

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

**SECOND APPEAL NO.273 OF 2016
WITH
CIVIL APPLICATION NO.523 OF 2016**

Hanif Hasham Mujawar ... Appellant
Vs
Badshah Gulab Mujawar and Ors. ... Respondents
...
Mr. Manoj A. Patil for the Appellant.
Mr. S.R.Ganbavale for the Respondent No.1.

**CORAM : SANDEEP K. SHINDE J.
DATE : 22 JANUARY, 2019**

P.C. :

Defendant No.1 in Special Civil Suit No.60 of 2008 has preferred this appeal. The suit was filed for specific performance of the contract dated 10th January, 2005. The suit was decreed by the learned trial Court and the said decree was confirmed in Regular Civil Appeal No.51 of 2013 by the judgment and order dated 5th December, 2015. It is against the decree of the appellate Court, Defendant No.1 has preferred this appeal.

2 *Heard learned counsel for the Parties. Perused the compilation of documents tendered by the appellant. It consists of suit agreement dated 10th January, 2005 and another dated 23rd July, 2006. The learned counsel for the appellant has made three submissions. First is, the suit ought to have been for specific performance of the agreement dated 23rd July, 2006 ('Second Agreement' for short). It is contended that the second agreement has substituted the first one and as such, new agreement came into effect. It is contended that the appellant was not party to the second agreement. It is submitted that since the second agreement substituted the suit agreement dated 10th January, 2005 to which the appellant was not party, the decree passed in the instant suit is not binding on him and, therefore, it may be set aside against the present appellant.*

3 *The third submission is that the Courts below have not addressed that performance of contract would involve and cause hardship on defendant and no hardship would cause to plaintiff if agreement is not performed while granting the relief of specific*

performance.

4 I have gone through the agreement dated 10th January, 2005 (Suit Agreement). This agreement was executed by all the defendants including the appellant. The appellant is defendant no.1 and other defendants are his brothers. Stamp-paper of the suit agreement was purchased by defendant no.1 in his name. It appears on 23rd July, 2006 another document was executed and it was titled as agreement. Under the second agreement, part consideration, as agreed under the suit agreement was received by defendant nos.2 to 4. It is contended by the appellant that he had not received consideration either under the first agreement or under the second agreement.

5 After going through the second agreement, in my view, it is not a novation of contract or substituted contract but it is mere acknowledgment of part consideration paid by the vendor, which was received by defendant nos.2 to 4. I say so because recitals of the second agreement stipulates that all the terms and conditions of the suit

agreement would continue and bind the parties. In view of this, the first contention is rejected.

6 *The appellant had pleaded in the Written Statement that his signature on the suit agreement was obtained by misrepresentation. However, the defendant had not pleaded the particulars of misrepresentation nor led the evidence of misrepresentation as alleged by him. Therefore, fact remains that in absence of any evidence on record that the suit agreement was obtained from the appellant by misrepresentation has been rightly rejected by the Courts below.*

7 *The next contention is that in view of the facts as stated here-in-above, the trial Court ought to have considered comparative hardship in terms of Section 20(2)(b) of the Specific Relief Act, 1963 while exercising discretion. In my view, considering evidence on record and conduct of the appellant, Courts below were justified in granting performance. That for the reasons aforesaid, appeal does not give rise*

to substantial question of law. The Appeal is accordingly dismissed and the Civil Application is disposed of.

(SANDEEP K. SHINDE, J.)