



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CIVIL APPLICATION (CAS) No.132 OF 2024
IN
SECOND APPEAL No.482 OF 2022

(Ramesh Ganeshrao Mohod Vs. Pankaj Kamalkishor Agrawal)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. Vinay Dhabe, Advocate for appellant.
Mr. Vinay Sharma, Advocate for respondent.

CORAM : SANJAY A. DESHMUKH, J.
DATE : 13th SEPTEMBER, 2024.

1. This is an application for forming additional substantial questions of law.
2. This Court by an order dated 20.12.2022 formed following substantial question of law.

“Whether the learned Lower court justified in holding that the agreement was towards the sell of property and not the security in lieu of money advanced by the plaintiff?”

3. Learned Advocate for the appellant pointed out following two substantial questions of law.

(a) Whether the plaintiff/respondent was agriculturist at the time of executing an agreement to sale at Exh.-31 dated 19.1.2013 and the transaction between the parties was contrary to the provisions of Maharashtra Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 ?

(b) Whether the agreements at Exhs.- 31 and 32 dated 19.1.2013 and 26.7.2013 are in violation of provisions of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act ?

4. He submits that these two questions are questions of law and, therefore, those can be formed as per Section 100 of the Code of Civil Procedure, 1908. He is relying upon the following cases :

(i) **Sm. Surasaibalini Debi vs. Phanindra Mohan Majumdar**, reported in AIR 1965 SC 1364, in para No.23 it is held that:

‘.....Where a contract or transaction ex facie is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of the nature of the contract or transaction and mould its relief according to the circumstances.’

(ii) **Shri Lachoo Mal Vs. Shri Radhey Shyam**, reported in 1971(1) SCC 619, in para No.6 it is held that :

‘The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanction the non-observance of the statutory provision is cuilibet licet renuntiare juri pro se introducto. (See Maxwell on Interpretation of Statutes, Eleventh

Edition, pages 375 & 376.) If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation 'as a matter of public policy. In Halsbury's Laws of England, Volume 8, Third Edition, it is stated in paragraph, 248 at page 143 :

"As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void."

Section 23 of the Indian Contract Act provides :

"The consideration or object of an agreement is lawful, unless-

*it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law or is fraudulent;
or*

involves or implies injury to the person or property of another; or the Court regards it as immoral, or

opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

5. Learned Advocate for the appellant further submitted that these two substantial questions of law and merely because specific plea is not taken those cannot be held as waived. He pointed out that agreement to sale which shows that some non-agricultural plots are agreed to be sold. However, there is no any such non-agricultural plot or sanctioned lay out plan as asserted by the respondent in the plaint etc. He, therefore, submits that these two questions are substantial questions of law and needs to be framed for the decision of this appeal on merit.

6. Learned Advocate for the respondent pointed out reply and strongly opposed the application. He submits that no any substantial question of law arise as pointed out by the appellant in this application. As no such question was raised in the trial Court or the first appellate Court the application deserves to be rejected. He is relying upon the following authorities :

(i) **Karunanidhi Vs. Seetharama Naidu and others, (2017) 5 SCC 483**, in para No. 31 and 32 it is held as under :

"31) Now reverting to the facts of this case, in our considered opinion, the High Court rightly upheld all the

material findings of the two courts below but committed one legal error when it placed reliance on Section 15(2)(a) read with Schedule appended to the Act for granting relief to the plaintiffs and by recognizing their right in the suit properties against the defendant. This finding of the High Court is bad in law for various reasons mentioned hereinafter.

32) In the first place, such was not the case set up by the plaintiffs in the Trial Court or the first appellate Court or even before the High Court. Second, no substantial question of law was framed by the High Court on the applicability of Section 15(2) of the Act and third, in the absence of any pleading, issue and finding recorded by the two courts below on the applicability of Section 15(2) of the Act, the High Court had no jurisdiction to examine the case of its own for the first time in second appeal on such issue.”

(ii) **K. Chelliah Servai Vs. P. Muthusami**

Servai, reported in 1995 Supp (1) SCC 202, in para No.3 it is held as under :

“The High Court non-suited the appellant on the ground that the boundaries of the property in dispute did not tally with the evidence produced on the record. According to the High Court, the identity of the property in dispute could not be established by the appellant and as such, the official receiver was not competent to sell the same. It is not disputed that there were neither

pleadings nor an issue framed on this point by the trial Court. Mr. B. Kanta Rao, learned counsel appearing for the respondent does not dispute that the point on which the High Court allowed the second appeal was not an issue before the two courts below. We are of the view that in the second appeal it was not open to the High Court to have gone into a question which was neither pleaded nor raised or dealt with by the trial Court and the lower appellate court. The High Court, in the facts and circumstances of this case, exceeded the jurisdiction vested in it under Section 100, Civil Procedure Code."

(iii) **Anant Kevlekar and others Vs. Milan Danthe @ Anita Dantie and others**, reported in 2015(3) Mh.L.J. 428, in para No.18 it is held as under :

".....in the case of K. Chelliah Servai (supra), the appellant had neither pleaded nor argued that the boundary of properties did not tally with the evidence produced on record. It was held that in the Second Appeal, it was not open to the High Court to go into the question which was neither pleaded nor argued before the two Courts below. In the circumstances above, the question of assessment of the suit property to the payment of land revenue could not have been raised for the first time in this Second Appeal. Therefore, the substantial question No.1 does not arise."

(iv) **Sadashiv Mahadeorao Pokle (since**

deceased through LRs) and others Vs. Mahesh Baban Pokle and others, reported in 2008(4) Mh.L.J. 747, in para No.18 it is held as under ;

“.....It is, therefore, apparent that in the present case when appellants did not raise plea of any licence in alternative, either before trial Court or before lower Appellate Court, such an issue cannot be looked into for the first time in Second Appeal as it would be deciding the case on entirely new issue.”

Nobody will dispute the ratio laid down in the above authorities. However, each case must be decided on its own merit and facts of the case are always decisive.

7. On perusal of the judgments of both the Courts it appears that no such plea of laws were raised in the trial Court by the appellant/defendant. However, the object of ambit of Section 100 of the C.P.C. is that any substantial question of law can be decided if it is relevant to the facts of case in the Second Appeal, which is basic goes to the root of the case. It is well settled that it is not necessary to plead the law. However, from the peculiar set of facts of the case raised by both the sides and that agreement to sale shows that it was regarding alleged non-agricultural plots not resulted out of sanctioned lay out which is noted in the agreement to sale. No such non-agricultural plots are in existence though it is stated in the agreement to sale. These two substantial questions of law needs to be formed which goes to the root of the case in view of the principle that law need not be pleaded.

8. Considering all these aspects, the case laws cited supra by the learned Advocate for the respondent as to limits of Section 100 of C.P.C. is not helpful to him as both the questions are coming within the purview of substantial questions of law to be decided by this Court.

9. Considering all these aspects, the application deserves to be allowed.

10 The application is allowed in respect of question Nos.(a) and (b) which are stated in para No.3 of this order.

11. The application is disposed of.

SECOND APPEAL No.482 OF 2022.

1. Learned Advocate for the respondent seeks four weeks' time to decide as to whether respondent wanted to go to Supreme Court against this order.

2. At his request, stand over after four weeks.

(SANJAY A. DESHMUKH, J.)