

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 11.12.2023

Pronounced on: 22.12.2023

CPC No.6/2014

C/W

MA N.132/2012

**HAJI NOOR MOHAMMAD PATLOO
AND ANOTHER**

... APPELLANT(S)

Through: - Mr. M. A. Rathore, Advocate.

V/s

**MOHAMMAD RAFIQ BAKTOO
AND ANOTHER**

...RESPONDENT(S)

*Through: - Mr. Z. A. Qureshi, Sr. Advocate, with
Mr. Agha Faisal Ali, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

MA No.132/2012

1) The appellants have challenged order dated 31.07.2012 passed by learned Additional District Judge, Srinagar (hereinafter referred to as "the trial court"), whereby, in a suit filed by respondents against the appellants seeking specific performance of agreement to sell, the trial court has, while deciding the application under Order 39 Rules 1 & 2 of CPC, restrained the appellants from interfering in the suit land and from transferring, alienating or creating any third-party interest in respect of the suit land till the disposal of the suit.

2) It appears that the respondents (plaintiffs) have filed a suit for specific performance of contract against the appellants (defendants) seeking specific performance of agreement to sell dated 26.12.2011,

whereby appellants/defendants had agreed to sell 20 kanals of land comprised in Survey No.418 situated at Beigyar Masjid, Rainawari, Srinagar, for a consideration of Rs.30.00 lacs. As per case of the appellants, an amount of Rs.10.00 lacs was received by the defendants on the date of execution of agreement to sell and the balance amount was agreed to be paid by the plaintiffs/appellants by ending February, 2012. It has been further pleaded by the plaintiffs that the defendants had to accompany the plaintiffs for obtaining the requisite revenue documents, whereafter a formal sale deed was to be executed in the name of the plaintiffs and in case of failure of defendants to do so, they were obliged to pay double the amount of consideration to the plaintiffs as penalty. According to the plaintiffs, a further sum of Rs.9.00 lacs was paid to the defendants on 30th January, 2012. Thus, in total, an amount of Rs.19.00 lacs out of sale consideration of Rs.30.00 lacs, was paid by the plaintiffs to the defendants. It has been pleaded by the plaintiffs that they approached the defendants for obtaining the revenue extracts so that the sale deed could be executed by the end of February, 2012 but the defendants, on one pretext or the other, avoided to do so.

3) According to the plaintiffs, the defendants, in order to defeat the rights of the plaintiffs, got a suit filed against themselves by one Noor Mohammad before the Court of Municipal Magistrate, Srinagar, but in spite of there being no stay order, the defendants avoided to execute a formal sale deed with respect to the land in the question. It has also

been pleaded that the plaintiffs offered to pay the balance amount to the defendants but they refused to accept the same.

4) The defendants in their written statement pleaded that they are not the tile holders of the land in question and, as such, they cannot transfer the same. According to the defendants, the land in question belongs to Mosque, as such, the same cannot be transferred in favour of the plaintiffs. It is also pleaded by the defendants that the plaintiffs have committed breach of conditions of the agreement to sell and have not paid the balance amount of Rs.11.00 lacs by ending February, 2011. It has been further pleaded that the land in question is located around the Dal Lake area and its sale has been banned by the Government and by the High Court. It has been contended that the agreement to sell, which is subject matter of the suit, is not executable and enforceable because the subject matter of the said agreement belongs to Mosque and the defendants have no legal authority to sell the same.

5) The learned trial court after hearing the parties decided the application of the plaintiffs for grant of temporary injunction vide impugned order dated 31.07.2012. The trial court, after discussing various parameters necessary for grant of interim injunction came to the conclusion that, prima facie, possession of the suit land is with the plaintiffs for the last more than 30 years in their capacity as lessees. It has been further observed by the trial court that the question whether the defendants are under law competent and entitled to sell the land of

the Mosque, is a mixed question of fact and law and on this sole ground, the case of the plaintiffs cannot be thrown out. Accordingly, the trial court has, vide the impugned order, directed the defendants not to interfere in the suit land and not to transfer, alienate or create any third-party interest with respect to the suit land.

6) The defendants/appellants have challenged the impugned order passed by the trial court on the grounds that the land in question is Wakaf property as defined in the Jammu and Kashmir Wakfs Act. It is contended that there is a specific bar contained in the said Act regarding transfer of Wakf property. It has been submitted that the agreement to sell which is subject matter of the suit is un-enforceable because the defendants had not authority in law to alienate the property belonging to the Mosque. It has been further contended that no specific performance of an agreement which is not enforceable at law can be granted and, as such, the suit of the plaintiffs is barred by law. According to the appellants, the learned trial court, without going into the issue of maintainability of the suit itself, has proceeded to pass an interim injunction order against the defendants/appellants which is not in accordance with law. It has been further contended that the learned trial court has not considered the pleadings of the parties in a proper perspective and has observed that the suit land is in possession of the plaintiffs for the last more than 30 years, though the possession of the suit land was to be delivered to the plaintiffs only upon payment of balance amount of sale consideration.

7) Heard learned counsel for the parties and perused the grounds of appeal, the impugned order and the trial court record.

8) So far as the execution of agreement to sell dated 26.12.2011 regarding the property comprising 20 kanals of land in Khasra No.418 situated at Beigyar Masjid, Rainawari, Srinagar, is concerned, there is no dispute between the parties regarding its execution. It is also not in dispute that at the time of execution of the agreement to sell, the defendants have received a sum of Rs.10.00 lacs from the plaintiffs. While the plaintiffs claim that they have paid a further sum of Rs.9.00 lacs to the defendants, the same is being disputed by the defendants. However, the plaintiffs have placed on record of the trial court the receipts executed by the defendants which show that they have received a sum of Rs.10.00 lacs on 26.12.2011 and another sum of Rs.9.00 lacs on 30th January, 2012. Thus, the plaintiffs have been able to, prima facie, show that the parties have entered into a transaction whereby the defendants had agreed to sell the land in question in favour of the plaintiffs and in furtherance of this agreement, a sum of Rs.19.00 lacs, out of total sale consideration of Rs.30.00 lacs, has been received by the defendants.

9) The contention raised by the defendants/appellants is that the land in question belongs to the Mosque, therefore, the appellants had no authority to sell the same. It has been contended that the land in question is Wakf property and, as such, the appellants could not have alienated the same in violation of the provisions contained in the

Jammu and Kashmir Wakfs Act. It is being contended that the suit is not maintainable in view of the provisions contained in the Wakfs Act as also in view of the provisions contained in Section 17 of the Specific Relief Act, which is in *pari materia* with Section 25 of the J&K Specific Relief Act, which provides that a contract to sell any immovable property cannot be specifically enforced in favour of a vendor who knowing himself not to have any title to the property has contracted to sell the property.

10) On the other hand, the respondents/plaintiffs have contended that the issue whether the subject matter of the agreement to sell is a Wakf property is a question of fact which is required to be determined during the trial of the case. It has been contended that merely because the property belongs to a Mosque does not mean that it is Wakf property. It has been further contended that the defendants cannot take advantage of their own fraudulent act by claiming that they were not authorized to sell the property in question and thereby defeat the rights of the plaintiffs. It has been contended that the defendants cannot approbate and reprobate and take advantage of their own illegal actions.

11) So far as the question as regards the maintainability of the suit in view of the provisions of the Wakf Act and the provisions contained in the Specific Relief Act, is concerned, a perusal of the trial court record would reveal that the learned trial court has already framed specific issues on this aspect of the matter vide order dated 31st July,

2012. Issues No.3, 4 and 5 framed by the trial court specifically deal with the objections raised by the defendants/appellants as to the maintainability of the suit. In these circumstances it may not be appropriate for this Court to render any opinion on this aspect of the matter, lest it may prejudice the case of the parties before the trial court.

12) It has been contended by learned counsel for the appellants that the trial court has presumed that the possession of the subject matter of the agreement to sell is with the plaintiffs and the said presumption drawn by the learned trial court is without any basis. There appears to be sufficient force in this contention raised by learned counsel for the appellants. If we have a look at the impugned order passed by the learned trial court, prima facie finding regarding possession of the suit property rendered by the learned trial court is based upon rent receipts which are stated to be on record of the file. A perusal of the trial court record shows that there are no rent receipts depicting possession of the plaintiffs over any part of the suit property. In fact, in the plaint, the plaintiffs have not even pleaded that they are in possession of any shop as lessees and that they are paying the rent either to the defendants or to the Mosque. The plaintiffs have not even pleaded that they are in possession of the said property.

13) As against this, the plaintiffs' own document i.e. receipt dated 26.12.2011 clearly show that the possession of the suit land would be handed over to the plaintiffs after making the payment of the balance

amount to the defendants. Since whole of the balance amount has not been paid by the plaintiffs to the defendants for one reason or the other, it has to be inferred that possession of the suit land was never delivered to the plaintiffs. In the light of this material, the finding of trial court that the suit land is in possession of the plaintiffs for the last 30 years is perverse. Accordingly, the direction restraining the defendants from interfering in the plaintiffs' possession over the suit land deserves to be set aside.

14) However, there is sufficient material on record to, prima facie, show that the defendants have received Rs.19.00 lacs out of the sale consideration of Rs.30.00 lacs from the plaintiffs and there is no dispute about the execution of the agreement to sell. Even if it is assumed for the sake of arguments that the defendants were not authorized or competent to enter into agreement to sell with the plaintiffs, still then, as per the terms of the said agreement, they are obliged to return double the amount of the sale consideration to the plaintiffs. Therefore, to this extent, interest of the plaintiffs in the suit property is required to be protected. The defendants, therefore, cannot be allowed to alienate the suit property or to create third party interest therein as allowing them to do so would result in defeating the interests of the plaintiffs.

15) In view of the above, the appeal is partly allowed and the impugned order to the extent it restrains the defendants from interfering in the plaintiffs' possession over the suit land is set aside.

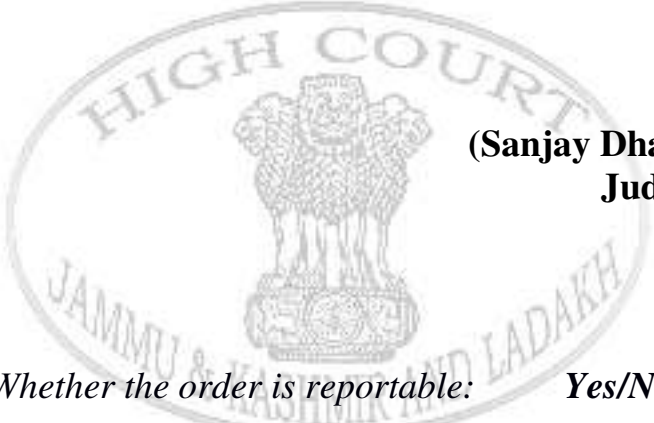
However, the direction with regard to restraint on alienation and creation of third-party interest in the suit land is upheld. The learned trial court is directed to proceed ahead with the decision of preliminary issues/trial of the case expeditiously.

16) The trial court record along with a copy of this judgment be sent down.

CPC No.6/2014

With the disposal of main appeal, these contempt proceedings do not survive. Accordingly, the contempt proceedings are closed. The contempt petition shall stand disposed of.

Srinagar
22.12.2023
"Bhat Altaf, PS"

 (Sanjay Dhar)
Judge

Whether the order is reportable: **Yes/No**