

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No.465 of 1992

Ramchandra Sadashiv Tavate,
Aged about 34 years,
Occupation – Service,
Residing at 'Gulmohar' Colony,
South Shivajinagar,
Sangli.

... Appellant/
Ori. Defendant No.4.

Versus

1. Ananda Vyankatraya Pavaskar,
Aged 45 years, Goldsmith,
R/o Plot No.65, Mali Plots,
S.No.447, Sangli.
2. Smt. Baby Annasaheb Shembade,
aged 37 years,
Household duties.
3. Prakash Annasaheb Shembade,
Aged 22 years,
Occupation – Education.
4. Satish Annasaheb Shembade,
Aged 14 years,
Occupation – Education,
minor guardian, Respondent
No.2 Baby Annasaheb Shembade.

Nos.2 to 4 residents of Khanbhag,
Sangli.

5. Laxman Virupaksha Kudache,
Aged 54 years,
Occupation – Service.

6. Dadu Laxman Kudache,
Aged 25, Occupation – Service.

7. Sanju Laxman Kudache,
Aged 23 years,
Occupation – Education.

Nos.5 to 7 residing at Shembade
Plots, South Shivajinagar,
Sangli.

... Respondents/
(No.1 Ori. Plaintiff,
Nos.2 to 4 heirs of
ori. Defendant No.1,
Nos.5 to 7 heirs of
ori. Defendant
Nos.2 and 3)

Shri Anilkumar Patil, Advocate for Appellant.
None for Respondents.

Coram : R.K. Deshpande, J.
Dated : 30th July, 2015

Oral Judgment :

1. Special Civil Suit No.42 of 1984 for specific performance of contract dated 5-1-1983 was partly decreed by the Trial Court on 22-12-1989. The relief of specific performance of contract was refused, but the heirs of the defendant Nos.1 to 3 were directed to pay to the plaintiff an amount of Rs.18,000/- received towards earnest money and they are held liable to pay the same in case they have inherited any property of the original defendant Nos.1 to 3.

2. In Regular Civil Appeal No.92 of 1990, the lower Appellate Court has modified the decree passed by the Trial Court and the suit filed by the plaintiff for specific performance of contract was decreed in its entirety. The appellant, who was joined as the defendant No.4 in the said suit as a subsequent purchaser, was directed to join the execution of the sale-deed with the other defendants in favour of the plaintiff. The plaintiff was directed to deposit the balance amount of consideration in the Court. Hence, this second appeal by the original defendant Nos.4, the subsequent purchaser of the property from the defendant No.3.

3. On 10-12-1992, this second appeal was admitted, framing the following substantial questions of law :

“(1) Whether the agreement dated 5th January, 1983, between the Plaintiff and Defendants 1 and 2 is binding on the joint family of Defendants 1 to 3, when neither of Defendant Nos.1 and 2 was a manager or was authorized to deal with the joint family property?”

“(2) When admittedly Defendant No.3 was the father and head of the family and when he had not agreed to the execution of the agreement, whether the agreement could be enforced

either against Defendant No.3 or against the joint family of the Defendant?

(3) Whether the sale deed (Exhibit 122) confers a valid title on the Appellant-Defendant No.4?”

4. Undisputedly, the defendant Nos.1 and 2 executed an agreement to sale the suit property in favour of the plaintiff on 5-1-1983, which is at Exhibit 104. It was for a total consideration of Rs.33,500/-, out of which an amount of Rs.18,000/- was paid. The balance amount of Rs.15,500/- remained to be paid. The defendant Nos.1 and 2 resisted the suit on the ground that the suit property was the ancestral property, in which the defendant No.3, the Karta of the joint family, had a share. The defendant No.3 was not signatory to the transaction and he refused to give any consent for transfer of such property.

5. The defendant No.3 resisted the claim, urging that it is his self-acquired property, and the defendant No.1, who is his son, and the defendant No.2, who is his wife, had no right, title or interest, which could have been alienated in favour of the plaintiff by executing an agreement dated 5-1-1983. During the pendency of the suit, the

defendant No.3 executed the registered sale-deed dated 5-10-1984 in favour of the defendant No.4, who is the appellant before this Court. The sale-deed was the subject-matter of challenge in the suit.

6. The Trial Court recorded the finding that the suit property was the joint family property and the defendant No.3, who was the Karta of the joint family, was not a party to the agreement dated 5-1-1983. The plaintiff has not claimed the relief of partition and separate possession. On these findings, the Trial Court dismissed the claim for specific performance of contract and directed refund of the amount, which was received by the defendant Nos.1 to 3.

7. The lower Appellate Court has recorded the finding that the agreement dated 5-1-1983 and the circumstances discussed indicate that the defendant No.3 impliedly consented to the transaction entered into by the defendant No.1, and, therefore, it is binding upon him. The suit property was not the self-acquired property of the defendant No.3, but the defendant Nos.1 to 3 were the joint owners of the property acquired under the sale-deed 29-11-1968 at Exhibit 139 by the defendant No.3 out of the sale proceeds of his ancestral property. The lower Appellate Court has held that the

sale-deed dated 5-1-1983 was executed by the defendant No.3 in favour of the defendant No.4 during the pendency of the suit and it was for the benefit of the family. With these findings, the lower Appellate Court has reversed the decision of the Trial Court and passed a decree for specific performance of contract.

8. The Trial Court recorded the finding that the defendant No.3 is not signatory to the agreement dated 5-1-1983 and the revenue record shows that the suit property stands in his name. The sale-deed dated 29-11-1986 at Exhibit 139 is in the name of the defendant No.3. The agreement dated 5-1-1983 at Exhibit 104 though clearly records the fact the revenue record indicates the name of the defendant No.3 as the owner of the suit property, in fact the property was acquired from the nucleus of the joint family property.

9. The plaintiff in his deposition in para 13 states as under :

“13. ...It is true that the consent of defendant no.3 was to be obtained as he was the real owner of the suit property. ...”

In para 15 of his deposition, he further states as under :

“15. ... The defendant no.3 has not executed any agreement in my favour.”

The agreement dated 5-1-1983 contains a recital that the consent of the defendant No.3 shall be obtained and thereafter within a period of three years, the sale-deed shall be executed. In the light of this evidence on record, there was no scope left for the lower Appellate Court to hold that there was an implied consent of the defendant No.3 to the agreement dated 5-1-1983. The findings of the lower Appellate Court are not based upon any evidence available on record.

10. Section 17 of the Specific Relief Act, 1963 is relevant and hence it is reproduced below :

“17. Contract to sell or let property by one who has no title, not specifically enforceable.--(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor--

(a) who, knowing not have any title to the property, has contracted to sell or let the property;

(b) who, though he entered into the contract believing

that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.”

In view of the aforesaid provision, the contract to sell the immovable property cannot be specifically enforced in favour of a vendor, who, knowing not to have any title to the property, has contracted to sell the property.

11. The lower Appellate Court could not have adjudicated upon the controversy as to whether the suit property was the self-acquired property of the defendant No.3 or it was the joint family property of the defendant Nos.1 to 3. The sale-deed dated 29-11-1986 at Exhibit 139 indicates the name of the defendant No.3 and the revenue record also stands in his name. The question could have been agitated or touched by the Trial Court only in the event if the plaintiff had claimed a relief of partition and separate possession, as contemplated by Section 22 of the Specific Relief Act. Sub-section (1) of Section 22 of

the said Act states that any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for possession, or partition and separate possession, of the property, in addition to such performance. Sub-section (2) therein states that such relief shall not be granted by the Court unless it has been specifically claimed.

12. In view of above provisions, the lower Appellate Court was not competent in this suit to adjudicate upon the controversy as to whether the suit property was the ancestral property or the self-acquired property of the defendant No.3. The lower Appellate Court could have proceeded on the footing that the sale-deed and the revenue record stand in the name of the defendant No.3 as the owner of the property and he being not signatory to the agreement dated 5-1-1983, it was not binding upon him. The substantial questions of law framed at serial nos.(1) and (2) are, therefore, answered accordingly.

13. Coming to the sale-deed dated 5-10-1984 at Exhibit 122 executed by the defendant No.3 in favour of the appellant/defendant No.4 is concerned, once it is held that the Court was not competent to grant a relief of specific performance of contract in the facts and

circumstances of this case, the challenge to the sale-deed dated 5-10-1984 at Exhibit 122 automatically fails. The substantial question of law framed at serial no.(3) is, therefore, answered accordingly.

14. The necessary consequence of answering the substantial questions of law is to set aside the judgment and decree passed by the lower Appellate Court in Regular Civil Appeal No.92 of 1990 on 8-4-1992 and to restore the decree passed by the Trial Court in Special Civil Suit No.42 of 1984 on 22-12-1989.

15. In the result, the second appeal is allowed. The judgment and decree passed by the lower Appellate Court in Regular Civil Appeal No.92 of 1990 on 8-4-1992 is hereby quashed and set aside and the decree passed by the Trial Court in Special Civil Suit No.42 of 1984 on 22-12-1989 is restored. No order as to costs.

Judge

pdl