

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SECOND APPEAL NO. 240 of 2025**

With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2025
 In R/SECOND APPEAL NO. 240 of 2025
 With
CIVIL APPLICATION (FOR AMENDMENT) NO. 2 of 2025
 In **CIVIL APPLICATION (FOR STAY) NO. 1 of 2025**
 In R/SECOND APPEAL NO. 240 of 2025
 With
CIVIL APPLICATION (FOR AMENDMENT) NO. 3 of 2025
 In R/SECOND APPEAL NO. 240 of 2025

FOR APPROVAL AND SIGNATURE:**HONOURABLE MR.JUSTICE SANJEEV J.THAKER****Sd/-**

Approved for Reporting	Yes	No
	✓	

PATEL AMITKUMAR BHAGWANBHAI & ORS.

Versus

THAKOR JHEMABEN WD/O MERUJI KALA & ORS.

Appearance:

MS PREETI R DIXIT(11328) for the Appellant(s) No. 1,2,3,4

CORAM:HONOURABLE MR.JUSTICE SANJEEV J.THAKER**Date : 01/09/2025****ORAL JUDGMENT**

1. The present Second Appeal has been filed under Section 100 of the Code of Civil Procedure, 1908 (for short “the Code”) challenging the judgement and decree passed by the 3rd Additional District Judge, Patan, in Regular Civil Appeal no.14 of 2015, vide order dated 31.12.2024 whereby the

appeal filed by the plaintiff has been dismissed and the judgement and decree passed in Regular Civil Suit no.131 of 2013 has been confirmed.

2. For the sake of brevity and convenience, the parties are referred to as per their original status as that in the suit.
3. The brief facts arising in the present case are that the plaintiff filed Regular Civil Suit No.131 of 2013, on the ground that, the ancestors of the plaintiff entered into an agreement to sell with the ancestors of the defendant on 16.05.1980 and pursuant to the said agreement to sell, the possession of the property was handed over to the father of the plaintiff and at the time of entering into said agreement to sell, the suit property was new tenure land and it was specifically agreed that the defendants shall convert the suit property from new tenure to old tenure and thereafter execute the sale deed and therefore, the plaintiff has filed the suit for specific performance of an agreement executed in the year 1980 with respect to the property which was a new tenure land at the time of execution of agreement to sell. The Trial Court framed issues vide Exhibit 32 as under:

“(1) Whether the Plaintiff proves that the disputed land was legally obtained by deceased Meruji Kalaji Thakor as per tenancy rights and that he was thereby the lawful owner and occupant of

the disputed land?

(2) Whether the Plaintiff proves that deceased Meruji Kalaji Thakor had executed a legal agreement of sale regarding the disputed land in favor of the father of Plaintiffs on 16/05/1980?

(3) Whether the plaintiff proves that based on the basis of the agreement dated 16/05/1980, possession of the disputed land was handed over to the deceased father of plaintiffs, and since then until the date of the suit, the plaintiffs enjoy peaceful and direct possession?

(4) Whether the plaintiff is entitled to the relief sought in the plaint?

(5) What order and decree?”

4. The plaintiff examined himself vide Exhibit 26 and witnesses of the plaintiff were examined vide Exhibit 27. The defendant did not examine themselves and after considering the oral evidence, documentary evidence and giving finding on all the issues, the Trial Court dismissed the said suit. Aggrieved by the said judgement and decree, the plaintiff filed Regular Civil Appeal and the after re-appreciating the evidence, the Appellate Court confirmed the judgement and decree passed by the Trial Court and dismissed the appeal, hence the present Second Appeal.
5. Learned advocate for the plaintiff has mainly argued that the entire suit of the plaintiff is based only on the ground that the

defendant had to convert the suit property from new tenure to old tenure and thereafter, execute the sale deed and therefore, the suit that has been filed by the plaintiff is not for purchase of new tenure land but the suit has been filed for specific performance of the property, after the suit property has been converted by the defendant to old tenure land and therefore, the Trial Court and the Appellate Court could not have dismissed the said suit.

6. Learned advocate for the plaintiff has also argued that while deciding the appeal, the Appellate Court has not framed substantial questions of law as per the provisions of Order 41 Rule 31 of the Code and therefore, the First Appellate Court without framing the point of determination expressing general expression of concurrent view with the Trial Court judgement, passed the order of dismissal of the appeal and therefore, the present Second Appeal is required to be admitted.

7. Learned advocate for the plaintiff has relied on the judgement passed vide order dated 03.11.2023 in **Second Appeal No.297 of 2023**, in the case of **Gordhanbhai Ranchodbhai Patel Vs. Dineshbhai Laxmanbhai Patel** and relied on the judgement passed vide order dated 20.10.2022 in **Second Appeal No.432 of 2022**, in the case of **Ramabhai Galabhai Bariya Through LHR Vs. State of Gujarat** and in view of the said fact, it has

been argued that the Trial Court and the Appellate Court could not have disallowed the claim of the plaintiff and the Appellate Court could not have decided the appeal without properly framing and deciding the appropriate points for determination as required under Order 41 Rule 31 of the Code and in view of the said fact, it has been argued that the present Second Appeal is required to be admitted on the following substantial questions of law:

“A) Whether the learned first appellate Court has erred in passing the impugned judgment order and decree contrary to the provisions of Section 96 of the Code of Civil Procedure, 1908?

(B) Whether the learned first appellate Court has erred in passing impugned judgment, order and decree contrary to the provisions of Order 41 of Code of Civil Procedure 1908?

(C) Whether the learned first appellate Court has erred in passing impugned judgment order and decree contrary to the provisions of Order 41 Rule 31 of the Code of Civil Procedure, 1908?

(D) Whether the learned first appellate Court has erred in not framing points of determination as mandatory under the provisions of Order 41 Rule 31(a) of the Code of Civil Procedure, 1908?

(E) Whether the learned first appellant Court has erred in not

giving the decision on the point determination as mandatory as per the provisions of Order 41 Rule 31(b) (c) of Code of Civil Procedure, 1908?

(F) Whether the first appellate Court has erred in dismissing the Regular Civil appeal No. 14 of 2015 without framing point of determination and without adjudicating the point of determination?

(G) Whether the learned first appellate Court has erred in not discussing and not re-appreciating the oral as well as documentary evidence on record and further erred in passing the impugned judgment, order and decree?

(H) Whether both the Courts below erred in rejecting the reliefs claimed having accepted that the possession of the said disputed land in question was with the plaintiffs since 1980.”

8. Having heard learned advocate for the plaintiff, the fact remains that Agreement on which the Plaintiff is seeking specific performance also states that at that time, the suit property was a new tenure land and in the Plaint also, there is a clear averment of the Plaintiff that the suit property was a new tenure land.

9. To decide the dispute between the parties, it would be appropriate to reappreciate provision of Section-43 of the Gujarat Tenancy and Agricultural Land Act, 1948, which reads as under:-

“43. (1) No land or any interest therein purchased by a tenant under section 17B, 32, 32F, 32-I, 6[], 7[32U, 43-1D or 88E] or sold to any person under section 32P or 64 shall be transferred or shall be agreed by an instrument in writing to be transferred, by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine; and no such land or any interest, therein shall be partitioned without the previous sanction of the Collector*

[Provided that no previous sanction of the Collector shall be required, if the partition of the land is among the members of the family who have direct blood relation or among the legal heirs of the tenant:

Provided further that the partition of the land as aforesaid shall not be valid if it is made in contravention of the provisions of any other law for the time being in force: Provided also that such members of the family or the legal heirs shall hold the land, after the partition, on the same terms, conditions and restrictions as were applicable to such land or interest therein purchased by the tenant or the person.”

10. At the time when the Agreement was entered into between the parties, the suit property was new tenure land and the same was to be converted into an old tenure land and thereafter the sale-deed was to be executed between the parties. Therefore, the admitted position before the Court is that an Agreement that was entered into between the parties was with respect to new tenure land and hence, its sale or agreement to sell was barred by law. The suit has been filed for specific performance of the agreement, which in view of Section 43 of the Tenancy Act is illegal in view of restrictions contained therein.

11. The Division Bench of this Court in the case of ***Bharatbhai Devashibhai Ukani vs. Vinaben Babaji and ors.*** in **First Appeal No. 4023 of 2023** in Para 11, has referred to the issue in question that has been decided by the Full Bench in the case of deceased Shaikh Ismailbhai Husenbhai thro' Legal Heirs (supra), which reads as under:

“11. Issue, in question is no longer res-integra in view of the recent judgment of the Full Bench, in the case of deceased Shaikh Ismailbhai Hushainbhai through legal heirs (supra). The Full Bench, has confined its examination to the provision of Section 43 of the Act of 1948. Paragraph 21 in this behalf reads thus;

“21. Furthermore, in light of the controversy before us, as can be seen from the previous decisions of this Court noted hereinbefore, we do not find any reason to enlarge the scope of the reference and confine ourselves to the question of reference to examine “whether a plaint is liable to be rejected on the ground that the suit for specific performance of contract based on an illegal or invalid agreement to sell, hit by Section 43 of the Tenancy Act, 1948, is not maintainable?”

12. In view of the said judgment it has been held and observed that it is only the Civil Court that can look into the fact as to whether the agreement on the basis of which the suit for specific performance is instituted is a valid agreement and not hit by any statutory provisions or forbidden by law or opposed to public policy.

13. If the agreement itself is invalid being hit by section 43 of the Tenancy Act, no cause of action can be said to have arisen asking Defendant to perform his part of the contract and there is no sanction and the agreement itself is illegal and

invalid. Para 12 of the decision rendered in **First Appeal No. 4023 of 2023** reads as under:

“12. It has been held and observed that the Civil Court, alone can look into the fact that as to whether the agreement on the basis of which, the suit for specific performance is instituted is a valid agreement, not hit by any statutory provision, or forbidden by law or oppose to public policy. The Full Bench, has also considered the object and scope of Order VII Rule 11 of the Code, and referred to the judgment in the case of Dahiben vs. Arvindbhai Bhanusali (Gajara) dead through LHS., reported in (2020) 7 SCC 366, wherein, it has been held and observed that the cause of action for a suit for specific performance of an agreement of refusal by the Vendor inspite of readiness and willingness of the vendee to execute the sale deed, will not be existing in a case where the agreement itself is invalid being hit by Section 43 of the Act of 1948, inasmuch as, no cause of action can be said to have arisen, asking the Defendant to perform his part of the contract when there is no sanction and the agreement itself is illegal or invalid. Paragraphs 138, 139, 151 and 153 of the judgment of Full Bench, read thus;

“138. We may clarify that we are not concerned with the dispute pertaining to the validity of an agreement, i.e. the dispute whether an agreement is hit by Section 43 or not, i.e. whether it is valid or not? The issue before us is

plain and simple; as to whether the agreement which has been executed with a view to transfer a restricted tenure land as prescribed in Section 43(1), without the permission of the Collector, can be specifically enforced by the Civil Court by granting a decree of specific performance of such an agreement.” Our concern is about the jurisdiction of the Civil Court to decide on the question of enforceability of such an agreement of sale, which in our considered opinion clearly resides in the Civil Court as held by the Division Bench in Ganpatlal (supra). The Civil Court alone will have jurisdiction to adjudicate on the question of enforceability of the agreement of sale, on the basis of which the suit for specific performance has been executed. It is the Civil Court which alone can look into the fact as to whether the agreement on the basis of which the suit for specific performance is instituted is a valid agreement, not hit by any statutory provision, or forbidden by law or opposed to public policy.

139. *The question as to enforceability of an agreement hit by Section 43 of the Tenancy Act, 1948, to grant a decree of specific performance, cannot be by any stretch of imagination, a question within the scope of the jurisdiction of the revenue authority under the Tenancy Act, 1948. There is no gainsaying that Civil Court will not be required to stay a suit for specific performance based on an agreement hit by Section 43(1) of the Tenancy Act,*

1948 and relegate the parties to approach the Mamaltdar to decide on the question of validity of such an agreement. (g) Enforceability of the agreement hit by Section 43 of the Tenancy Act:-

151. On a careful reading of the provision in Order VII, Rule 11 of the Code of Civil Procedure and the law laid down by the Apex Court in Dahiben (supra), in light of the dispute before us, we may note that in order to maintain the suit for specific performance of agreement, which is hit by Section 43(1) of the Tenancy Act, 1948, the Plaintiff would be required to disclose the cause of action for seeking a decree of specific performance of such an agreement. The cause of action for a suit for specific performance of an agreement of refusal by the Vendor inspite of readiness and willingness of the vendee to execute the sale deed, will not be existing in a case where the agreement itself is invalid being hit by Section 43(1), inasmuch as, no cause of action can be said to have arisen asking the Defendant to perform his part of the contract when there is no sanction and the agreement itself is illegal or invalid. Further, on the averments made in the plaint, in conjunction with the documents relied upon by the Plaintiff, the Civil Court will be in a position to ascertain the question of enforceability of the agreement. It will be in a position to ascertain that the agreement, which is the basis of the suit, whether is hit by Section 43(1) or not, inasmuch as, to seek a decree of

specific performance of agreement, the Plaintiff is required to disclose and establish two circumstances: (I) firstly, that the documents, which is the basis of the suit is a valid document in the eye of law and (ii) secondly, that the cause of action has arisen prior to the presentation of the plaint. If the documents, i.e. the agreement is an illegal or invalid document in the eye of law, the Civil Court from the statement in the plaint itself will ascertain the suit being barred by law. In any case, a suit basis of which is an invalid document in the eye of law or where there exists no cause of action to institute the suit on the date of the presentation of the plaint, the Civil Court will have no option but to reject the plaint, at the threshold, under Order VII, Rule 11 of the Code of Civil Procedure. The arguments that the Civil court will be required to frame the issue as to the validity of the agreement, which is the basis of the suit and must necessarily proceed with the trial to arrive at the decision as to whether the decree of specific performance of an agreement hit by law, is to be granted or not, does not appeal to us.

153. We are in respectful agreement with the decision of the Division Bench in Naranbhai Kanjibhai Gajera (supra), holding that the Division Bench decision in Amarben (supra) can be said to be 'per incuriam' ignoring statutory provisions and in view of the decision of another Division Bench dated 21.06.2021 in Vijaybhai Shambhubhai Patel (supra), which was challenged in

Special Leave to Appeal (Civil) No.5124 of 2022, and which has been dismissed vide judgement and order dated 10.11.20222 affirming the Division Bench judgement in Vijaybhai Shambhubhai Patel (supra).”

14. In any case, this Court is bound by the judgment of the Hon’ble Full Bench in ***Shaikh Ismailbhai Hushainbhai through legal heirs*** (supra) and Hon’ble Division Bench in ***Bharatbhai Devashibhai Ukani vs. Vinaben Babaji and ors.*** (supra). These judgments squarely cover the position of law on the application of Order VII Rule 11 to Agreements hit by Section 43 of the Tenancy Act and hence, they squarely apply to the facts of the present case.

15. Therefore, in view of provisions of Section 43 of the Tenancy Act and the admitted position that the suit property was a new tenure land, the suit for specific performance of the contract based on illegal and invalid agreement to sale is hit by section 43 of the Tenancy Act.

16. It is required to be noted that in Second Appeal, the scope is very limited and the Court cannot re-appreciate the evidence. In the case of **Navaneethammal v. Arjuna Chetty** reported in **1996 (6) SCC 177**, the Hon’ble Apex Court has observed as under:-

“11. This Court, time without number, pointed out that interference with the concurrent findings of the courts below by the High Court under Section 100 CPC must be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to reappreciate the evidence just to replace the findings of the lower courts.”

17. *In the case of **Jaichand (Dead) through Lrs and Other v. Sahnulal and Another** reported in **2024 SCC OnLine SC 3864**, the Hon 'ble Apex Court has observed as under:-*

“28. It is thus clear that under Section 100 CPC, the High Court cannot interfere with the findings of fact arrived at by the first Appellate Court which is the final Court of facts except in such cases where such findings were erroneous being contrary to the mandatory provisions of law, or its settled position on the basis of the pronouncement made by the Apex Court or based upon inadmissible evidence or without vidence.”

18. In the present case, the Courts below have not ignored important evidence and looking at the judgment passed by the trial Court and confirmed by the appellate Court, it cannot be said that the Courts below had drawn wrong inference from two parts by applying the law

erroneously and in the present case while exercising powers under Section 100 of the Code of Civil Procedure, this Court while examining the judgment and decree passed by the Trial Court and confirmed by the appellate Court as well as considering the plaint and the documents annexed with the plaint, no error can be found by this Court in the judgment and decree passed by the trial Court as well as the appellate Court. In view of the same, there is no substance in the present Second Appeal and the substantial questions of law which have been formulated in the memorandum of appeal cannot be considered as substantial question of law.

19. In view of the same, the present Second Appeal is required to be dismissed.

20. In view of the fact that Appellate Court has dealt with all the issues and has also considered the oral evidence, the present Second Appeal is dismissed. In view of the disposal of the main matter the connected Civil Applications are accordingly disposed of.