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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 509 OF 2024
WITH
INTERIM APPLICATION NO. 11639 OF 2024**

Harish Dhaniram Sharma and Others ... Appellants
(Orig. Defendants)

Vs.

Tukaram Dhondiba Gunjal and Another ... Respondents
(Orig. Plaintiffs)

Mr. Vishal Kanade a/w. Ms. Janhavee Joshi and Mr. D. B. Dixit i/b.
Mr. Mohan B. Jadhav for the Appellants.
Mr. Prathamesh Bhargude a/w. Mr. Sharad R. Dhore and Mr. Sumit
Sonare for the Respondents.

CORAM : GAURI GODSE, J.

DATE : 7th OCTOBER 2024

ORDER :

1. Heard learned counsel for the parties. This Second Appeal is preferred by the original defendants to challenge the concurrent judgments and decrees passed for specific performance in favour of the plaintiffs.
2. Learned counsel for the appellants submits that the defendants had specifically pleaded in the written statement that the

suit property, though it stood in the name of the defendants, was the joint family property of defendant no. 2 and all his children. Learned counsel further submitted that even the other children of defendant no. 2 had contributed towards the purchase of the suit land and the construction of the structure standing on the land. He thus submits that the defendants specifically pleaded that even the other children of defendant no. 2 had a share in the suit property.

3. Learned counsel for the appellants further submits that the trial court failed to frame any specific issue with regard to the title of the suit property or whether the suit property was exclusive and self-acquired property of the defendants. He submits that though the trial court has recorded a finding on the said pleading, there is no specific issue framed to enable the parties to lead evidence. Learned counsel for the appellants further pointed out that the First Appellate Court framed a point for consideration on whether the suit property was exclusively owned property of the defendants.

4. He further submits that the application filed on behalf of the appellants, praying to remand the matter back to the trial court to frame additional issues, was not correctly considered by the First Appellate Court. To support his submissions regarding the suit property exclusively owned by the defendants, learned counsel for

the appellants relied upon pleadings in paragraph 18 of the written statement. He also relied upon certain admissions on behalf of the plaintiffs to indicate that the documentary, as well as oral evidence, would show that other children of defendant no. 2 had contributed towards the purchase of the land and further contributed to the construction of the structures standing on the land. He thus submits that the correct appreciation of the evidence on record would indicate that the suit property was not the exclusive property of the defendants.

5. Learned counsel for the appellants further submits that there is a difference in the description of the property mentioned in the Memorandum of Understanding i.e. Visar Pavati produced on record and subsequent agreement for sale. He points out that the prayer in the suit does not specify that the specific performance is sought of which of the two agreements. He thus submits that in view of the prayers made in the suit and the difference in the description of the properties made in the Visar Pavati and the agreement for sale, both the courts ought to have considered that the contract between the parties could not be said as a concluded contract. He submits that both the courts erred in not framing specific issues regarding the description of the property and the

exact nature of the prayer regarding specific performance.

6. He thus submits that the Second Appeal would also require consideration on the aspect of not framing proper issues with reference to the suit property not exclusively belonging to the defendants and with regard to the variance of the description of the property in the Visar Pavti and the agreement for sale. He thus submits that the Second Appeal raises substantial questions of law on the aforesaid grounds.

7. Learned counsel for the respondents supports the impugned decrees. He submits that a correct reading of paragraph 18 of the written statement would indicate that it was not a ground raised by the defendants that it was a joint family property. He submits that the pleadings were vague with regard to only the contribution made by the other children of defendant no. 2 for purchasing the land and the construction on the land. He thus submits that there was no requirement to frame any specific issue on the nature of property based on the pleadings made in paragraph 18.

8. With regard to the discrepancy in the description of the property in the two documents, learned counsel for the respondents points out the findings recorded by the First Appellate Court in

paragraphs 51 and 52 of the impugned judgment. He submits that the plaint specifically seeks specific performance of the agreement for sale, with reference to the description of the property in the agreement for sale. Hence, the First Appellate Court has referred to the undisputed boundaries of the suit property mentioned in the agreement for sale. With respect to the description in the both the documents and the plaint to be consistent, he submits that the suit property is identifiable based on the agreement of sale and the plaint. Thus, the First Appellate Court has recorded finding on the grounds raised on the difference in the description of the property in the Visar Pavati and the agreement for sale. He thus submits none of the grounds raised in the Second Appeal would require consideration by this Court as the same do not raise any substantial question of law.

9. I have perused both the impugned judgments as well as the pleadings. The suit is filed for specific performance with reference to the agreement for sale dated 7th April 2006. The Visar Pavati is dated 7th February 2006 and records the initial agreement between the parties and payment of the earnest amount. The plaint clearly describes the suit property and the agreement between the parties. With reference to the agreement for sale dated 7th April 2006, the

reasons recorded by both the courts clearly indicate that the suit has proceeded with reference to the plaintiffs' prayer for specific performance of the agreement dated 7th April 2006. The pleadings of the parties, as well as the reasons recorded by both the courts, nowhere indicate that there was any dispute with regard to the plaintiff's prayer for specific performance of the agreement dated 7th April 2006. Thus, even if the prayers in the plaint do not refer to any date of the agreement of which specific performance was claimed, the pleadings in the plaint clearly indicate that the specific performance was sought for the agreement dated 7th April 2006 and Visar Pavati dated 7th February 2006 was also relied upon for the payment of earnest money. Thus, the parties proceeded to the trial for specific performance of the agreement dated 7th April 2006.

10. The arguments raised about the difference in the description of the property in the Visar Pavati and the agreement for sale would not require consideration by this court in view of the specific pleadings and the findings recorded by both courts. It is not the appellants' case that there was any discrepancy in the suit property described in the plaint and the agreement for sale. From the reasons recorded by both the courts, it is clear that the parties have correctly understood the prayer in the suit, terms and conditions of

the contract, and accordingly raised their rival contentions on the specific performance of the agreement as prayed by the plaintiffs. The difference in the description of the properties and the arguments with reference to the same are dealt with by both courts. On examination of the pleadings and evidence on record, the courts have concurrently held that the plaintiffs were entitled to specific performance of the contract executed between the parties.

11. The argument raised with regard to the issue required to be framed as to whether the suit property was a joint family property; the pleadings do not raise any such issue. Both the courts have referred to the pleadings and held that there is no specific case made out by the defendants regarding any existence of the joint family or the suit property belonging to any joint family. Hence, the First Appellate Court rejected the application filed by the defendants for framing additional issues.

12. Even otherwise, the application was filed under Order XLI Rule 27 of the Code of Civil Procedure 1908 ["CPC"], which is for producing additional evidence. I have also perused the application filed under Order XLI Rule 27, which clearly prays only for additional issues without any reference to the evidence proposed to be adduced by the defendants.

13. A perusal of the written statement does not indicate that the defendants have specifically pleaded that the suit property is a joint family property. Learned counsel for the respondents is right in submitting that the averment in the written statement is only about the alleged contribution made by the other children of defendant no. 2 for the purchase of the suit property and construction.

14. Thus, I do not find any substance in the arguments raised regarding the additional issue required to be framed as to whether the suit property was a joint family property. Admittedly, the documents of the property stand in the name of defendant nos. 1 and 2. Hence, the agreement was executed by defendant nos. 1 and 2. The plaintiffs entered into a contract with the defendants on the basis that they were exclusive owners of the suit property. Thus, vague averments in the written statement regarding the contribution made by the children of defendant no. 2, and in the absence of any pleading that the suit property was a joint family property, it was not necessary to frame and decide any specific issue as to whether the suit property was a joint family property. Defendants have not filed any counterclaim seeking any declaration that the suit property was joint family property.

15. Both the courts, on examining the pleadings and evidence on

record, concurrently held that the defendants were exclusive owners of the suit property and thus executed the agreement in favour of the plaintiffs. In view of the concurrent finding of facts as referred to above, the arguments raised on behalf of the appellants would not require any consideration by this court as the same would require re-appreciation of the pleadings and evidence, which is not permissible under Section 100 of the CPC.

16. There is no perversity or illegality in the reasons recorded by both the courts. In view of the concurrent findings on facts recorded by both courts, the grounds raised on behalf of the appellants would not require any consideration by this court. The Second Appeal does not raise any substantial question of law. Hence, the Second Appeal is dismissed.

17. In view of the dismissal of the Second Appeal, Civil Application No. 11639 of 2024 is disposed of as infructuous.

18. At this stage, learned counsel for the appellants prays for an extension of the interim protection since the suit property also pertains to a residential house. He seeks a stay to the execution of the impugned decree for four weeks from today for approaching the Apex Court.

19. Learned counsel for the respondents opposes the grant of any interim protection on the ground that till date there was no interim protection granted by this court.

20. To enable the appellants to approach the Apex Court, the impugned decree is stayed for four weeks from today, subject to the appellants not creating any third party interest or parting with possession.

[GAURI GODSE, J.]