

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

SECOND APPEAL NO.436 OF 2023
WITH CA/10576/2023 IN SA/436/2023

SHRI. LAXMAN VENKAT PATIL (Died) TRH GPA S. L. PATIL,
D. L. PATIL (Died) TRH LRS. KAILAS D. PATIL AND ORS
VERSUS
SHRI. NARESH PANDHARINATH CHAUDHARI

...

Advocate for Appellants : Mr. Ameet Vaidya a/w Mr. Deshmukh
Bhausahab Sadashivrao.

Advocate for Respondent : Mr. Ajay G. Talhar.

...

CORAM : S. G. MEHARE, J.
DATE : 01.09.2023

PER COURT :-

1. Heard the learned counsels for the appellants and respondent at length.
2. The present respondent had filed a suit for Specific Performance of Contract based upon an agreement to sell. He came with the case that he was ready and willing to perform his part of the contract. He had issued a cheque to the defendant/owner of the land in question, but he did not encash it. He was ready with the money to perform his part of the contract. A notice for execution of the sale deed was sent to the defendant at the correct address. However, it was returned with endorsement, 'refused'. Then the suit was filed. The

learned Trial Court believed the plaintiff and had decreed the suit. The defendants had preferred an appeal against the said judgment and decree. The first appellate Court also dismissed the appeal.

3. Learned counsel for the appellants would submit that the transaction was hit by Section 12 of the Maharashtra Project Affected Persons Rehabilitation Act, 1999. Unless permission from the Commissioner is obtained, transfer is not allowed. Even the transfer could not be affected by the Court's decree. He would submit that the cheque, as alleged by the plaintiff, was never delivered to him. Hence, there was no question of encashing it. He would further submit that the plaintiff was never ready and willing to perform his part of the contract. He had created false evidence. The Postman, to prove that the defendant had refused to receive the notice sent before filing the suit, was not examined. He submits that it was a joint family property. Therefore, the defendants were not exclusively authorized to sell the entire joint family property. He further argued that the issue of legal necessity has not been correctly appreciated. The legal necessity can never be for personal difficulties of the *Karta* of Hindu family. The legal necessity shall always be for and in the interest of the joint family and its

property. He has vehemently argued that both the Courts have recorded the findings against the evidence led before the Court. The impugned judgments are perverse. Perversity is a substantial question of law that may be considered in the second appeal.

4. Per contra, the learned counsel for the respondent/plaintiff would submit that, on the one hand, the defendants are coming with a case that the sons were not taking his care. Hence, he was in legal necessity to sell the suit land and on the other his son appeared in the Court as his Power of Attorney. Both Courts have correctly appreciated these contradictory facts, believing that he had raised the false plea of legal necessity. Further, he would argue that the defendant never appeared in the Court in person. His Power of Attorney, who was his son who led the evidence, was not party to the agreement to sell and did not know about the terms of the contract. Hence, his evidence cannot be received in the evidence. He would submit that the notice was sent to the correct address. It was returned with the endorsement 'refused'. Therefore, it is a deemed service of notice under Section 27 of the General Clauses Act. He has also advanced the argument that the plaintiff was ready and willing to

perform his part of a contract. He never refused to perform his part of the contract. Interestingly, he argued that during the pendency of the suit, the witness to the agreement to sell, who was the property broker in this transaction, applied before the Executive Engineer, Irrigation Department, Waghur Dam for seeking permission to transfer the suit land under Section 12 of the Maharashtra Project Affected Persons Rehabilitation Act, 1999. The Execution Engineer granted the permission. The witness summons was issued to the said commission agent to prove that the defendants had instructed him to seek permission from the Commissioner under Section 12 of the above Act. However, he did not appear.

5. Both learned counsels have read the judgments and decrees of both Courts and tried to convince the Court that there is a substantial question of law and the appellants have no case to impugn the judgments and orders.

6. Learned counsel for the appellants has relied upon the case of *Kulwant Kaur Vs. Gurdial Singh Mann (dead) by legal heirs and others, AIR 2001 Supreme Court 1273*, in which the ratio has been laid down that interference with findings of fact is permissible. The substantial question of law includes its ambit. In other words, the Hon'ble Supreme Court has laid

down the law that the perverse findings of the Court may be dealt with as the substantial question of law.

7. He also relied upon the case of *Bondar Singh and others Vs. Nihal Singh and others; AIR 2003 Supreme Court 1905*. In the said case, it has been observed by the Hon'ble Supreme Court that the High Court can set aside perverse and contrary findings to evidence by subordinate courts in the second appeal. The impugned judgments and decrees by the trial Court as well as the first appellate Court, were not in consonance with the issues involved.

8. After hearing respective counsels and going through the relevant provision of law, the Court is of the view that the following substantial questions of law have been involved in the case and formulated thus;

- (i) Does the plaintiff prove that he was ready and willing to perform the part of the contract?
- (ii) Does examination of the Postman was essential to prove the refusal of the notice, and in the absence of examining the Postman, can it be a deemed service of notice under Section 27 of the General Clauses Act?

- (iii) Can the permission be granted under Section 12 of the Maharashtra Project Affected Persons Rehabilitation Act, 1999, without the consent of the allottee?
- (iv) Whether the personal need is a legal necessity for the *Karta* of the joint Hindu family:
- (v) Whether the witness to the agreement has the power/authority to apply for the permission under Section 12 of the Maharashtra Project Affected Persons Rehabilitation Act, 1999.

9. **Admit.**

10. Call Record and Proceedings.

11. Learned counsel Mr. Talhar waives service of the notice for the respondent.

In Civil Application No.10576 of 2023

12. After hearing the parties at length, it seems that the commission agent was in the pocket of the plaintiff. The appellants had a strong objection that he never granted him authority to apply for permission under Section 12 of the

Maharashtra Project Affected Persons Rehabilitation Act, 1999. The plaintiff had called him as a witness to prove that he had applied for seeking permission on the instructions of the defendants. But, he did not appear. These circumstances strongly go against the conduct of the plaintiffs. Various issues and substantial questions of law have been involved in this case as framed by this Court. Hence, the following order :

ORDER

- (i) The Civil Application is allowed.
- (ii) The execution, implementation, effect and operation of the judgment and decree passed in Special Civil Suit No.109 of 2011 by the learned 4th Joint Civil Judge Senior Division, Jalgaon, dated 17.10.2018 and the judgment and decree passed by the learned District Judge-3, Jalgaon passed in Regular Civil Appeal No.181 of 2018, dated 01.12.2022 stands stayed till the conclusion of the second appeal.

(S. G. MEHARE, J.)

...