

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.514 OF 2014
WITH
CIVIL APPLICATION NO.1633 OF 2014

Sayyad Habibulla Khabula Husen Jahagirdar (decd)
through his LRs and others ... Appellants
Vs.
Nisar Sayyad Murad Jamadar and others ... Respondents

Mr. S. G. Kudle for Appellants.
Mr. A. A. Valsangkar i/b. Mr. Samir Kumbhakoni for Respondents No.1 to 3a
to 3c.

CORAM : R. G. KETKAR, J.
DATE : 9TH APRIL, 2015

P.C. :

Heard Mr. Kudle, learned Counsel for appellants and Mr. Valsangkar, learned Counsel for respondents No. 1 to 3a to 3c at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), legal representatives of original defendants No.1 and 2 have challenged the judgment and decree dated 30.10.2007 passed by the learned Civil Judge, Junior Division, Akkalkot in Regular Civil Suit No.68 of 1988 as also the judgment and decree dated 06.02.2013 passed by the learned District Judge-1, Solapur in Civil Appeal No.309 of 2007. By these orders, the Courts below decreed the Suit instituted by the original plaintiffs for specific performance of contract dated 25.03.1988 subject to the plaintiffs paying balance consideration of Rs.10,000/- as also bearing the expenses for registration. The parties shall hereinafter be referred as per their status before the trial Court.

3. In support of this Appeal, Mr. Kudle submitted that in paragraph 8 of the written statement filed on behalf of defendant No.1, it was specifically asserted that the land bearing Gat No.117 was never given for cultivation to defendants No.1 to 3. To that effect, no document was executed. Not only that, defendants No.1 and 2 did not execute so called agreement of sale on 25.03.1988 and that, they did not receive amount of Rs.5,000/- as earnest money. The so called agreement of sale is a forged and fabricated document. Defendants No.1 and 2 have not signed that document. The said document bears signatures of defendant No.1 in Urdu script. That is not the signature of defendant No.1. Defendant No.1 never signs in Urdu. He is highly educated. All along he is signing in English. In other words, Mr. Kudle submitted that the agreement of sale dated 25.03.1988 is a forged and fabricated document. He further submitted that the suit land is a Devasthan Inam land and consequently, defendants No.1 and 2 have no authority to transfer the said land. He submitted that though the specific defence was raised to this effect in paragraphs 8, 10 and 11 of the written statement, neither the trial Court nor the District Court framed any issues / points in that regard. The agreement of sale dated 25.03.1988 was also not sent to the expert for verifying the signatures. The agreement of sale is a forged and fabricated document and this aspect goes to the root of the matter. The Courts below could not have decreed the Suit for specific performance of agreement, which is a forged and fabricated. The plaintiffs also did not examine the attesting witness. He further submitted that though the appellate Court recorded a finding that the suit land is Inam land and decree for specific performance could be passed by directing the vendor to apply for permission of the Competent Authority, no such direction was issued.

4. Mr. Kudle further submitted that the Government of Maharashtra

had issued Resolution on 30.07.2010 laying down therein that Devasthan Inam lands cannot be transferred, and if such transfers have taken place, the same are invalid. He submitted that Gat No.117 is Inam land and the same could not have been alienated by defendants No.1 and 2. Non-framing of material issues / points by the trial Court / District Court has resulted into miscarriage of justice. For all these reasons, he submitted that Appeal requires consideration as it involves substantial questions of law.

5. On the other hand, Mr. Valsangkar supported the impugned order. He submitted that defendant No.1 executed agreement of sale on 25.03.1988 in favour of the plaintiffs. Defendant No.2 had given power of attorney in favour of defendant No.1 to sell the suit land. Thus, agreement of sale was executed by defendant No.1 for himself and also on behalf of defendant No.2. He submitted that the witness examined on behalf of the defendant No.1, namely, Sayyad Khalilulla Hussaini at exhibit-186 admitted during cross-examination that the plaintiffs are in possession of the suit land. He also admitted that his father's signature appears on the power of attorney at exhibit-197. Mr. Valsangkar submitted that the learned trial Judge held that the suit land is not Inam land and assuming it is Inam land, conditional decree of specific performance could be passed. The Courts below relied upon the decision of Apex Court in the case of *Vishwa Nath Sharma Vs. Shyam Shankar Goela*, **2007 (10) SCC 595**. For all these reasons, he submitted that the Appeal does not involve any substantial question of law.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the impugned orders shows that the trial Court framed issue No.1 namely whether the plaintiffs establish execution of agreement of sale in their favour and answered that issue in the affirmative. As far as

the District Court is concerned, the learned District Judge framed point No.1 to the effect that whether plaintiffs prove that the defendant No.1 had executed agreement of sale dated 25.03.1988 in their favour in respect of land bearing Gat No.117 admeasuring 2-H 76-R situate at Village Barhanpur, Taluka Akkalkot. The Courts below, and in particular, the learned District Judge has considered the submissions as regards agreement of sale being a suspicious document from paragraphs 13 onwards. The learned District Judge also considered contentions advanced on behalf of defendants No.1 and 2 that signature on that document is forged one. The contention advanced on behalf of the defendants that the said agreement does not bear the signature of defendant No.2 and that she is not party to that document was also considered. The learned District Judge considered evidence of D.W.1-Sayyad Khalilulla Hussaini at exhibit-186. During the course of cross-examination, he admitted that plaintiffs are in possession of the suit lands. He also admitted that signature of his father appears on the power of attorney at exhibit-197. In paragraph 21, the learned District Judge recorded that plaintiffs have placed on record the power of attorney executed by the defendant No.2 in favour of the defendant No.1 on 04.04.1960. The power of attorney so produced by the plaintiffs was handed over to them at the time of execution of agreement of sale on 25.03.1988. The learned District Judge observed that perusal of power of attorney shows that the defendant No.2 has authorized the defendant No.1 to sell the suit lands on her behalf. The learned District Judge also noted that the defendants have not clarified under what circumstances, the original power of attorney came into possession of the plaintiffs. Had the defendants never executed agreement of sale in favour of the plaintiffs, there was no reason for them to hand over the original power of attorney in possession of the plaintiffs.

7. In paragraph 23, the learned District Judge dealt with the case of the defendants that they did not execute agreement of sale as also signatures upon the agreement of sale are forged. The learned District Judge noted

that immediately after execution of agreement of sale on 25.03.1988, plaintiffs issued notice on 12.04.1988. Defendants No.1 and 2 however, did not give reply to the said notice. In other words, silence maintained by the defendants despite service of notice itself speaks volumes about the veracity of the agreement of sale. The learned District Judge also observed in paragraph 24 that the defendants' witness in his cross-examination in unequivocal terms admitted possession of plaintiffs over the suit land. Thus, after considering the evidence on record, the Courts below concurrently found that in pursuance of the agreement of sale, plaintiffs were to put in possession. Both the Courts below found that the agreement of sale was executed by defendants No.1 and 2 in favour of the plaintiffs on 25.03.1988 and the said document is neither forged nor fabricated document. In view thereof, I do not find merit in the submission of Mr. Kudle that no agreement of sale was executed on 25.03.1988 and that it is a forged and fabricated document.

8. As far as the contention that Inam land cannot be transferred is concerned, the Courts below relied upon the decision in the case of **Vishwa Nath Sharma** (*supra*) and observed that vendor can be directed to apply to the Competent Authority for permission. It is no doubt true that the trial Court recorded a finding that suit land is not Inam land. However, in paragraph 25, the learned District Judge recorded a categorical finding that it is Inam land. In such circumstances, in my opinion, the learned District Judge should have modified the trial Court's decree and passed conditional decree of specific performance.

9. Mr. Kudle relied upon the Government Resolution dated 30.07.2010 issued by the Government of Maharashtra which lays down that Devasthan Inam lands cannot be transferred and if such transfers have taken place, the same are invalid. As noted earlier, on 25.03.1988, defendants No.1 and 2 executed agreement of sale in favour of the plaintiffs. Section 54 of the Transfer of Property Act, 1882 lays down that a contract for the sale of

immovable property does not, of itself, create any interest in or charge on such property. In other words, agreement of sale does not create any interest in the property and only enables the person, in whose favour agreement is executed, to obtain relief of specific performance. In view of this, I do not find any merit in the submission of Mr. Kudle.

10. Mr. Kudle submitted that as the learned District Judge held that the Suit land is Inam land, the Court should have passed conditional decree. I find merit in this submission. In the case of **Vishwa Nath Sharma** (*supra*), in paragraph 12, the Apex Court, observed thus,

“12. The Privy council in Motilal v. Nanhelal, AIR 1930 P.C. 287, laid down that if the vendor had agreed to sell the property which can be transferred only with the sanction of some government authority, the court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming, to convey to the purchaser within a certain time. This proposition of law was followed in Mrs. Chandnee Widya Wati Madden v. C.L. Katial, (AIR 1964 SC 978), and R.C. Chandiok v. Chuni Lal Sabharwal (AIR 1971 SC 1238). The Privy Council in Motilal's case (supra) also laid down that there is always an implied covenant on the part of the vendor to do all things necessary to effect transfer of the property regarding which he has agreed to sell the same to the Vendee. Permission from the Land and Development Officer is not a condition precedent for grant of decree for specific performance. High Court relied upon its decision in Mrs. Chandnee Widya Madden v. Dr. C.L. Katil (supra) and Maharo Saheb Shri Bhim Singhji v. Union of India (AIR 1961 SC 234) to substantiate the conclusive. In Mrs. Chandnee Widya (supra) this Court confirmed the decision of the Punjab and Haryana High Court holding that if the Chief Commissioner ultimately refused to grant the sanction to the sale, the plaintiff may not be able to enforce the decree for specific performance of the contract but that was not a bar to the Court passing a decree for that relief. The same is the position in the recent case. If after the grant of the decree of specific performance of the contract, the Land and Development Officer refused to grant permission for sale the decree holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract.”

11. In view thereof, the decree passed by the Courts below is confirmed subject to modification to the effect that legal representatives of defendants No.1 and 2 shall apply to the Competent Authority for permission within 3

months from today, and if sanction is forthcoming then legal representatives of defendants No.1 and 2 shall execute the sale deed in favour of the plaintiffs within 3 months thereafter. If the legal representatives of defendants No.1 and 2 fail to apply, the plaintiffs would be at liberty to apply through the Court Commissioner for obtaining permission. Subject to this modification, Second Appeal fails and the same is dismissed.

12. At this stage, Mr. Kudle orally applies for stay of this order for a period of 3 months from today. Mr. Valsangkar opposes this prayer.

13. Having regard to the fact that appellants desire to challenge this order before the higher Court, in my opinion, request made by Mr. Kudle is reasonable. Hence, notwithstanding dismissal of the Appeal, this order shall remain stayed for a period of 3 months from today subject to condition that appellants will not apply for further extension of time.

14. In view of the dismissal of the Appeal, nothing survives in Civil Application No.1633 of 2014 for stay and the same is disposed of accordingly.

(R. G. KETKAR, J.)

Minal Parab