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

**SECOND APPEAL NO.807 OF 2019
WITH
CIVIL APPLICATION NO. 1620 OF 2019
WITH
CIVIL APPLICATION NO.1621 OF 2019**

Mr. Vasant Bapuso Kadam & Ors. ...Appellants
Versus
Vijay Ganapati Ghewari & Ors. ...Respondents

Mr. Surel S. Shah, for the Appellants.

Mr. Sandeep Koregave, for Respondent Nos. 1 and 2.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 29th MARCH 2023**

P.C. :

1. Heard Mr. Surel Shah, learned counsel appearing for the Appellants and Mr. Sandeep Koregave, learned counsel appearing for the Respondent Nos. 1 and 2.

2. By the present Second Appeal, the Appellants are challenging the legality and validity of the Judgment and Decree dated 18th August 2015 passed by the learned Civil Judge, Senior Division, Kolhapur in Special Civil Suit No.306 of

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2011 as well as the Judgment and Decree dated 7th December 2017 passed by the learned Principal District Judge, Kolhapur in Regular Civil Appeal No.353 of 2015. The said Special Civil Suit No.306 of 2011 was filed by the present Respondents on 2nd August 2011 seeking specific performance of agreement dated 17th October 2008 as well as supplementary agreement dated 11th November 2008 in respect of property bearing Plot No.5 admeasuring 279 sq. mtr. out of 487.7 sq.mtr. along with the constructed house admeasuring 32.34 sq. mtr. (348 sq.ft.) towards south side constructed in City Survey No.2909/117, B Ward, Subhash Nagar, Kolhapur (hereinafter referred to as “suit property”)

3. Learned Trial Court as well as the learned Appellate Court have recorded concurrent finding that the Plaintiffs i.e. Respondents proved the execution of agreement dated 17th October 2008 and supplementary agreement dated 11th November 2008 and also proved that the Appellants i.e. Defendants agreed to sell suit property in favour of the Plaintiffs. The agreed consideration was Rs.420/- per sq.ft. Both the Courts have concurrently held that Rs.25,000/- was paid as

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earnest amount and the Plaintiffs have proved their readiness and willingness. The learned Trial Court decreed the suit by the impugned Judgment and Decree dated 18th August 2015. The learned Trial Court has directed to execute the Sale Deed by accepting remaining consideration i.e. Rs.12,35,857/-. The learned First Appellate Court confirmed the said finding and therefore, dismissed the appeal with costs by the impugned Judgment and Decree dated 7th December 2017. It is admitted position that the said amount is deposited by the Respondents in Special Darkhast No.40 of 2015 before the learned Executing Court.

4. Mr. Shah, learned counsel appearing for the Appellants submitted that the following substantial questions of law arise in this Second Appeal:-

- i. Whether decree of specific performance can be granted with respect to agreement dated 17th October 2008, as there is overwriting on the said agreement?
- ii. Whether the decree of specific performance can be passed in view of provision of Section 20(2) (b) of the Specific Relief Act, 1963 (before 2018 amendment)?

5. Both the Courts have concurrently held that Plaintiffs have proved the said agreement dated 17th October 2008 as well as the supplementary agreement dated 11th November 2008. In fact, the overwriting which Mr. Shah has pointed out appears to have been done for the purpose of preparing supplementary agreement dated 11th November 2008. The said overwriting is included in the supplementary agreement. As far as overwriting is concerned, only word added in paragraph 1 is “खरेदीपत्राप्रमाणे i.e. as per Sale Deed” after the area of 279 sq.mtrs. and other overwriting is for correction with respect to the boundaries. These corrections/overwritings are incorporated in the supplementary agreement dated 11th November 2008. It is clear that said alleged overwriting in the agreement dated 17th October 2008 is not significant and in fact, by execution of supplementary agreement dated 11th November 2008, the Defendants specifically agreed about execution of agreement dated 17th October 2008.

6. Mr. Shah has not denied execution of supplementary agreement dated 11th November 2008. No contention is raised with respect to supplementary agreement dated 11th November

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2008. It is clear that the execution of agreement dated 17th October 2008 and contents of the same are reiterated in the supplementary agreement dated 11th November 2008. Therefore, there is no illegality or perversity with respect to the concurrent finding recorded by both the Courts that the Plaintiffs have proved execution of agreement dated 17th October 2008 and supplementary agreement dated 11th November 2008.

7. With respect to the contention of Mr. Shah that the decree of specific performance should not have been passed in view of provision of Section 20 (2)(b) of Specific Relief Act, 1963 (before 2018 amendment), it is necessary to set out the said provision which reads as under:-

“20.(2)(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;”

Therefore, what is provided by Section 20(2)(b) is that where the performance of the contract would involve some hardship on the Defendant which he did not foresee, whereas

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its non-performance would involve no such hardship on the Plaintiff, in such a case the Court may properly exercise jurisdiction not to decree specific performance.

8. It was the contention of the Defendants that the Plaintiffs are having several properties and the suit property has been purchased for the business purpose. It appears that the said contention was tried to be raised by amending the written statement at the appellate stage and said application was rejected by order dated 11th April 2017 by the learned First Appellate Court by observing that said contention is totally irrelevant. What is relevant is hardship which Defendants would face and which they could not foresee at the time of execution of the agreement. There is no pleading and no evidence with respect to the said aspect. Therefore, there is no substance in the second substantial question of law raised by Mr. Shah.

9. However, as the suit agreement is dated 17th October 2008 and 11th November 2008, Mr. Koregave, learned counsel appearing for the Respondents after taking instructions submitted that he has instructions to enhance consideration

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under the agreement from Rs.12,60,857/- to Rs.20,00,000/-. It is significant to note that both the Courts have concurrently held that Rs.25,000/- was paid towards the earnest amount in the year 2008. Thereafter, the balance agreed consideration of Rs.12,35,857/- was deposited before the learned Executing Court in the year 2015 immediately after the decree was passed by the learned Trial Court. It is admitted position that the possession of the suit property is with the Appellants. Mr. Koregave, learned counsel appearing for the Appellants states that the Respondents will pay the balance amount of Rs.7,39,143/- either at the time of execution of Sale Deed and handing over of possession by the Appellants or the same will be deposited before the Executing Court when the Executing Court passes the final order. Thus, as against the agreed consideration of Rs.12,60,857/-, the Appellants will get Rs.25,000/- (already paid as earnest amount in the year 2008), Rs.12,35,857/- (deposited by the Respondents in 2015 before the Executing Court which the Appellants will get with accrued interest, if any) and Rs.7,39,143/- at the time of execution of the Sale Deed and handing over possession.

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10. For the above reasons, the Second Appeal is dismissed (subject to above clarification) with no order as to costs, as there is no substantial question of law involved in this Second Appeal.

11. In view of the dismissal of the Second Appeal, nothing survives in the Civil Applications and the same are dismissed as such.

12. At the request of Mr. Koregave, learned counsel appearing for Respondent Nos. 1 and 2, the learned Executing Court is requested to dispose of Special Darkhast No.40 of 2015 expeditiously.

[MADHAV J. JAMDAR, J.]