



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 334 OF 2004

Shri. Rupsing Nathu Patil,
Age: 50 Years, Occupation: Agriculture,
R/o: Amjalisim Post Vadoda,
Taluka Chodpa, District: Jalgaon. ...Appellant

VERSUS

1. Shri. Dongar Paulad Chaudhary,
Deceased through his Legal Heirs,
 - 1/1. Himmat Dongar Chaudhary,
Age: 46 Years, Occupation: Agril.,
 - 1/2. Manohar Manik Dongar Chaudhary.
Age: 44 Years, Occupation: Agril.,
 - 1/3. Vatsalabai Vasudeo Patil,
Age: 55 Years, Occupation: Household,
 - 1/4. Leelabai Kalidas Patil,
Age: 53 Years, Occupation: Household,
 - 1/5. Kokilbai Dattatraya Patil,
Age: 51 Years, Occupation: Household,
 - 1/6. Sushilabai Pandurang Patil,
Age: 47 Years, Occupation: Household,
 - 1/7. Janabai Dhansing Patil,
Age: 44 Years, Occupation: Household,
 - 1/8. Smt. Hulnabai Dongar Chaudhary
Age: 75 Years, Occupation: Household,
- All R/o: Nim, Taluka Amalner, District Jalgaon.
2. Shri. Himmat Dongar Chaudhary,
Age: 49 Years, Occupation: Agriculture,
R/o: Nim, Taluka Amalner, District Jalgaon.

3. Shri. Manik Dongar Chaudhary,
Age: 45 Years, Occupation: Agriculture,
R/o: Nim, Taluka Amalner, District Jalgaon.

...Respondent

- Mr. V. B. Patil, Advocate for the Appellant
- Mr. B. R. Warma, Advocate for the Respondents

CORAM : R. M. JOSHI, J
RESERVED ON : AUGUST 08, 2025
PRONOUNCED ON : AUGUST 12, 2025

JUDGMENT :

1. This Appeal under Section 100 of the Code of Civil Procedure takes exception to the judgment and decree passed by the First Appellate Court in RCA No. 46/1995 whereby the First Appellate Court over turned the judgment and decree passed by the Trial Court of granting decree of specific performance of contract.

2. This Court by order dated 10.09.2004 in addition to the points mentioned in paragraphs 10 and 12 of the memo of the Appeal, framed following substantial question of law:

“Whether the First Appellate Court was right in interfering in the decree for specific performance passed by Trial Court, in the facts and circumstances of the present case and in particular, taking into consideration that the respondent defendant

had not entered the witness box and had not adduced any evidence?"

3. Parties are referred as 'Plaintiff' and 'Defendant' for the sake of convenience.

4. The facts which led to the filing of this Appeal can be narrated in brief as under:

Plaintiff filed suit for specific performance of contract against Defendant being Special Civil Suit No. 14/1993 on the basis of the agreement to sale executed by Defendant in favour of Plaintiff on 20.07.1991. Defendant by filing written statement though has admitted the execution of the agreement, however, contents therein are denied. It is claimed that the transaction is not sale transaction but a loan transaction and that the Plaintiff is a money lender. It is also claimed that there is no other land of the Defendant and that he had no intention to sale the said property.

5. After framing of the issues, Plaintiff led evidence. Defendant did not enter the witness box nor led any evidence. Trial Court decreed the suit by judgment and decree dated 05.09.1995. By directing the

Plaintiff to deposit the balance consideration within a period of a month and Defendant was directed to execute sale deed in respect of suit property.

6. Defendant being aggrieved by the said judgment and decree, preferred RCA No. 46/1995. The learned First Appellate Court framed points for consideration and answered all the points in favour of the Plaintiff, however, rejected the relief of specific performance on the ground of hardship caused to the Defendant. The First Appellate Court directed Defendant to return the part of consideration received by him along with interest. Plaintiff being aggrieved by said judgment and decree, preferred this Second Appeal.

7. Learned Counsel for Plaintiff submits that the Trial Court as well as First Appellate Court have accepted the case of Plaintiff about execution of agreement to sale in respect of suit property, payment of part consideration of Rs. 15,000/-, readiness and willingness of the Plaintiff to perform his part of contract and rejecting the contention of Defendant of the transaction being money lending transaction. It is his submission that after recording those findings and

without framing any issue of hardship, it was not open for the First Appellate Court to reverse the judgment and decree passed by the Trial Court. It is his submission by referring to the judgment of the Supreme Court in case of *K. Prakash vs. B. R. Sampath Kumar, 2014 (107) ALR 896* that the Appellate Court ought not to have interfered with the order of the Trial Court unless it was established that the discretion has been exercised perversely, arbitrarily or against judicial principles. In respect of the issue of hardship without framing any point for consideration, he placed reliance on the judgment of Supreme Court in case of *Prakash Chandra vs. Narayan, 2012 AIR(SC) 2826*. It is his argument that neither there is specific pleading in respect of the hardship nor Defendant has entered into witness box in order to substantiate the same. It is his submission that unless Defendant proves the hardship, it cannot become a ground for denying specific performance of contract. It is his submission that issue of hardship even otherwise ought not to have been answered in favour of Defendant as when the Defendant agreed to sale the suit property, he was conscious of the fact that he would become landless. To

support this submission, he placed reliance on the judgment of this Court in case of Abdul Mutalik Rajjak Musalman and Others vs. Khubai Majidkha Musalman and Others, 2005 (1) All.M.R. 593. Finally it is argued relying upon the judgment of Hon'ble Supreme Court in case of Parswanath Saha vs. Bandhana Modak (Das) and Another, 2025 AIR(SC) 280, that in absence of any pleadings or evidence that there was hardship of any kind, which was not foreseen by the Defendant at the time of execution of the agreement to sale, it cannot become a ground for denying decree of specific performance of contract.

8. Learned Counsel for Defendants supported the impugned order with submission that admittedly Defendant is the tenant under the Bombay Tenancy and Agricultural Lands Act, 1948 (for short '**the Act**') and the extent of the said legislature needs to be kept in mind while deciding the *lis* of a tenant. It is his submission that in fact he sought to argue that wherever there is a agreement to sale in respect of the land hold by tenant under the Tenancy Laws and in view of the impediments for the transfer of the said land

created under the said Act, the agreement to sale must contain recitals that the tenant has ceased the occupation as agriculturist or that he is incapacitated. He further argues that written statement indicates that there was no intention of sale coupled with the fact that the Defendant would lose the entire land and there is admission of Plaintiff in his cross-examination to that effect. It is his submission that in such circumstances it was not necessary for the Defendant to enter into witness box. In so far as the findings recorded by the First Appellate Court with regard to the hardship, it is his submission that having regard to the provisions of the Act and rules framed thereunder and more particularly, Rule 25A(f) of Bombay Tenancy and Agricultural Land Rules, 1956 (for short '**Rules**'), the findings of the First Appellate Court cannot be termed as perverse in order to cause interference therein. It is his submission unless it was established before the Civil Court that the tenant has given up the profession or he was incapacitated for cultivation of the land, the permission granted by the Authority under the said Act (Exhibit 33) ought not to have been relied upon by the Trial Court. It is his

submission that Trial should have Court refused to act upon the same for being contrary to the provisions of the Act.

9. There is no dispute about the fact that the Trial Court as well as First Appellate Court held that the Defendant had executed registered agreement to sale dated 20.07.1991 for the sale of suit land for a consideration of Rs. 40,000/-. Both Courts have further held that the Plaintiff was ready and willing to perform his party of the contract and that out of total amount of consideration, an amount of Rs. 15,000/- is already paid by Plaintiff to the Defendant. There is no further dispute about the fact that the case of the Defendant about this being no transaction for sale but a money lending transaction has been rejected by both Courts. Moreover, admittedly, after passing of the judgment and decree by the Trial Court with direction to the Plaintiff to deposit balance consideration within a month, the said direction has been duly complied with.

10. Now only question remains for consideration as to whether the First Appellate Court was justified in rejecting this specific performance on the ground of

hardship. Similarly, it needs to be seen as to whether in facts of the case the Defendant not entering into witness box and adducing any evidence, any such refusal of specific performance is justified.

11. In order to appreciate the said rival contention of the parties on this issue, it would be relevant to take into consideration the observations of Supreme Court in case of Paraswanath Saha (supra), which reads thus:

27. While evaluating whether specific performance ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the court is not arbitrary but is "sound and reasonable", to be "guided by judicial principles". The exercise of discretion is capable of being corrected by a court of appeal in the hierarchy of appellate courts. Sub-section (2) of Section 20 contains a stipulation of those cases where the court may exercise its discretion not to grant specific performance. (See: Jayakantham & Ors. v. Abaykumar reported in (2017) 5 SCC 178.)

28. A perusal of Section 20 of the Specific

*Relief Act, 1963 as it then stood would go to show as to under what circumstances 'hardship' can be taken into consideration in refusing specific performance. It is not possible to enumerate the different circumstances which constitute a hardship. It will suffice if it is noted that the question of hardship will have to be adjudged in the facts and circumstances of the case. In this connection, the observations of the Privy Council in the decision in **G.W. Davis v. Maung Shwe Go reported in 1911 SCC OnLine PC 25** throw light on an important aspect of the matter. Among other things, it is observed in the said case as under:*

"In the absence of any evidence of fraud or misrepresentation on the part of the Plaintiff which induced the Defendant to enter into the contract, their Lordships see no reason to accede to the argument. The bargain is onerous, but there is nothing to show that it is unconscionable. The Defendant knew all along that a lakh was the Plaintiff's limit; it is in evidence that he had frequently urged the Defendant's daughter to advise him to sell the land if he was getting a higher offer. It is difficult to say under the circumstances that he took an improper advantage of his position or the difficulties of the Defendant."

(Emphasis supplied)

29. Then again, it is necessary to remember that mere rise in price subsequent to the date of the contract or inadequacy of price is not to be treated as a hardship

entailing refusal of specific performance of the contract. Further, the hardship involved should be one not foreseen by the party and should be collateral to the contract. In sum, it is not just one factor or two, that is relevant for consideration. But it is the some total on various factors which is required to enter into the judicial verdict.

30. The High Court seems to have been carried away by the fact that in the written statement the Defendants did plead that hardship would be caused if they would be asked to execute the Sale Deed of the suit property.

31. The Trial Court had not framed any issue as regards hardship that may be caused to the Defendants. It is also pertinent to note that the High Court concurred with the Trial Court on all other issues but thought fit to reverse the decree only on the ground that if the Defendants are asked to execute the Sale Deed of the suit property, i.e., the residential house they would be rendered shelterless.

32. In the aforesaid context, we may refer to a decision of this Court in **Prakash Chandra v. Narayan** reported in (2012) 5 SCC 403 wherein para 17 of the report, it has been held:

“17. The question as to whether the grant of relief for specific performance will cause hardship to the Defendant within the meaning of clause (b) of sub-section (2) of Section 20 of the Specific Relief Act,

1963, being a question of fact, the first appellate court without framing such an issue ought not to have reversed the finding of the trial court while concurring with it on all other issues with regard to the Appellant's entitlement to relief for specific performance of contract."

33. Thus, in view of the aforesaid the High Court committed an error in taking the view that the Plaintiff is not entitled to the decree for specific performance as the same would cause hardship to the Defendants.

34. The High Court seems to have overlooked the fact that the question of hardship in terms of Section 20(2)(b) of the Act, 1963 read with explanation (2) bears reference to hardship, which the Defendant did not foresee at the time of entering into the contract. In other words, the issue of hardship would come into play only if it is established by cogent evidence that Late Prabha Ranjan Das who executed the Agreement of Sale was unable to foresee the hardship at the time of entering into the contract.

35. The explanation elucidates the point of time at which the hardship has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has been caused from an act of the Plaintiff subsequent to the contract.

36. There is nothing to indicate in the pleadings or evidence that there was a hardship of the kind which Late Prabha Ranjan Das did not foresee at the time he

executed the Agreement of Sale or that the hardship which the Defendants herein would face is the result of an act of the Plaintiff based on his supervening acts.

37. This Court in K. Narendra (supra) in paras 29 and 30 held as under:

"29. Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the Defendant which he did not foresee while non-performance involving no such hardship on the Plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the Defendant or improvident in its nature, shall not constitute an unfair advantage to the Plaintiff over the Defendant or unforeseeable hardship on the Defendant. The principle underlying Section 20 has been summed up by this Court in Lourdu Mari David v. Louis Chinnaya Arogiaswamy [(1996) 5 SCC 589 : AIR 1996 SC 2814] by stating that the decree for specific performance is in the discretion of the

Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court.

30. Chitty on Contracts (27th Edn., 1994, Vol. 1, at p. 1296) states:

Severe hardship may be a ground for refusing specific performance even though it results from circumstances which arise after the conclusion of the contract, which affect the person of the Defendant rather than the subject-matter of the contract, and for which the Plaintiff is in no way responsible.

12. The above observations of the Supreme Court clearly indicates that the question of hardship will have to be adjudged in the facts and circumstances of each case. Mere rise in price subsequent to the date of the contract or non adequacy of the price cannot be treated as hardship entailing refusal of specific performance of contract. The hardship should be one which is not foreseen by the party and should be collateral to the contract. It is also observed that in absence of any evidence of fraud or misrepresentation on the part of the Plaintiff, which induced the Defendant to enter into an contract and there is

nothing to show that it is unconscionable or where improper advantage is taken by the decision of the Plaintiff or the difficulties of the Defendant, the issue of hardship cannot be answered in favour of Defendant. The aforestated observations need to be kept in mind while appreciating the facts of the case.

13. Here in this case, admittedly, Defendant has executed agreement to sale of suit land for valid consideration. It is not the case of the Defendant that he was been forced to execute the agreement to sale at a lesser price than the market price or the price entitled by him. Agreement to sale is a registered document and as such, presumption of the registered document would certainly be attached to it unless rebutted. It is pertinent to note that the Defendant has denied the intention to sale and has claimed that it is a money lending transaction. Once such stand is taken by the Defendant, it cannot be presumed that there is likelihood of any hardship being caused to the Defendant by execution of the said agreement. The hardship involved must be collateral to the contract. Thus, in order to accept the contention of the

Defendant with regard to the hardship, the agreement to sale ought to have been admitted by him. Though he admits the execution of the document, he does not admit the contents therein and specifically claims it to be a money lending transaction. Both Courts have recorded the findings of fact on the basis of material evidence on record that the Defendant had executed the agreement to sale and it was always intended sale and not a money lending transaction.

14. In this backdrop, the non appearance of the Defendant in the witness box assumed relevance. The First Appellate Court has sought to record findings that the Plaintiff in his cross-examination has admitted that the Defendant became landless, however, the Court has failed to take into account that no hardship was claimed by Defendant with execution of the agreement to sale and consequent sale of the land. When the Defendant has executed the sale deed and accepted the part consideration, he was fully conscious of the fact that he is going to lose the land. Thus, it cannot be said that he becoming landless was not or could not be foreseen by him. This fact of the knowledge of the

Defendant of the land being lost get confirmed from the fact that he applied to the Collector for seeking permission of the sale of the suit land. Document Exhibit 33 indicates that the sale was permitted in respect of half portion of the suit land. The positive act on the part of the Defendant of applying for the permission not only shows that it was a case of the sale deed only and not a money lending but also indicates that a conscious decision was taken by the Defendant to sale the suit land.

15. Though it is sought to be argued by the Counsel for the Defendant that in case of sale of the land belonging to the tenant under the Act, there should be restoration of the agreement with regard to the tenant becoming incapacitated or ceased to be agriculturist. This cannot be made as a condition precedent for holding an agreement to sale being the valid. There cannot be direction to parties to incorporate terms in mutual contract. Moreover, issuance of such directions would not be supported by law. This conclusion is inevitable in view of the settled position of law that the specific performance

of contract cannot even be refused merely on the ground that there is no permission obtained for the sale of the land under the Tenancy Laws. The condition of sanction/permission would apply at the time of execution of sale deed. Moreover, when there is no embargo created by the law of sale/transfer of said land, save and except permission of the competent Authority, it would not be possible to accept the contention of the learned Counsel for the Defendant in this behalf.

16. Learned Counsel for Defendant has also sought to impress upon this Court that the Trial Court ought not to have accepted Exhibit 33 to be a permission for sale as it was not on the ground that tenant has ceased to be an agriculturist or is incapacitated. Exhibit 33 is an order passed by the Collector under the provisions of the Act. In view of Section 85 of the Act, there is clear embargo for the Civil Court to decide any issue which is to be decided by the parties under the said Act. In view of such legal impediment, it was not open for the Trial Court to record any findings in respect of correctness or otherwise of the

said order passed by the Collector. Moreover, even as of today the said order Exhibit 33 still subsists.

17. Learned Counsel for Defendant also sought to argue that it is high time that the First Appellate Court are required to be directed to frame points for determination in advance and not at the time of deciding the Appeal. This submission, however, is not supported by the scheme of Order XLI of Code of Civil Procedure. Rule 31 of Order XLI requires judgment to state the points for determination and decision thereon. There is no provision to frame points for determination before this stage unlike framing of issues in a trial. As far as the trial is concerned, Trial Court is required to frame issues on the basis of pleadings and also the evidence is required to be lead by the parties thereon. In so far as the Appellate Court is concerned, the Appellate Court is expected to decide the issues and points for consideration, which were raised before the Trial Court. In case Appellate Court finds that any issue is required to be framed and not framed by the Trial Court, as per Order XLI, Rule 25 additional issue can be framed and trial Court may

be directed to record evidence and findings thereon. In such circumstances, this Court finds it not possible to issue any direction to the Appellate Court for framing the points for determination in advance. Needless to say that if Appellate Court finds any issue to be additionally framed and there is sufficient evidence available on record, it may decide same after putting parties to the notice.

18. Though this Court accepts the contention of learned Counsel for Defendant that being First Appellate Court it was open for the District Court to re-appreciate the evidence and record the findings afresh, the findings recorded by the First Appellate Court cannot be said to be in consonance with the material evidence on record and more particularly, when the Defendant has not substantiated the said hardship by entering into witness box and consequently subjecting himself to the cross-examination. Moreover, the conclusion drawn by First Appellate Court are inconsistent to settled position of law. The findings recorded by the First Appellate Court are, therefore, required to be held to be perverse being contrary to

the evidence on record and settled position of law.

19. As a result of above discussion, the substantial question of law framed herein above deserves to be answered in affirmative. Hence, the impugned judgment and order dated 12.11.2003 passed by the First Appellate in RCA No. 46/1995 is set aside. Judgment and decree passed by the Trial Court dated 05.09.1995 in Special Civil Suit No. 14/1993 is restored.

20. Appeal stands allowed in above terms. Pending civil application(s), if any, stands disposed of.

(R. M. JOSHI, J.)