

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

**INTERIM APPLICATION NO. 3422 OF 2021
IN
FIRST APPEAL NO.1402 OF 2016**

Pralhad Namdeo Pawar	 Appellant/Applicant
v/s.	
Shahid Latif Mukhtar Ahmad	 Respondent

Mr. Amol Deshpande i/b. Mr. Shantanu Chandratre for the Appellant.
Mr. N.R. Bubna for the Respondent.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 04th MARCH, 2022.

P. C. :-

. The Appellant herein has filed this Application for amendment of the Appeal as to incorporate additional ground to the effect that the decree for specific performance in respect of the suit property is not maintainable without seeking a declaratory relief in respect of notice dated 02/01/2013 whereby the agreement for sale was terminated.

2. Heard Mr. Amol Deshpande, learned counsel for the Appellant/Applicant. He has relied upon the decision of the Apex Court in *I.S. Sikandar (D) By Lrs v/s. K. Subramani and others [2013] 15 SCC 27*, to contend that once the agreement is terminated, the suit

for specific performance would not be maintainable in the absence of declaration that the termination of Agreement of Sale was bad in law. He submits that in the instant case, the Appellant herein had already terminated the agreement by notice dated 10/01/2013. He submits that the Respondents-plaintiffs has filed the suit for specific performance without raising any challenge to the termination notice dated 10/01/2013. He contends that in the light of the judgment of the Apex Court in ***I.S. Sikandar*** (supra), the suit for specific performance is not maintainable.

3. Per contra, learned counsel for the Respondent-plaintiff states that the Appellant-defendant had not raised such plea in the written statement. He submits that in ***A. Kanthamani v/s. Nasreen Ahmed (2017) 4 SCC 654***, the Apex Court after considering the earlier decision in ***I.S. Sikandar*** (supra) has held that once the defendant has failed to raise the plea regarding maintainability of the suit in the written statement, he cannot raise such plea at a later stage. In ***Chittoori Subbanna v/s. Kudappa Subbanna and ors. AIR 1965 SC 1325***, and that the Apex Court has held that the mixed question of law and fact, which is not pleaded, cannot be raised subsequently.

4. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

5. The records indicate that the parties had entered into an agreement for sale dated 10/05/2012 whereunder the Respondent – Plaintiff had agreed to sell the suit property to the Appellant-defendant @ Rs.31 lakhs per Acre. The Appellant received sum of Rs.25 lakhs towards earnest money deposit. The balance sale consideration was to be paid as on the date of execution of the sale deed, which was to be executed on 30/08/2012. In terms of clause 4 of the agreement, the Appellant was to get the land measured through the Government Surveyor. The Respondent claimed that he was willing to complete the sale transaction within the stipulated period. However, the sale deed could not be executed in view of non-compliance of clause no.4 by the Appellant. The Respondent-plaintiff also claimed that the Appellant herein had terminated the agreement for sale after receiving additional amount of Rs.5 lakhs on 20/12/2020. The Respondent therefore filed the suit for specific performance.

6. The Respondent claimed that he has entered into an agreement at the instance of his nephew-Kewal Sawant and his friend Jagdish

Pawar who were dealing agents of real estate transaction. It was stated that there was fraud and collusion between the dealing agents and that he had entered into the said agreement under coercion and misrepresentation. The Appellant further claimed that he has already terminated the agreement by notice dated 10/01/2013.

7. The Trial Court held that there was a valid agreement and decreed the suit for specific performance. The Respondent has filed the Appeal assailing the impugned judgment on several grounds. By the present Application, the Appellant has sought leave to incorporate additional ground that the suit for specific performance is not maintainable without seeking declaration with respect to termination notice.

8. In *I.S. Sikandar* (supra), the Apex Court has observed that “ the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff, the original suit filed by him before the trial Court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law ”.

9. As noted above, in the instant case, the Appellant-defendant had not raised the plea of maintainability of the suit. In the absence of such pleadings in the written statement, the defendant cannot be permitted to raise such challenge in the Appeal. Reliance is placed on the decision of the Apex Court in **A. Kanthamani** (supra) wherein the Apex Court has held thus :-

“ 30) Coming first to the submission of the learned counsel for the appellant about the maintainability of suit, in our considered view, it has no merit for more than one reason.

30.1) First, as rightly argued by learned counsel for the respondent, the objection regarding the maintainability of the Suit was neither raised by the defendant in the written statement nor in first appeal before the High Court and nor in grounds of appeal in this Court.

30.2) Second, since no plea was raised in the written statement, a fortiori, no issue was framed and, in consequence, neither the Trial Court nor the High Court could render any finding on the plea.

30.3) Third, it is a well-settled principle of law that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written statement) then only such plea can be adjudicated by the Trial Court on its merits as a preliminary issue under Order 14 Rule 2 of the CPC. Once a finding is rendered on the plea, the same can then be examined by the first or/and second appellate Court. ”

10. As noted above, in the instant case, the Appellant – defendant has not raised a plea of maintainability of the suit. Consequently, no issue was framed and no evidence was adduced by the respective parties. In

view of the decision of the Apex Court in ***A. Kanthamani*** (supra), the Appellant-defendant cannot be permitted to raise an additional ground which involves mixed question of fact and law, without there being foundation in the pleading. Hence, the Application has no merits and is accordingly dismissed.

PREETI
H JAYANI

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(SMT. ANUJA PRABHUDESSAI, J.)