

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3553 OF 2015
WITH
CIVIL APPLICATION NO.2142 OF 2015
AND
CIVIL APPLICATION NO.2143 OF 2015

Yadav Consultancy Services Pvt. Ltd. and another ... Petitioners
Vs.
M/s. J. D. Gandhi Constructions ... Respondent

Mr. Praksh W. Yadav, Petitioner No.2 in person.
Mr. S. V. Sadavarte for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 13, 2016

P.C. :

Heard Mr. Yadav, petitioner No.2 in person and Mr. Sadavarte, learned Counsel for respondent at length. Rule. Mr. Sadavarte waives service for respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as defendant, has challenged the judgment and order dated 24.09.2014 passed by the learned 2nd Joint Civil Judge Senior Division, Pune below exhibit-14 in Special Darkhast No.68 of 2014. By that order, the learned trial Judge rejected the application exhibit-14 made by the defendant in Special Darkhast No.68 of 2014.

3. Respondent, hereinafter referred to as plaintiff, had instituted Special Summary Suit No.18 of 2009 against the petitioners for

recovery of Rs.14,21,000/-. After hearing both sides, the learned trial Judge partly decreed the Suit and directed the defendants therein to pay Rs.12,00,000/- to the plaintiff along with interest @ 5% p.a. from the date of filing of the Suit till realization of decretal amount. In pursuance thereof, plaintiff filed Special Darkhast No.68 of 2014 in the Court of Civil Judge, Senior Division, Pune for execution of that decree. In that Darkhast, defendant No.2 filed application exhibit-14 inter alia alleging that plaintiff obtained the decree by misrepresentation and fraud and by suppressing the material facts. Defendant No.2 alleged that plaintiff did not submit necessary and relevant documents while obtaining the decree. He did not bring on record the approved plans and commencement certificate issued by the Pune Municipal Corporation. It is further alleged that plaintiff did not sell 150 sq.mtrs. area to the defendants and the said fact is also not supported by approved plans. By the impugned order, the learned trial Judge rejected the application. In paragraph 6, it was observed thus,

“6. By going through record, it makes clear that decree is passed after full fledged trial. Decree is not for damages for in respect of 150 sq.ft. extra area. But decree is passed on the ground that J.D./defendant issued cheques to satisfy dues and or recovery of amount. There is no issue whether construction is legal or illegal and whether commencement certificate is obtained by D/H. (plaintiff). At the relevant time, J.D./defendant has not raised said objection. Decree is not obtained by playing fraud on court. On the contrary, decree is passed after full fledged trial after giving sufficient adjournments to defendant. Hence, I have hesitation to answer Point No.1 in negative and pass following order.”

4. Perusal of paragraph 6 shows that the learned trial Judge came to the conclusion that decree is not obtained by playing fraud on the Court. On the contrary, decree is passed after full fledged trial after giving sufficient adjournments to the defendant.

5. It is settled principle of law that when a party comes with a plea

of fraud, the burden is on that party to plead and establish fraud played by the opposite party. In the present case, apparently parties did not lead evidence. Unless the evidence is led in support of the plea of fraud, Court will not be in a position to positively come to the conclusion either way.

6. Mr. Sadavarte submitted that defendant No.2 did not file application for setting aside the ex-parte decree passed in Special Summary Suit No.18 of 2009 and has filed application exhibit-14 in Special Darkhast No.68 of 2014. The executing Court cannot go behind the decree. It is not in dispute that the Suit was instituted in the Court of Civil Judge, Senior Division and the Darkhast is filed by plaintiff in the same Court. The learned trial Judge ought to have treated this application as having been filed in the Suit and not in Darkhast. As noted earlier, parties did not lead evidence. In my opinion, in the absence of any evidence, the learned trial Judge was not justified in recording a finding that defendant No.2 did not establish fraud. On this ground alone, the impugned order deserves to be set aside and hence the following order:

- a. Order dated 24.09.2014 is set aside and application exhibit-14 is restored to the file of the trial Court;
- b. The learned trial Judge will treat that this application as having been filed in Special Summary Suit No.18 of 2009 and permit the parties to lead evidence in support of their respective case, if they so desire;
- c. All contentions of the parties on merits are expressly kept open;
- d. The amount of Rs. 3 lacs deposited by the defendant No.2 which is invested by the Executing Court shall be renewed pending the decision on application at exhibit-14. Liberty is

reserved to the plaintiff to apply for withdrawal of that amount before the trial Court. If such application is made, the learned trial Judge will pass appropriate orders thereon.

e. Rule is made absolute in the aforesaid terms with no order as to costs.

7. In view of the disposal of the main Petition, Civil Applications No.2142 and 2143 of 2015 do not survive and the same are disposed of.

(R. G. KETKAR, J.)

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