

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

SECOND APPEAL NO.307 OF 2010

WITH

CIVIL APPLICATION NO.808 OF 2010

Jagannath Kaluram Modak

...Appellant

V/s.

Genba Parshuram Gaikwad & Ors.

...Respondents

Mr. S. N. Chandrachud for the appellant.

Mr. Pramod J. Pawar for respondent No.1.

CORAM: K.K. TATED, J.

DATED : DECEMBER 18, 2013

P.C. :

1. Heard the learned counsel for the parties. Office note shows that the appellant has deleted respondent Nos.4 and 5 from the present proceedings.

2. This appeal is preferred by the original plaintiff challenging the judgment and decree passed by the lower appellate court dated 30th October 2009 in Regular Civil Appeal No.145 of 2005 reversing the judgment and decree dated 8th November 2001 passed by the learned 5th Joint Civil Judge, Junior Division, Pune in Regular Civil Suit No.397 of 1990.

3. Few facts of the matter are as under:

The appellant original plaintiff filed Regular Civil Suit No.397 of 1990 in the court of 5th Joint Civil Judge, Junior Division, Pune for specific performance of agreement for sale dated 13th July 1976. It is the case of the plaintiff that the defendant executed agreement for sale dated 13th July 1976 in respect of the property Gut No.87A admeasuring 17 R and gut No.87B admeasuring 31R situated at village Wadki, Tq. Haveli, Dist. Pune. It is the case of the plaintiff that he paid entire consideration to the defendants except Rs.500/-. As per the agreement for sale, duty was cast upon the defendant to obtain permission from competent authority within six months under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. As the defendants failed to obtain permission from the competent authority, the plaintiff filed suit for specific performance. During pendency of the suit, defendant expired, thereafter his legal heir Dattu was brought on record. Dattu also expired during pendency of the suit. However, his legal heirs were not brought on record. During trial, none appeared on behalf of the defendant. The trial court decreed the suit vide judgment and decree dated 8th February 2001 directing the respondent original defendant to execute the sale deed of the suit property in favour of the appellant original plaintiff by accepting Rs.500/-.

4. Being aggrieved by the said order passed by the trial court, the legal heirs of deceased defendant No.1 preferred appeal before the lower appellate court. The lower appellate court, by its judgment and decree dated 30th October 2009 allowed the appeal and set aside the

judgment and decree dated 8th November 2001 passed by 5th Joint Civil Judge, Junior Division, Pune in Regular Civil Suit No.397 of 1990 granting relief of specific performance of agreement and permanent injunction. The lower appellate court further granted liberty to the respondent original defendant to apply to the learned lower court under section 144 of the Code of Civil Procedure for restitution of the suit property to them.

5. Being aggrieved by the said order of the lower appellate court, the appellant original plaintiff preferred the present second appeal.

6. The learned counsel for the original plaintiff submits that the lower appellate court erred in coming to the conclusion that in view of abatement of the suit against one of the co-owners, the plaintiff is not entitled to the relief of specific performance in respect of the agreement dated 13th July 1976. He states that the lower appellate court failed to appreciate that once the decree is passed in favour of the appellant, he may or may not execute the decree against deceased co-owner. Hence, the judgment and decree passed by the lower appellate court is liable to be set aside. He further states that none appeared on behalf of the respondent original defendant before the trial court. He further states that as per the agreement for sale dated 13th July 1976, the plaintiff is in possession of the suit property and therefore there is no question of refusing specific performance just because one of the co-owners died and his legal heirs are not brought on record. On the basis of this submission, the learned counsel for the appellant states that the judgment and decree passed by the lower appellate court is liable to be set aside.

7. On the other hand, the learned counsel for respondent No.1 vehemently opposed the present appeal. He submits that the present appeal is withdrawn by the appellant against respondent No.4 (original defendant No.6) Balu Dattatray Gaikwad and respondent No.6 (original defendant No.8) Smt. Muktabai Kisan Kale who are legal heirs of original defendant. In view of deleting the names of these two legal heirs of original defendant nothing survives in the present appeal and it may be dismissed.

8. The learned counsel for the respondent further submits that before the lower appellate court the appellant original plaintiff has not brought on record the legal heirs of co-owner and therefore, the suit stood abated. Therefore there is no question of granting any relief of specific performance of agreement dated 13th July 1976 because the suit property was held by all the co-owners jointly. On the basis of this submission, the learned counsel for the respondents submits that there is no substance in the present second appeal and the same be dismissed.

9. Heard the learned counsel for the parties at length. Admittedly the appellant deleted the names of some of the legal heirs of original defendant from the cause title of the present appeal i.e. respondent Nos.4 and 6. Not only that defendant No.2 died during pendency of the suit. His legal heirs were not brought on record. In spite of that the trial court has passed the decree of specific performance against defendants' legal heir only.

10. There is no dispute that the suit property is owned by original defendants jointly and severally and therefore, whether the suit for specific performance can be decreed in view of abatement of the suit against one of the defendants. That question was considered and decided by the trial court and decreed the suit. The lower appellate court, in paragraph 18 and 19 of the impugned order specifically held that once the suit abates against one of the co-owners, the plaintiff is not entitled to the relief of specific performance. The lower appellate court in paragraph 21 of the impugned judgment held that the agreement of sale is dated 13th July 1976. The appellant original plaintiff filed suit for specific performance in the year 1990 i.e. after more than 11 years. The appellate court considered the fact that as per agreement for sale dated 13th July 1976 duty was cast upon the respondent – defendant to obtain permission from the competent authority within six months. Therefore, the cause of action for filing the suit arose for the appellant – original plaintiff only in the year 1977 whereas the appellant original plaintiff has filed the suit on 16th February 1990. In the present proceedings, the Regular Civil Suit No.397 of 1990 filed by the appellant – original plaintiff stood abated against one of the defendants – co-owner and his legal heirs were not brought on record and therefore, there is no question of granting any relief of specific performance of agreement dated 13th July 1976 in favour of the appellant. In view of these facts, I do not find any substantial question of law involved in the present appeal. Hence, the appeal stands dismissed.

11. In view of dismissal of the second appeal the present civil application does not survive. Hence, the same stands dismissed.

(K.K. TATED, J.)