

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.904 OF 2015
with
CAA/1096/2015

Shri Annasaheb Kallappa Upadhye & Ors. ... Appellants

Vs.

Shri Ramesh Football Chougule & Ors. ... Respondents

Mr.A.A. Kumbhakoni, Sr. Adv. With Mr.N.P. Dalvi for the Appellants
Mr.T.S. Ingale for Respondent Nos.6 to 30
Mr.A.Y. Sakhare, Sr.Adv. i/b Shivaji Misal for Resp. Nos.31, 32 and 33

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **FEBRUARY 2, 2016**

P.C.:

1. Admit. By consent of the parties, matter called out and heard finally at the stage of admission.
2. This Appeal from order is directed against the order dated 18.6.2010 passed in Special Civil Suit No.151 of 2014 by the learned Joint Civil Judge, Senior Division, Sangli, whereby the application below exhibit 5 filed by the plaintiffs was rejected. The original defendant Nos.6 to 28 are the owners of the land which is an open agricultural land. On 16.1.2003, defendant Nos.6 to 28 executed power of attorney in favour of defendant No.29. Defendant No.30 is the wife of defendant No.29. Thereafter, defendant Nos.29 and 30 executed agreement of sale of the said suit land

on 30.9.2011 in favour of defendant Nos.1 to 5 and plaintiff No.5 pursuant to which Rs.1,01,00,000/- was received by defendant Nos.29 and 30. Thereafter, on 14.10.2011, defendant Nos.1 to 5 and plaintiff No.5 executed memorandum of understanding in favour of plaintiff Nos.1 to 4 and 5, by which the development rights were assigned to plaintiff Nos.1 to 4 and 5 i.e., the appellants, for which the plaintiff Nos.1 to 4 and 5 were required to pay Rs.3.99 crores to defendant Nos.1 to 5 and plaintiff No.5. However, defendant Nos.29 and 30 and defendant Nos.1 to 28 entered into registered sale deed on 30.6.2014 in favour of defendant Nos.31, 32 and 33 for Rs.2.82 core. It is the case of the plaintiff Nos.1 to 4 i.e., the appellants that after execution of Memorandum of Understanding dated 14.10.2011, possession of the suit land was given to them.

3. Mr.Kumbhakoni, learned Senior Counsel appearing for the appellants, submitted that the MoU was executed between defendant Nos.1 to 5, 29 & 30 and plaintiff No.1 to 4 and 5 on 14.10.2011 for Rs.3.99 crores. Subsequently, defendant No.29 and the land owners defendant Nos.6 to 28 by registered sale deed on 30.6.2014 fraudulently and surreptitiously sold the property to defendant Nos.31, 32 and 33 for Rs.2.82 core. He submitted that the value of the property cannot be reduced after three years. He further pointed out that defendant Nos.1 to 5 and plaintiff No.5 had received rights by agreement of sale dated 3.9.2011

to transfer or assign the property to third person. He pointed out there is a specific mention that defendant Nos.29 and 30 i.e., the power of attorney holders of the original land owners – defendant Nos.6 to 28 had specifically mentioned that they agreed to transfer the property or assign the right to a person chosen by defendant Nos.1 to 25 and plaintiff No.5. He further submitted that the MoU dated 14.10.2011 is illegally cancelled by defendant Nos.1 to 4 and 5. He pointed out that defendant No.3 and plaintiff No.5 are not parties to the cancellation of the said MoU and, therefore, the agreement between the appellants i.e., plaintiff Nos.1 to 4 and defendant No.3 and plaintiff No.5 still exists to the extent of their share. Mr.Kumbhakoni also submitted that the appellants have paid money to defendant Nos.1, 2, 3 and 5 and, therefore, they are entitled to recover money from them as there is an alternative prayer for damages.

4. In reply, Mr.Sakhare, the learned Senior Counsel for respondent Nos.31, 32 and 33 i.e., the Developers, has submitted that the manner in which the plaint is drafted and the reliefs prayed, specific performance cannot be granted. He submitted that the original landlords i.e., defendant Nos.6 to 28 issued power of attorney in favour of defendant No.29 on 16.1.2013 pursuant to which he entered into a contract with defendant Nos.1 to 5 and plaintiff No.5 on 3.9.2011. However, the said contract is canceled on 7.6.2014 by defendant Nos.1 to 4 and defendant No.5. He

submitted that the respondent Nos.31 to 33 have entered into a registered sale deed thereafter on 14..2014 with defendant Nos.1 to 5 and plaintiff No.5. However, these two documents are not challenged by the appellants/plaintiffs. Thus, defendant Nos.31 to 33 have right, title and interest in the suit land by virtue of registered document. He submitted that the claim of the plaintiffs is based on unregistered Memorandum of Understanding. However, in view of section 54 of the Transfer of Property Act, unregistered agreement of sale does not create any right in favour of the plaintiffs. Moreover, there is no privity of contract between plaintiff Nos.1 to 4 and defendant Nos.6 to 29, who are the land owners. He further pointed out relevant portions from the power of attorney dated 16.1.2013 and also agreement dated 3.9.2011 wherein it is specifically mentioned that the possession was never given to defendant Nos.1 to 5 and, therefore, there was no question of giving possession of the suit land to the present plaintiffs. He further submitted that defendant Nos.31 to 33 have in fact applied to the concerned authorities to obtain permission to convert the agricultural land into non-agricultural land. The necessary permissions for development are entirely obtained by the respondent No.29 and, therefore, the contentions of the plaintiffs that they have worked for obtaining the permission for non-agricultural land are false.

5. In support of his submissions on the point of section 54, Mr.Sakhare relied on the **Suraj Lamp & anr. vs. State of Haryana & anr.**¹ to submit that where a suit cannot be decreed, then interim relief is not to be granted. He also relied on the judgments in **Cotton Corporation of India Ltd. vs. United Industrial Bank Ltd. & Ors.**² and **Rambhau Namde Gajre vs. Narayan Bapuji Dhotia & Ors.**³ on the point of section 54.

6. Mr.Ingale, learned Counsel appearing for Respondent Nos.6 to 30, adopted the submissions of Mr.Sakhare and submitted that the defendant Nos.6 to 28 are the owners of the land and never handed over possession of the land to anybody muchless, to the plaintiffs. He submitted that the land owners have applied to all the authorities to get permission for non-agricultural land and that credit cannot be taken by the appellants.

7. Heard the submissions of the learned Counsel for the parties. Perused the orders and documents produced herewith. The suit for specific performance is filed by the plaintiffs. The admitted facts in the present matter are as follows:

Respondent Nos.6 to 28 are the land owners of the suit property i.e., survey No.37A admeasuring 3 hectares 84 ares situated at Kupwad,

1 (2012) 1 SCC 656

2 (1983) 4 SCC 625

3 (2004) 8 SCC 614

Sangli. They have executed a power of attorney in favour of respondent No.29 i.e., Madhukar Shankar Koshti on 16.1.2003. Respondent No.28 executed power of attorney and development agreement in favour of respondent No.29. Respondent No.30 is the wife of respondent No.29. It is also not disputed that the power of attorney executed agreement of development or sale with defendant Nos.1 to 5 and plaintiff No.5 on 3.9.2011 and thereafter defendant Nos.1 to 5 and plaintiff No.5 have executed a Memorandum of Understanding in favour of plaintiff Nos.1 to 4 on 14.10.2011. The consideration under this Memorandum of Understanding was fixed at Rs.3.99 crore. The agreement was cancelled by defendant Nos.1 to 4 and defendant No.5. Thus, it is clear that there was no privity of contract between the original land owners i.e., defendant Nos.6 to 28 and the present appellants. Defendant Nos.6 to 28 have given power of attorney to respondent No.29 and pursuant to which respondent No.29 has executed further agreements with defendant Nos.1 to 5 and plaintiff No.5. It was pointed out by Mr.Kumbhakoni, the learned Senior Counsel, in the agreements, there was a power to assign or convey the land mentioned in the agreement of sale which was executed by the power of attorney in favour of defendant Nos.1 to 5 and plaintiff No.5 on 3.9.2011. It is correct that such power to assign, the assigned rights is permissible in law. However, in the present case, defendant Nos.26 to 28 have come with a specific case that not only there was any privity of

contract between the defendants and the present appellants, but no money was received by them towards consideration when such transactions had taken place. Moreover, the agreement of 3.9.2011 was cancelled on 7.6.2014 by defendant Nos.1 to 5. If it was so, the defendant Nos.1 to 5, prima facie, had no power to execute further agreements or Memorandum of Understanding dated 14.7.2014 in favour of the present appellants. Undoubtedly, the appellants are claiming their right in the suit plot and seeking relief through defendant Nos.1 to 5 and plaintiff No.5. If at all, the defendant Nos.1 to 5 and plaintiff No.5 have any claim in the suit property, then only the same relief can be granted to the present appellants. The defendant Nos.1 to 5 and plaintiff No.5 had already entered into separate registered sale deed dated 14.7.2014 in favour of respondent Nos.31 to 33. The earlier agreement dated 14.10.2011, the Memorandum of Understanding dated 3.9.2011 and also, the earlier agreement dated 16.1.2003, are all unregistered agreements. The plaintiffs cannot claim their right in the suit property i.e., immovable property on the basis of the unregistered agreement or the Memorandum of Understanding when the landlord have executed registered sale deed dated 14.7.2014, between respondent Nos.31 to 33, who have a better title in the suit land.

8. This is an application for temporary injunction moved by the plaintiffs in the suit for specific performance and, therefore, at this stage, it is necessary to see whether the plaintiffs have made out prima facie case and whether there is any irreparable loss and in whose favour is the balance of convenience. The prayers in the suit are for injunction that the respondents i.e., the original defendants, shall not create any third party right and especially defendant Nos.31 to 33 shall not go for further development. It was argued that earlier the suit land agricultural land and subsequently, it was developed by the plaintiffs by taking necessary steps before the competent authority and obtain non-agricultural permission. The land was earlier described as an agricultural land. Now it is non-agricultural and divided in plots. The relevant portion from the earlier agreement dated 3.9.2011 and subsequent agreement dated 14.7.2014 is highlighted on this point by the learned Senior Counsel. He pointed out development work of plotting and obtaining N.A. permission is done by the plaintiffs. He submitted that the plaintiffs have till now paid approximately Rs.1.55 crore of consideration to the defendant Nos.1 to 5 and plaintiff No.5. He further submitted that the plaintiffs at the time of executing the Memorandum of Understanding agreed for an amount of Rs.3.99 crore for the suit land. However, in the year October, 2011 and three years thereafter, i.e., on 14.7.2014, respondent Nos.31 to 33 have registered the sale deed for lesser amount of Rs.2.82 crore. He submitted that the

bonafides of the transaction appear to be doubtful as the price of the land cannot become less three years after the earlier transaction.

9. Both the learned Counsel for respondent Nos.6 to 28 and also respondent Nos.31 to 33 have relied on the N.A. order dated 12.9.2011 passed by Shri Dilip Bund, the Commissioner, Pune Division, whereby the name of the respondent Madhukar Koshti is appearing as an applicant and the Memorandum of Understanding has taken place on 14.10.2011. The plaintiffs can claim possession through defendant Nos.1 to 4 and 5. My attention was drawn to the statements made by respondent Nos.1 to 4 and 5 in their written statement filed in suit No.151 of 2014 especially in paras 9 and 11 wherein these defendants have denied that at any time, they gave possession of the suit property to the plaintiffs. Though these defendants have admitted the agreement dated 3.9.2011, however, it is specifically mentioned that plaintiffs were never in possession of the suit property so there is no question of handing over the possession of the property to the appellant.

10. In the judgment relied on by Mr.Sakhare in the case of **Rambhau Namdeo Gajre (supra)**, it is held that the agreement to sell does not create an interest of the proposed vendee in the suit property.

11. I have perused the order passed by the learned trial Judge. The order is in detail and in the said order, the trial Court has also considered the aspect of possession. Thus, though there was some monetary transaction between defendant Nos.1 to 5 and plaintiff No.5 and the present appellant, this fact cannot make out any good case for the plaintiffs to grant relief of temporary injunction in their favour in view of the other agreements and facts. The order passed by the learned Judge therefore cannot be faulted with. Therefore, the order is upheld and the appeal is dismissed.

12. The learned Counsel for the appellants submitted that there has been an ad-interim stay from 28.8.2014 till today which may be continued as the appellants want to challenge this order before the honorable Supreme Court. It is opposed by the learned Counsel for the respondents. However, in view of the submissions made by the learned Counsel for the appellants, the stay granted earlier to continue for six weeks from the date the order is signed and uploaded.

(MRIDULA BHATKAR, J.)