

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

SECOND APPEAL NO. 410 OF 2014

Yashwant Rajaram Kulkarni,
since deceased through legal representatives
1A) Smt.Ratan Yashwant Kulkarni & Ors. ...Appellants
vs.
Shri Kuber Narasgonda Patil ...Respondent

Mr.C.G. Gavnekar with Suhas Deokar for Appellants.
Mr.Rahul P. Walvekar for Respondent.

CORAM : S.C. GUPTE, J.

13 JANUARY 2017

P.C. :

Heard learned Counsel for the parties.

2 This second appeal challenges an order and judgment passed by the court of Ad-hoc District Judge, Kolhapur in Regular Civil Appeal No.262/2000. By this order, the learned District Judge dismissed the civil appeal of the Appellants against the judgment and decree passed by the court of Civil Judge, Junior Division, Kolhapur in Regular Civil Suit No.995/1998.

3 The subject matter of the present appeal is an agreement of sale entered into between the Appellant (original Defendant), now represented by his legal heirs (who are arraigned as Appellant Nos.1A to 1C to the present appeal) and the Respondent (original Plaintiff). This agreement was entered into between the parties on 26 October 1988. (The agreement was recorded at Exhibit 52 by the trial court.) By this agreement, the Appellant

agreed to sell his 1/4th share in the house property, being CTS No.321. The Appellant's 1/4th share admeasures 99.17 sq.metres of the total area of 396.7 sq.metres of CTS No.321. The agreement for sale was for a total consideration of Rs.25,000/-, out of which the Appellant received a sum of Rs.20,000/- as earnest money. At the date of the agreement, the property continued to stand in the name of the Appellant's father despite the latter's death. The Appellant agreed to execute a sale deed in favour of the Respondent within one month after getting his name recorded in the property card. Sometime in or about October 1998, the Respondent came to know that the suit property was recorded in the name of the Appellant and requested the Appellant to execute a sale deed in his favour. Upon the Appellant's failure to do so, the present suit was filed by the Respondent for specific performance of the suit agreement. The trial court found that there was valid and subsisting agreement for sale between the parties, which was partly performed by the Respondent; that the Respondent was ready and willing to perform the balance part of his contract; and that the Appellant had committed a breach of contract by refusing to execute a sale deed despite the Respondent's readiness and willingness to pay the balance consideration. The trial court accordingly decreed the Respondent's suit for specific performance. Being aggrieved, the Appellant herein challenged the judgment and decree passed by the trial court before the District Court at Kolhapur. The Appellate Court, by its impugned judgment and order dated 29 November 2013, held that the Respondent had established the validity and subsistence of the agreement, Exhibit 52 and his readiness and willing to perform his part of the contract. The Appellate Court also held that considering the provisions of Sections 10 to 20 of the Specific Relief Act, the trial court had correctly exercised its judicial discretion by allowing specific performance. The Appellate Court accordingly dismissed the civil appeal and

confirmed the judgment and decree passed by the trial court.

4 The only argument advanced by learned Counsel for the Appellant in the present appeal is that the property being a joint family property could have been sold by the Appellant only on account of a legal necessity and that the burden of proving such legal necessity was on the Respondent as a purchaser. It is submitted that this burden was not discharged by the Respondent and in the absence of any proof as to the legal necessity, the agreement for sale could not have been enforced by the court. Learned Counsel relies on various passages from the principles of Hindu Law. Learned Counsel submits that the agreement for sale does not indicate any legal necessity on the part of the vendor and none is alleged in the pleadings by the Respondent.

5 It is pertinent to note that the original Appellant before the first Appellate Court had not raised any plea of want of legal necessity either before the trial court or before the first Appellate Court. The present Appellants, who were impleaded as Appellants in place of the original Appellant before the first Appellate Court, had sought leave to file a fresh written statement after their impleadment, presumably for raising a ground of want of legal necessity. That application was rejected by the Appellate Court. The matter was not carried further by the Appellants. Once again, an attempt was made before the first Appellate Court to seek leave to amend the written statement filed by the Appellant by taking a plea of want of legal necessity. That application was rejected by the Appellate Court. The matter was carried further in a writ petition before this court. A learned Single Judge of this Court, by order dated 24 November 2008, disposed of the writ petition as withdrawn with liberty to file a fresh application before the

Appellate Court to implead the Appellants as Defendants in their individual capacity in the suit as well as appeal and to raise this defence. The learned Single Judge in his order dated 24 November 2008 recorded that under Order 22 Rule 4(2) any person made party as a legal representative of the deceased defendant may make any defence appropriate to his character as the legal representative of the deceased defendant and not in his individual capacity or in his own right. That is where the matter rested when the first Appellate Court took up the appeal for hearing. No plea was made before the court to implead the Appellants in their individual capacity.

6 Once again, however, when the matter was heard before the first Appellate Court, a plea was raised on the part of the Appellants herein that there was no legal necessity for their predecessor, the original Appellant, to execute the agreement at Exhibit 52 in favour of the Respondent. The Appellate Court found the arguments advanced by the Appellants to be contrary to the pleadings in the written statement. Anyway after going through the record and material before the court including the oral evidence led before the court, the Appellate Court came to the conclusion that the original Appellant had entered into a contract of sale of property for legal necessity.

7 The plea now raised by learned Counsel for the Appellants does not give rise to any substantial question of law. It is not the case of the original Appellant, who defended the suit, that there was want of legal necessity for entering into the suit agreement. The present Appellants tried to bring in such a plea first by way of an application filed for a fresh written statement and later by amending the written statement of the original Appellant. That attempt was repelled by the first Appellate Court. The

present Appellants did not succeed in their challenge from that order before this court. Though liberty was reserved unto them to apply for impleadment in their individual rights as members of the joint family of the original Appellant, they admittedly did not avail of such liberty or file any application for their impleadment in their individual right. The Appellants, in the premises, cannot be heard to raise a plea of want of legal necessity. Such plea is an issue of fact or at any rate, a mixed issue of law and fact. No party can be allowed to advance such plea at the hearing in the absence of any foundation being led for such plea in its pleadings before the court.

8 Anyway, the first Appellate Court has gone through the evidence led by the parties and found that there was a case of legal necessity for alienation of the property. Nothing is pointed out to this court for challenging that finding.

9 The second appeal, accordingly, does not raise any substantial question of law for the consideration of this court. The appeal is dismissed. There shall be no order as to costs.

10 In view of the dismissal of the appeal, the civil application does not survive and the same is also dismissed.

(S.C. Gupte, J.)