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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.138 OF 2014
WITH
CIVIL APPLICATION NO.1448 OF 2013
WITH
SECOND APPEAL NO.139 OF 2014
WITH
CIVIL APPLICATION NO.1446 OF 2013

Punjaba Kisan Avhad .Appellant.
V/s.
Sunil Walmit Sarode & Anr. ..Respondents.

Mr.J.R.Avhad for the Appellant in both the Appeals & Applicant in the Civil Applications.

Mr.Drupad Patil for Respondent No.1 in both the appeals.

Coram : N.M.Jamdar, J.

Date : 10 April 2017

<u>ORAL ORDER</u>

Both these two appeals have been filed by the same Appellant, arise between the same parties and they have been argued together, hence they are being disposed of by this common order.

2. The suit land bearing Gat No.416/2 is situated at

Jalgaon, Taluka Nandgaon, District Nashik. An agreement for sale was executed between the Appellant and Respondent No.1, original Plaintiff in respect of the suit land on 17 September 1994. The consideration was fixed at the rate of Rs.75,000/- out of which Rs.23,000/- was deposited towards the earnest money. Respondent No.1 was put in possession of the suit property on 17 September 1994. Respondent No.1 having come to know that the Appellant was trying to create a third party rights filed a suit for simplicitor injunction on 15 September 1995. Thereafter, the Appellant had executed the agreement with Respondent No.2 and an ex-parte decree for specific performance was obtained by Respondent No.2 by instituting a Special Civil Suit No.146/1995. Respondent No.1 filed Regular Civil Suit No.37/2000 (old Suit No.19/1997) for declaration that the said decree is null and void and in collusion and sought specific performance of the agreement. The learned Civil Judge, by the Judgment and Order dated 3 October 2001, partly decreed the suit and held that the agreement in favour of Respondent No.1 was proved. However, the decree for specific performance cannot be executed in view of the decree passed in Special Civil Suit No.146/1995. As against this order, Respondent No.1 filed Regular Civil Appeal No.203/2001 in the District Court, Nashik. In the meanwhile, the Appellant filed a Regular Civil Suit No.35/2002 seeking possession of the suit property. The suit was decreed by Judgment and Order dated 31 August 2009. As against this Judgment and Decree, Respondent No.1 filed Civil Appeal

No.67/2009. Both the appeals were heard together by the learned District Judge and disposed of by the impugned Judgment and Order dated 5 April 2013. As against the dismissal of the Regular Civil Appeal No.203/2001, the Appellant filed Second Appeal No.138 of 2014 and as against the dismissal of Civil Appeal No.67/2009, the Appellant filed the Second Appeal No.139 of 2014.

3. The learned counsel for the Appellant has placed an order passed in Regular Civil Suit No.78/1995. So also the proceedings before the Sub-Divisional Officer under the Maharashtra Land Revenue Code, 1966. Both these documents are sought to be produced by way of Civil Application. As far as the document in respect of the R.T.S. proceedings are concerned, they are part of the record in the appeal. As far as Regular Civil Suit No. 78/1995 is concerned, the learned counsel for the Appellant has orally sought to produce and rely on the same, which was objected to by the learned counsel for Respondent No.1 by submitting that the plaint was never produced before the trial Court in spite of ample opportunities. For the sake of competence I have permitted the Appellant to produce the plaint in Regular Civil Suit No.78/1995 and also order passed in the same as they are Court records.

4. The learned counsel for the Appellant firstly submitted that the finding of the learned District Judge that the decree in Special Civil Suit No.146/95 is based on the fact that Advocate

Mr.Kasar, who had appeared for the Respondent No.2 therein had also appeared the Appellant in the revenue proceedings and there was a clear collusion. He submitted that the perusal of the revenue proceedings would show that some other Advocate had appeared not the same one. The learned counsel submitted that there is no admission in the examination-in-chief that the same Advocate had appeared.

5. On 24 March 2014, noting the facts observed by the learned District Judge, the learned Single Judge (R.G.Ketkar, J.) issued notice to the Advocate Mr.Kasar and directed him to explain. The concerned Advocate remained present on 7 May 2014 in the Court and affidavit has been filed by the Advocate on 7 May 2014. Advocate Mr.Kasar stated as under:-

> *"2. I say that the above second appeals arise out of the 20 years old litigations. As far as I remember, one Shri Popat Karbhari Ghuge had approached me somewhere in the year 1994 – 1995 with a grievance that one Shri Punjaba Kisan Avhad had executed an agreement with him for sale for a piece of land at village Jalgaon Bk, and he is not performing his part of contract and therefore said Popat Karbhari Ghuge requested me to issue notice to said Shri Punjaba Kisan Avhad to honour the said agreement. I recollect that, on his instructions I had issued notice to said Shri Punjaba Kisan Avhad and thereafter I also filed a suit for specific performance on behalf of Shri Popatlal Karbhari Ghuge. It appears that, Defendant Shri Punjaba Kisan Avhad did not appear in the said suit and therefore the said suit proceeded ex-parte. During the pendency of suit both parties approached me and informed me*

that they have arrived at amicable settlement.

3. I further say that, as far as I remember, at the fag end of the suit proceedings, Shri Punjaba Kisan Avhad approached me and requested to represent him in the revenue proceedings of RTS Appeal before Hon'ble S.D.O., Malegaon. In the said case Shri Popat Ghuge was not party and therefore under bonafide belief that there would be no conflict of interest, I had appeared on behalf of Shri Avhad in the revenue proceedings. I was under bonafide belief that since parties had arrived at compromise, there were no any clashes of interest.

6. I say that as a matter of propriety and according to the best traditions of the Bar I should not have appeared for the other party during the pendency of suit proceedings. However, it appears that under the bonafide belief that parties have compromised I appeared for the other party in the other litigation. The said mistake is bonafide mistake. I say that my intention was not to cause loss or injury to any individual or party."

6. Learned counsel for the Appellant submitted that this affidavit was filed in a hurry, without checking the documents and is incorrect. These submissions are to be rejected outright. In fact, it shows the length the Appellant is prepared to go.

7. After an order was passed issuing notice to the present Advocate personally to appear on that date three months thereafter the concerned Advocate filed his affidavit. The Advocate though in the affidavit has prefixed the averments stating that he has not gone through the relevant documents *in detail*. It is just a routine statement made to safeguard himself. He has not stated that he has

not gone through the record *at all*. The Advocate has narrated the events and appears to be fully aware of the events that transpired. He clearly states that he could remember that the Appellant approached him and requested him to represent him in revenue proceedings and did so as he was under the impression that they were were trying to settle the dispute and there will be no conflict of interest. Even though the revenue proceedings shows the name of other Advocate, it is not uncommon that the Advocates can appear with Vakalatnama of some other Advocate. No Advocate would needlessly go to the length of owning up a mistake he never committed as far as to tender an apology if he had nothing to do with the dispute. The concerned Advocate is experienced and had ample time to reflect on his position. He has also tendered an apology and any further humiliation at the hands of the present Appellant is not necessary. The Appellant seeks to further humiliate the concerned Advocate by contending that he has filed a wrong affidavit or there was a carelessness on his part. All that is being considered at present is whether the conclusion of the learned District Judge regarding collusion is sustainable.

8. There is one more aspect which cements the conclusion of collusion. The appeal filed by Respondent No.1 has been allowed wherein the decree by which the Appellant was directed to execute the sale deed in favour of Respondent No.2-Defendant No.2 has been set aside. The Appellant thereby stands restored as the owner of

the suit property. What is harm to the Appellant for being restored as an owner, is not understandable. It should be the Respondent No.2 who should be concerned. Respondent No.2 has not bothered to file an appeal. It is, therefore, clear that Respondent No.2 was merely a front put up by the Appellant. The conclusion drawn by the learned District Judge regarding the collusion is correct and no interference is warranted.

9. The learned counsel for the Appellant submitted that there is no finding nor any evidence regarding collusion of the present Appellant and Respondent No.2. He submitted that this aspect has been considered by the trial Court. This submission is not correct. The main reason why the trial Court refused to decree in favour of Respondent No.1 was the decree is Special Civil Suit No. 146/1995. Once that decree is held not binding, the only question arises regarding the readiness and willing of Respondent No.1. He has pleaded his readiness and willings in the plaint as well as in the evidence. Part of earnest money is already deposited and he is willing to pay the balance amount. No interference is, therefore, warranted in the finding that Respondent No.1 was ready and willing to perform his part of the contract.

10. Respondent No.1 was put in possession of the suit property in the year 1994 and has continued till date. The decree in Regular Civil Suit No.35/2002 for possession in favour of the Appellant is primarily on the ground of decree passed in Special Civil

Suit No.146/1995. Once that decree ceases to be in operation, then, there is no illegality for the Appellant to be in possession of the suit property and he could not have been directed to hand over the possession of the suit property.

11. As far as the argument of the learned counsel for the Appellant that based on Regular Civil Suit No.78/1995 filed by the Respondent No.1 under Order 2 Rule 2 of the Code of Civil Procedure, 1908 is concerned, why the suit was filed will have to be seen. First, it will have to be noted that this ground was not advanced in both the Courts. The submission that the suit is barred under Order 2 Rule 2 of the Code is not a pure question of law. The suit was filed by Respondent No.1 for injunction and after the decree was passed, Respondent No.1 filed the present suit for declaration and specific performance. Considering the reason why the earlier suit was filed and was withdrawn at this stage of the proceedings for the first time it cannot be held that the present suit was barred under Order 2 Rule 2 of the Code. Though I have permitted the learned for the Appellant to place the copy of the plaint in Regular Civil Suit No. 78/1995 on record, no explanation whatsoever is given for complete absence of this argument in both the Courts. The learned counsel for the Appellant placed reliance on the decisions of the Apex Court in the case of [1]Sir *Chunilal V.Mehta and Sons Ltd. V/s. The Century Spinning and Manufacturing Co. Ltd.,* [2]*Veluyudhan Sathyadas V/s.*

1 **A.I.R. 1962 SC 1314**
2 **JT 202 (5) SC 357**

Govindan Dakshyani, [3] *Virgo Industries (Eng) P.Ltd. V/s. Venturetech Solutions P. Ltd.* In the facts which are stated above and the law laid down in those decisions and the dispute in question, the ratio is not attracted to the present case. It was obligatory on the part of the Appellant to place the plaint in the earlier suit on record in the trial Court and explain how the provisions of Order 2 Rule 2 are attracted.

12. That Respondent No.1 has been put in possession in the year 1994 and continues to be in possession is an admitted position. The Appellant has attempted every trick to create complications and to go back on his agreement, even to the extent of filing collusive suits setting up third person to obstruct the completion of the sale deed. Such acts are to be deprecated. Even in this Court in spite of the concerned Advocate filing a personal affidavit and accepting the position that he had appeared in both the proceedings, even that affidavit is brazenly doubted. The conduct of the Appellant is totally brazen. Accordingly both the appeals are dismissed with cost quantified in the sum of Rs.25,000/-, to be deposited in the Court within a period of eight weeks, failing which they shall be recovered as arrears of land revenue, which costs the Respondent No.1 will be entitled to withdraw. In view of the dismissal of the Second Appeal, the Civil Applications are also dismissed.

(N.M.Jamdar, J.)

3 **(2013) 1 SCC 625**