

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9552 OF 2017

Dr. Laxman s/o Ramrao Nagargoje and others ...Petitioners

versus

Suresh Premraj Mutha ...Respondent

.....
Mr. A.D. Kasliwal, advocate for the petitioners
Mr. P.F. Patni h/f Mr. U.A. Bhadgaonkar, advocate for respondent
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 31.10.2017**

**Date of pronouncing
the Order: 07.11.2017**

PER COURT :-

1. By consent of parties, heard finally at admission stage.
2. Being aggrieved by the order dated 26.04.2017 passed below Exh.24 in Regular Civil appeal No. 243 of 2012, by Adhoc District Judge-2, Aurangabad, the original defendants have preferred this writ petition.
3. Brief facts giving rise to the present writ petition are as follows:-

a) The respondent-original plaintiff has filed Special Civil Suit No. 290 of 2001 for specific performance of contract and for perpetual injunction in respect of plot Nos. 1, 6, and 7 in all admeasuring 33 gunthas, situated at Gat No. 105, Nakshtrawadi, Tq. and District Aurangabad. The present petitioners had resisted the suit by filing written statement. Both the parties led their oral and documentary evidence in support of their rival contentions. Learned Joint C.J.S.D. Aurangabad, by its judgment and decree dated 4.4.2007 decreed the suit in terms of its prayer clauses.

b) Being aggrieved by the same, the petitioners preferred Regular Civil Appeal No. 243 of 2012 before the District Court Aurangabad. During pendency of aforesaid appeal, the petitioners filed an application Exh.24 under Order 41 Rule 25 of C.P.C. requesting therein that the issues be framed as stated in the body of application and the same be referred to the trial court for recording the finding on the same and for reverting the findings and reasons on those issues to the appellate court. The learned Adhoc District Judge-2, Aurangabad by its impugned order dated 26.4.2017 rejected the said application Exh.24. Hence, this writ petition.

4. Learned counsel for the petitioners submits that the trial court has not considered the pleading of the parties to the suit. There is

specific pleading in para 2, 10 and 11 of the plaint that the agricultural land bearing Gat No. 105 at village Nakshtrawadi, Tq. and District Aurangabad, was purchased by 15 persons, including the present defendants and a society was formed and registered as Mitrasangam Sahakari Grihanirman Sanstha for developing the said land. It has been specifically pleaded in the para 10 of the plaint that as per the terms of agreement of sale, it was agreed to execute the sale deed within one month from the date of dissolution of said society. The society came to be dissolved and members become individual owners of various plots. In para para 4 of written statement, the petitioners defendants have denied the contention raised in the plaint and also pointed out that the date of dissolution and details are not given by the plaintiff in the plaint. Learned counsel submits that considering the aforesaid pleading of the parties, the issue of enforceability of contract is related to the society, its dissolution and as such the issues as mentioned in application Exh.24 are required to be framed, however, the trial court has failed to frame the said issue. The respondent has specifically pleaded that there was G.P.A. in favour of one Vasant Pimlapure and he had executed an agreement to sale as power of attorney. The petitioners have denied the said execution of the power of attorney in favor of said Vasant Pimpalpure. However, the trial court has not framed specific issue in this regard. The authority of execution of agreement

to sale is going to the root of the matter. The learned counsel submits that however, the lower appellate court lost sight to consider the aforesaid facts. Learned counsel submits that Order XLI Rule 25 comes into operation when the Court, from whose decree the appeal is preferred, has omitted to frame or try any issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon merits.

5. Learned counsel for the petitioners, in order to substantiate his submissions, places reliance on the judgment of Supreme Court in the case of ***Smt. Bachahan Devi and Anr. vs. Nagar Nigam, Gorakhpur and Anr, reported in 2008 (2) ALL MR 299.***

6. Learned counsel for the respondent-plaintiff submits that the dissolution of society are not relevant factors for deciding the suit instituted by the respondent seeking specific performance of contract. If the issue whether the society is formed or whether it was dissolved and if dissolved what will the consequences are beyond the scope of suit for specific performance of contract. The land was initially purchased by 15 individuals and later on the society was formed. The said society was never the owner of the land. Thus, learned counsel submits that the proposed issues in the application are not essential for the right decision of the suit and therefore, they

are not framed. Learned counsel submits that the petitioners-defendants never raised any objection for framing of the issues. Even the learned Judge of the trial court has observed that the question of dissolution of the society has no bearing on the issue of specific performance of contract.

7. Learned counsel for the respondent, in order to substantiate his contentions, places reliance on the following judgments:-

- i) Kasturi vs. Iyyamperumal and Ors. reported in AIR 2005 SC 2813;
- ii) Narayan Vishwanath vs. Malappa Kasappa, reported in AIR 1956 Bombay 246.

8. I do not find any substance in the present writ petition. The petitioners by filing application Exh.24 in Regular Civil Appeal No. 243 of 2012 requesting the lower appellate court to frame following issues and refer the same to the trial court and further direct the trial court to take additional evidence, if required and further proceed to try such issues and return the evidence to the appellate court together with its finding thereon and reasons therefor.

- I. Whether and when the society was dissolved?
- II. What is the effect of dissolution with reference to the alleged

agreement of sale to be executed?

III. Whether on dissolution the ownership was transferred to the members by the society?

9. Learned Judge of the lower appellate court has rightly observed that in the suit for specific performance of contract, the issues which are relevant are (i) whether there is any agreement/contract of sale of property?, (ii) Whether plaintiffs are ready and willing to perform their part of contract? and (iii) Whether plaintiffs are entitled for the decree of specific performance of contract? As per the pleadings, four acres of agricultural land out of Gat No.105 came to be purchased by 15 persons by registered sale deed on 20.12.1982. After purchase of the said land, the aforesaid society was formed and registered in the year 1983. The society was dissolved and there was mutual partition between the parties and plots were allotted to the members on 11.9.2000. In the said partition, the plot Nos. 7, 6 and 1 (suit plots) came to be allotted to the present petitioners/defendant Nos. 1 to 3, respectively. The learned Judge of the lower appellate court therefore, rightly observed that the dissolution of society and effect of dissolution are not at all relevant factors for deciding the suit for specific performance of contract.

10. Even on perusal of judgment and decree passed by the trial court, it appears that the trial court has observed that the said society was formed for development of the land purchased by 15 persons in the year 1982. The learned Judge of the trial court has observed that existing of the society or its dissolution has no effect on the sale purchase transaction of the plaintiff, as before formation of society, agricultural land was purchased by those 15 members. The learned Judge of the trial court in para 11 of the judgment also given a reference to evidence of P.W.6 Anil Tanpure and observed that there was demarcation of plot and map Exh.72 shows such division for sanction of lay out. A witness from Land record office also examined, who had measured the suit property and a map drawn by him was also produced on record.

11. So far as the issue about whether defendant in fact executed the power of attorney in favour of Vasant Pimpalapure is concerned, by issue No.2, the burden is on the plaintiff to prove that the present petitioners/original defendants agreed to sale the suit plot to the respondent-plaintiff and execute the agreement to sale as alleged in the plaint.

12. In view of the above, I do not find any fault in the impugned order passed by the learned Judge of lower appellate court. There is

no substance in the writ petition. The writ petition is dismissed. In the circumstances there shall be no order as to costs.

(V. K. JADHAV, J.)

rlj/