precedent in the judgment dated 3rd of July 2009 reported in AIR 2007 Supreme Court 10 decided on 17th October 2006 irrespective of challenge to order dated 3rd of July 2009 vide Writ Petition No.9129 of 2009 dismissed for default on 2nd of July 2013 by Her Ladyship Mrs. Justice Mrudula Bhatkar, J ?”

Whereas according to learned Advocate Mr.Gangal for the Respondent, the evidence and findings by both the Courts below does not warrant framing of any substantial question of law.

4. The law on point of framing substantial question of law is well settled. The substantial question of law is different from question of

law. There are various observations of this Court as well as Hon'ble Apex Court on the point when it can be said that substantial question of law really arose. One of them is if particular piece of evidence is not considered by both the Courts below or wrongly considered by ignoring the principles of law then it can be said that the findings are perverse and parties can certainly request the Court to frame substantial questions of law.

5. In this case, grievance of unsuccessful Defendants is that there counter claim was not taken on record by the trial Court. According to them their predecessor in title Shri Dagdoba has orally agreed to purchase the suit property from predecessor in title of the Plaintiff. This agreement was entered into in the year 1966 and part of consideration was also paid. There is no dispute in between parties about possession of the suit property by the Original Defendant-Dagdoba and after his death by the present Appellants. The dispute is centered around what is nature of possession. That's to say whether Dagdoba was in possession as gratuitous licensee as claimed by the Plaintiff or whether he was in possession on the basis of oral agreement for sale.

6. The Plaintiff filed suit for possession by taking the plea that Dagdoba was in possession as gratuitous licensee and when he refused to handover possession, the suit was filed for possession before the Court of Civil Judge, Junior Division at Saswad. District Pune. The Original Defendant/Dagdoba contested the suit by filing written statement. He also took plea of oral agreement to sale. On the basis of those pleadings the trial Court framed certain issues. They are as follows :-

Sr. No.	Points	Findings
1	Does the Plaintiff prove that the suit land is in possession of the defendant as gratuitous licensee ?	In Affirmative
2	Does plaintiff prove that he had validly terminated gratuitous license ?	In Affirmative
3	Does the defendant prove that, he purchased suit property from Khanderao Khandagale in the year 1966 ?	In Negative
4	Does the defendant prove that he acquired possession of suit land as vendee of suit land ?	In Negative
5	Does the defendant in the alternative prove that he became owner of suit property by adverse possession ?	In Negative
6	Whether plaintiff is entitled for possession of suit property ?	In Affirmative
7	Whether plaintiff is entitled for mesne profit ?	In Affirmative
8	Whether the suit is within limitation ?	In Affirmative

Filing of Counter Claim

7. One of the issue raised later on is whether the legal representatives of deceased Dagdoba were entitled to file counter claim when they have filed additional written statement. This happened after death of Dagdoba and when his legal representatives were brought on record. The trial Court allowed them to file additional written statement but they were not allowed to file counter claim. Learned advocate Shri Chandrachood read over the observations of the trial Court in the order dated 3rd July 2009 filed at page 44 of compilation. The relevant observations are :-

“It is true that the defendants can submit their written statement as LRs of the deceased but it cannot be beyond the scope of defence or rights which were

available to the deceased defendant Dagdoba. For the above reasons, the objection raised by the plaintiff for excluding the counter claim, the same is taken on record to that extent only.”

8. According to him not allowing the legal representatives to file counter claim amounts to denying right of hearing. In support of his contention he relied upon observations in case of ***Sumtibai and Others Vs. Paras Finance Company and Others*** reported in (2007) 10 SCC 82 and more specifically paragraph 14 and 15. The Hon’ble Supreme Court in earlier judgment in case of ***Rohit Singh and Others Vs. State of Bihar (now State of Jharkhand)*** reported in AIR 2007 SC 10 has dealt with issue about when the counter claim can be entertained. The ratio is that “it cannot be entertained after framing of issues” and when evidence is closed.

9. According to learned Advocate Shri Chandrachud the observations by the trial Court in the order dated 3rd July 2009 are *per incuriam* to the observations in judgment reported in ***Sumtibai and Others*** (supra). That’s why he insisted that substantial question No.4(A) needs to be framed. In addition to that he submitted that order dated 3rd July 2009 passed by the trial Court thereby allowing the legal representatives of original Defendant to file additional written statement on one hand and not allowing them to file counter claim on the other hand is against the ratio laid down in case of ***Sumtibai and Others*** (supra).

10. According to him when this Court has dismissed Writ Petition No.9129 of 2009 on 2nd July 2013, it was for default and not on merits. This Writ Petition was preferred by the Appellants against the

order passed by the trial Court on 3rd July 2009.

11. Whereas substantial question No.4 deals with not framing the issue on the basis of principle laid down in section 53A of Transfer of Property Act. On the basis of part performance he submitted that there is averment in additional written statement to the effect that original Defendant – Dagdoba and his legal representatives were put in possession on the basis of agreement for sale and such is protected as per section 53A of the Transfer of Property Act. Whereas according to learned Advocate Shri Gangal the observations in case of ***Sumtibai and Others*** (Supra) as referred above are not useful to the Appellants as there are not factual aspect to deal with issue of counter claim filed by the legal representatives and in fact the issue was filing additional written statement by newly added Defendant. Whereas according to him the observations in case of ***Rohit Singh and Others*** (supra) are applicable to this case. These observations according to him are confirmed by the Constitutional Bench in case of ***Ashok Kumar Kalra vs. Wing CDR. Surendra Agnihotri and Others*** reported in ***(2020) 2 SCC 394***. That was judgment delivered on the issues which were referred and more specifically para 21 and para 60.

Plea of adverse possession

12. In order to rebut the contention on the point of tenability of plea of adverse possession particularly when there is theory of agreement to purchase is taken he relied upon the following three judgments :

- (i) *Achal Reddi Appellant Vs. Ramakrishna Reddiar and Others*
AIR 1990 SC 553

- (ii) *Gangadhar Pandurang Puranik Vs. Dnyanoba Nivrutti Mundhe and Others 2010 (1) ALL MR 337*
- (iii) *Agya Rani Dua Vs. Vidyagauri J. Tripathi and Anr. 2007 (5) ALL MR 787*

13. On this background I have perused the trial Court and Appellate Court judgment. It seems that Plaintiff No.1 has given evidence and examined one witness Sunil Maske whereas newly added Defendants gave evidence and examined Dilip Zadbuke and Kasam Bagawan and one Ganesh Khomane. After scrutinizing evidence, the trial Court has given finding in favour of the Plaintiff on the point of plea of gratuitous licensee whereas other issues framed on the basis of pleading of Defendant was answered against the Defendant.

14. When we read those issues and specifically issue Nos.3 and 4, we may find that burden is casted on the Defendant of proving that he has purchased the suit property from Khanderao Khandagale in the year 1966. That issue was answered against the Defendant after appreciating evidence and also evidence of witnesses of the Defendant. The trial Court held that the Defendant has not proved theory of oral agreement to purchase. Whereas issue No.4 pertains to acquiring possession of the suit property by Defendant as a vendee. The trial Court also answered it against the Defendant. In a nutshell the trial Court observed that theory of oral agreement to purchase and getting possession as prospective purchaser has been held in negative.

15. When the Appellate Court has gone into all these issues, we may find that theory of Appellants being put into possession on the basis of oral agreement to purchase was also answered against the Appellants/

Defendants. The Appellate Court confirmed the finding on point of Appellant being gratuitous licensee.

Plea of part performance

16. If we perused the provisions of Section 53A of the Transfer of Property Act, we may find that it gives protection to prospective purchaser who has been put into possession to protect his possession even though he has not filed suit for specific performance. He has to prove ingredients of Section 53A of the Transfer of Property Act. In proposed substantial question of law No.4, the Appellant has suggested section 53A of the Transfer of Property Act. It is true that in Issue No.4 framed by the trial Court and in Point No.2 framed by the First Appellate Court there may not be reference of section 53A of the Transfer of Property Act but on there perusal we may find that both the Courts below were clear in their understanding that the Defendant has put up theory of his possession on the basis of oral agreement for purchase. It is also true that the original Defendant as well as successors were having notice that such issue has been framed by the trial Court. They were knowing this fact and that's why they have examined two witnesses. However, those two witnesses could not prove the case that Original Defendant – Dagdoba was put in possession as prospective purchaser.

17. When this Court has read the observations in case reported in ***Sumtibai and Others Vs. Paras Finance Company and Others (2007) 10 SCC 82***, it is clear that issue has not cropped up before the Hon'ble Supreme Court as to whether newly added Defendants being legal representatives of original Defendant, whether they can take up

plea by way of counter claim in respect of point which was not taken by their predecessor in title in the written statement. The issue before the Hon'ble Supreme Court was on the basis of provisions laid down in Order 22 Rule 4 (2) and under Order 1 Rule 10(2) of the Code of Civil Procedure the question of counter claim has never cropped up before the Hon'ble Supreme Court. It is true that it has been observed in para 15 that if you do not allow newly added Defendants to file written statement, adding them as party will be meaningless.

18. This Court opines that this observation will not be useful to the Appellant. The trial Court in the order dated 3rd July 2009 has given a reasoned finding as to why the newly added Defendants cannot file the counter claim. The main reason is that their predecessor in title Dagdoba has not taken plea by way of counter claim in the written statement.

About counter claim

19. Filing of written statement and filing of counter claim has got different dimensions. By way of written statement one can deny averments and can take up new plea but when you are filing counter claim it means you are asking for certain relief from the Court and it is treated as good as filing plaint. The Defendant-Dagdoba has taken plea of oral agreement for sale. It has got meaning of refuting the contention of the Plaintiff. In fact, if he was really interested in getting certain relief on the basis of oral agreement for sale during his life time he could have filed counter claim and could have asked for decree for specific performance. He has not done that. The trial Court has rightly rejected that point.

20. The Hon'ble Supreme Court in case of ***Ashok Kumar Kalra*** (supra) has elaborately dealt with issue when counter claim can be filed. There are various directions. So this Court feels that on the basis of evidence and law as contended before this Court, no case for framing of substantial question of law No.4(A) is made out.

Part Performance

21. So far as proposed question No.4 is concerned, this Court also feels that Original Defendant and Additional Defendants were given full opportunity to prove their case on the basis of oral agreement for sale and the issue to that effect has been framed and the Defendants have also adduced evidence. Merely because there is no reference of section 53A of the Transfer of Property Act in issue No.3 by the trial Court, it does not mean that when the Appellant has failed before both the Courts below is entitled to request this Court to frame additional substantial question of law. In fact it cannot be said to be substantial question of law.

22. There was plea of adverse possession put up before the trial Court and it has been answered in the negative by the trial Court as well as by the First Appellate Court. During arguments, learned Advocate Shri Chandrachud has not laid any stress on that issue. The judgments in ***Achal Reddi*** (supra), ***Gangadhar Pandurang Puranik*** (supra) and ***Vidyagauri J. Tripathi & Anr*** (supra) are on the point when plea of adverse possession can be taken particularly when the Defendants have pleaded about agreement for sale. That is to say when prospective purchaser has admitted title of vendor whether he can take plea of adverse possession. The said issue has been negated

in above three judgments. This much observation is sufficient and no more observation is required for not entertaining remaining substantial questions of law. No interference in the judgment passed by both the Courts below is required. Hence the Appeal is dismissed.

Time to vacate

23. Learned Advocate for the Appellant seeks two years time for the Appellants to vacate from the suit premises, in view of the fact that they need to make alternate arrangement. Learned Advocate for the Respondent contended that adjacent to suit property the Appellants are owners of another property. By way of reply, it is submitted that tenants of the Appellants are residing therein.

24. In view of above, the Appellants are granted

- (a) three months time to vacate the suit premises on giving an undertaking that
 - (i) they will vacate the suit premises on expiry of that period and
 - (ii) also give an undertaking that they will not create any third party interest or part with possession in any manner.
- (b) Such undertaking to be filed before the trial Court within 15 days from date of uploading this order.

25. In view of disposal of the Appeal, Interim Application stands disposed of.

(S. M. MODAK, J.)