

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Second Appeal No. 0284 of 2017

District : Jalna

Ashok s/o. Vitthalrao Lahane,
deceased through L.Rs.,

1. Ranjana Ashok Lahane
(Wife of deceased),
Age : 45 years,
Occupation : Household.
2. Smita Manoj Panpatil
(Daughter of deceased),
Age : 28 years,
Occupation : Education
3. Vaishali Ashok Lahane
(Daughter of deceased),
Age : 26 years,
Occupation : Education.
4. Reema Ashok Lahane
(Daughter of deceased),
Age : 24 years,
Occupation : Education.
5. Rachana Ashok Lahane
(Daughter of deceased),
Age : 22 years,
Occupation : Education.
6. Kirti Ashok Lahane
(Daughter of deceased),
Age : 20 years,
Occupation : Education.
7. Sandip Ashok Lahane
(Son of deceased),
Age : 17 years,
Occupation : Education.

8. Pradip Ashok Lahane
(Son of deceased),
Age : 14 years,
Occupation : Education.

All R/o. Swami Vevekanand
Nagar, N-12, 34/7, HUDCO,
Aurangabad 431 001.

.. Appellants

versus

Sheshrao s/o. Dhondiram Dhas,
Age : 60 years,
Occupation : Agriculture,
R/o. Village Erandgaon,
Taluka Shevgaon,
Dist. Ahmednagar.

.. Respondent

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Mr. R.F. Totla, Advocate, for the appellants.

Mr. A.B. Kale, Advocate, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the order : 08th February 2019**

**Date of pronouncing
the order : 27th March 2019**

ORDER :

01. Present appeal has been filed by unsuccessful original plaintiff, whose suit as well as first appeal has been dismissed by both the Courts below.

02. The facts which are not in dispute, that

defendant and his brother Murlidhar are the owner of agricultural land bearing Gut No. 116, Survey No. 92 admeasuring 5 H. 22 R situated at Ganga Chincholi, Tal. Ambad, Dist. Jalna. Plaintiff had come with a case that defendant and his brother had entered into agreement to sell the suit land for a consideration of Rs.4,87,500/- each. Defendant executed agreement to sell portion of 2 H, 61 R out of the said land in favour of plaintiff on 04-07-2012. On that day itself, plaintiff had paid the earnest amount of Rs.4,37,500/- to defendant. The transaction was to be completed within 6 months. He was always ready and willing to perform his part of the contract. Due to the death of brother of defendant, defendant and son of his brother asked for more time to complete the transaction. Even after considerable time, when defendant did not come forward to execute sale-deed, plaintiff issued notice dt. 2-1-1013 to defendant. Defendant received the said notice, but did not comply with it, hence, suit for specific performance bearing Special Civil Suit No. 05 of 2013 was filed and in the alternative, refund of earnest amount is prayed with interest.

03. Defendant contested the suit by filing written statement. It was contended that he and his brother are resident of village Erandgaon, Tal. Shevgaon. Their ancestral property was acquired by Governement for Jayakwadi (Nath Sagar) Project. Suit land was allotted to them as project affected person.

There was restriction on mortgage, gift, sale, lease, etc put by Government while allotting the land. Hence, he has no right to sale out the same. It is also stated that one more suit is pending in respect of suit property. Injunction order was passed restraining him from alienating the land. He has not executed any agreement to sell and has not received any amount as contended in the plaint.

04. Taking into consideration the rival claims, issues came to be framed. Parties have led oral as well as documentary evidence. Learned Civil Judge Senior Division, Jalna has decreed the said suit partly on 05-02-2015. Defendant was directed to pay amount of Rs.4,37,500/- to the plaintiff together with interest @ 6% p.a. from the date of order till realization of entire amount. The relief of specific performance was refused. Plaintiff had challenged the said judgment and decree, in Regular Civil Appeal No. 58 of 2015. The said appeal was heard by learned Principal District Judge, Jalna and dismissed it on 31-01-2017. Hence, this second appeal by original plaintiff.

05. Heard learned Advocate Shri. R. F. Totla for appellant. Though respondent appears in the matter through advocate, neither respondent nor his advocate were present on the date of hearing.

06. It has been vehemently argued on behalf of appellant that both the Courts below have not considered the facts as well as law properly. Both the Courts have concluded that defendant had agreed to sell the suit land to plaintiff, and plaintiff has paid earnest amount of Rs.4,37,500/- to him. That means a substantial amount was paid by the plaintiff to defendant. He can be said to be not willing and ready to perform his part of contract. He was not required to deposit the remaining amount in Court to show his readiness and willingness. Reliance has been placed on the decision in *Nathulal v/s. Phoolchand* [AIR 1970 SC 546]; wherein it has been held that, "Purchaser need not produce money or vouch a concluded scheme for financing the transaction". When the agreement was proved, payment of substantial amount was proved; then both the Courts ought to have used the discretion given to them under Section 20 of Specific Relief Act, judiciously. They have not considered the provisions of Explanation 1 (b) (i) to Section 10 of Specific Relief Act, which provides "*unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money*". No proper reasons were assigned by learned Trial Court while refusing to grant specific performance. Learned First Appellate Court has taken help of order passed by High Court in Writ petition for refusing the said relief. In the said writ

petition defendant had contended that he is not possessing the suit land. No such specific plea was taken by him before the Trial Court. The reason assigned that in view of said order by High Court, Government may allot another land to defendant, is based on some future act, which can not be considered. It was also submitted that both the Courts below failed to consider that specific performance could have been granted subject to obtaining the condition to transfer the land given to project affected person from competent authority. The first appellate Court has not framed proper points for consideration as contemplated under Order 0.41, R. 31 of Code of Civil Procedure. Therefore, substantial questions of law are arising in this matter, requiring the admission of second appeal.

07. This appeal has been filed under Section 100 of Code of Civil Procedure, therefore, unless the appellant shows 'substantial question of law', appeal can not be admitted. In other words, it is incumbent on this Court to frame 'substantial question of law', if appeal is to be admitted. First point that can be considered is in respect of 0.41 R.31 of Code of Civil Procedure. No doubt, the first appellate Court has not framed all the points involved, but perusal of the judgment would show that the learned Principal District Judge has dealt with all the points involved in the matter in 'reasons' part. Finding is given on

each and every point involved, though it may not have been typed in tabular form. If there is substantial compliance of law, then matter does not deserve admission only on some procedural defect. No prejudice has been shown by the appellant, which could be said to have been caused by not tying the points specifically in para 12 of the judgment in tabular form. Hon'ble Supreme Court has held in *G. Amalorpavam & Ors vs R.C. Diocese Of Madurai & Ors* [(2006) 3 SCC 224]; wherein it observed that,

“It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is

proper appraisalment of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the Rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the Court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of Second Appeal conferred by Section 100 CPC”.

In this case reference was also taken of the view in *Girijanandini Devi and Ors. v. Bijendra Narain Choudhary* (AIR 1967 SC 1124); wherein it was observed that, *“It is not the duty of the appellate court when it agrees with the view of the Trial Court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the Trial Court. Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice”.*

08. Therefore, taking into consideration those observations, the reasons given by learned First Appellate Court in this case and failure on the part of appellant herein to show prejudice, it can be concluded that matter does not deserve admission on the ground of alleged non-compliance of O.41, R.31 of Code of Civil Procedure.

09. Here in this case, there are concurrent findings of both the Courts below. They have held that plaintiff had proved that defendant had agreed to sell suit land for a consideration of Rs. 4,87,500/- and paid amount of Rs.4,37,500/- as earnest on the date of agreement to defendant. However, the specific performance has been refused. The alternative prayer of refund of earnest amount with interest has been allowed. Only question then for the First Appellate Court was to see whether the learned Trial Court had exercised the discretion vested in it by virtue of Section 20 of Specific Relief Act, judiciously or not. No doubt, Explanation (b) (i) to Section 10 Specific Relief Act provides that unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; it was for the defendant to show that compensation in money is the adequate relief in this case. In order to bring those circumstances on record, he has produced certain documents. The reasons for refusal of granting

specific relief given by learned Trial Court were very cryptic. However, those reasons have been elaborately given by learned First Appellate Court. It was not in dispute that the said land was allotted to defendant as 'project affected person'. There were restrictions imposed by Government while allotting the land to him. Prior permission to alienate the said land from competent authority was the mandatory. Subject to said permission, specific performance could have been granted in any ordinary circumstances. However, in this case, plaintiff had approached this Court in Writ Petition No. 2154 of 2012. Directions were given by this Court to the Government to find out suitable unencumbered land for allotting it to defendant. That order was passed by this Court on 26-07-2012. The agreement to sell was executed prior to that i.e. on 04-07-2012. It appears that on the date of agreement to sell, defendant was not having possession of the suit land. Under such circumstance, it was rightly felt by the learned First Appellate Court that there would be problems in execution of the decree for specific performance. It was not brought on record of the First Appellate Court till the date of the decision (31-01-2017) as to whether any compliance of the order passed by this Court in the said Writ Petition was made or not. When this question was specifically asked to learned Advocate for appellant, he submitted that the respondent ought to have brought it. Appellant can not just get away from the said

point in such manner. It was then for the appellant to show that Government as well as defendant have not done anything in response to the said order and defendant is possessing the land. When such circumstances were brought on record, the learned Appellate Court was justified in not using the discretion in favour of appellant / plaintiff. Question of readiness and willingness of plaintiff was not questioned before First Appellate Court. The finding on that point was answered in the affirmative by learned Trial Court and defendant had not preferred any appeal. Therefore, we may not consider ratio in AIR 1970 SC 546 in this case.

10. Thus, from the above-said reasons, it can be concluded that appellant has failed to show any substantial question of law requiring admission of the second appeal under Section 100 of Code of Civil Procedure. Hence, the appeal is disposed of as '**Not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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