

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 94 OF 2017
ALONG WITH
CIVIL APPLICATION NO. 232 OF 2017

Munaf Daud Hushye ... Appellant / Applicant
Versus
Rihana Khalid Hodekar and Ors. ... Respondents

Mr.Dushyant Pagare for the Appellant / Applicant.
Mr. Sanjiv Sawant a/w. Mr. Balvendra Singh for Respondent No. 1.

CORAM : S.J. KATHAWALLA, J.
DATED : 29TH JUNE, 2017

P.C.:

1. Regular Civil Suit No. 18 of 2009 was filed by Respondent No. 1 (the original Plaintiff) before the Joint Civil Judge, Senior Division, Ratnagiri (the Trial Court), wherein the relief sought was for specific performance of the Agreement for Sale dated 16th February, 2007 and in the alternative for refund of earnest money with interest thereon. The Trial Court by its Judgment and Order dated 10th July, 2014 partly decreed the said Suit and directed Respondent Nos. 1(A), 2, 3, 5 and 6 (original Defendant Nos. 1(A), 2, 3, 5 and 6) to execute the Sale Deed in favour of Respondent No. 1 (original Plaintiff) to the extent of their shares in the Suit property specifically described in paragraph 1 of the Plaint within a period of two months from the date of said Judgment and Order.

2. Being aggrieved, Respondent Nos. 3 to 6 and the Appellant herein (original Defendant No. 2, 3 to 6) impugned the Judgment and Order of the Trial Court dated 10th July, 2014 by filing an Appeal being Civil Appeal No. 90 of 2014 before the Adhoc District Judge-1, Ratnagiri (the Appellate Court), which Appeal was dismissed vide Judgment and Order dated 2nd September, 2016. None of the Respondents (i.e. original Defendant Nos. 1(A), 2, 3, 5 and 6), who have been directed to execute the Sale Deed in favour of the Plaintiff, have filed a Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (the Code). However, the original Defendant No. 4 against whom the Trial Court as well as the Appellate Court have not passed any Orders, has filed the above Second Appeal on the ground that he is aggrieved by the Judgment and Order dated 10th July, 2014 passed by the Trial Court.

3. For the sake of convenience, the Appellant and the Respondents are referred to hereinafter as per their original status.

4. As stated earlier, the Suit property is described in paragraph 1 of the Plaint. The Suit property was owned by Usman Hushye. He had three sons namely Musa, Daud and Ali. Musa at the time of his death was not married and therefore Daud and Ali acquired one half share in the Suit property. Daud died on 5th July, 2003. Defendant Nos. 2 to 6 are the heirs of deceased Daud. In view thereof, Ali had one half share in the Suit property and the other one half share in the Suit property belonged to the heirs of the deceased Daud i.e. Defendant Nos. 2 to 6. Hushye had constructed one house in Survey No. 173 bearing No. 262, admeasuring 31 feet in

length and 19 feet in width. Accordingly, the entry of this house was taken in the Record of Rights by mutation entry No. 2 on 16th November, 1993. However, the said house is no more in existence and only plinth of the same is in existence. One half portion of the said land along with the plinth is the subject matter of the Regular Civil Suit. The Defendants intended to sell the Suit property. On 16th February, 2007, Defendant Nos. 1, 2, 3, 5 and 6 executed an Agreement for Sale in respect of the Suit property in favour of the Plaintiff for consideration of Rs.25,000/-. Defendant Nos. 1, 2, 3, 5 and 6 accepted the entire consideration from the Plaintiff.

5. According to the Plaintiff, when the Agreement for Sale was executed, Defendant No. 4 was absent, however, the other Defendants assured her that they will obtain consent of Defendant No. 4 at the time of execution of the Sale Deed in respect of the Suit property ; thereafter the Plaintiff repeatedly requested the Defendants to execute the Sale Deed ; Defendant No. 4 had Pan Shop in the Suit property ; when Plaintiff enquired about the same the Defendants assured her that they will remove the said Pan Shop at the time of execution of the Sale Deed ; since the Defendants were not executing the Sale Deed she issued Notice to the Defendants asking them to execute the Sale Deed, but the Defendants did not pay any heed to the same ; infact Defendant No. 4 disputed the allegations made by the Plaintiff ; the Plaintiff therefore filed Regular Civil Suit No. 18 of 2009 seeking specific performance of the Agreement for Sale dated 16th February, 2007 and in the alternative prayed for refund of the consideration of Rs.25,000/- from the Defendants with interest thereon.

6. Defendant Nos. 1, 2 and 6 contested the Suit by filing their Written Statement (Exhibit-22) contending that they never intended to sell the Suit property to the Plaintiff as alleged by her ; they have not executed any Agreement for Sale in respect of the Suit property in favour of the Plaintiff ; the Suit property is Gaothan land ; moreover it is the ancestral property of the Defendants and partition has not taken place between them and / or their shares are yet to be determined ; the Agreement for Sale is therefore illegal and not executable ; they have not received the consideration as alleged by the Plaintiff ; the said Agreement for Sale is not registered and therefore not executable ; the Agreement for Sale does not bear their signatures and is therefore not binding on them.

7. Defendant No. 4 has also filed his Written Statement (Exhibit-11) contending that he has erected one Pan Shop bearing No. 47 on the Suit property in August-2006 by obtaining permission of Grampanchayat ; after the death of Daud, the names of his heirs and other Defendants are mutated in the Record of Rights of the Suit property ; in City Survey No. 173 his Pan Shop is shown and in City Survey No. 166 there are houses of Defendants bearing Nos. 262A, 262B and 262C ; he is permanently residing at Village - Someshwar ; Defendant Nos. 1, 2 and 6 are also residing in the said Village, whereas Defendant Nos. 3 and 5 are residing at Mumbai ; about 8-9 years ago he has lost both his legs in an accident and therefore his only source of income is his Pan Shop, which is situated in th Suit property ; he has not signed the said Agreement for Sale and therefore the same is not binding on him ;

partition of the Suit property has not taken place and the shares are yet to be determined ; Regular Civil Suit No. 18 of 2009 filed by the Plaintiff is not within a period of limitation ; the Plaintiff has not paid proper Court fees and the said Suit be therefore dismissed.

8. The Trial Court after considering the rival pleadings of the parties, framed the following issues :

- i. Does the Plaintiff prove that Defendant Nos. 1, 2, 3, 5 and 6 made an Agreement to Sale on 16th February, 2007 in her favour regarding the Suit property ?*
- ii. Does she prove that they have also accepted entire consideration amount of Rs.25,000/- on the same day ?*
- iii. Does she prove that Defendant No. 4 also had consent for this transaction and he conveyed it through these Defendants ?*
- iv. Is the Plaintiff entitled for specific performance of contract as per Agreement for Sale dated 16th February, 2007 ?*
- v. Is she entitled for performance of contract excluding share of Defendant No. 4 as per the alternative prayer ?*

9. The Plaintiff in order to discharge burden casted upon her by the above issues, examined herself and examined Akhtar Ismile Mestri (PW-2) and Husainmiya Mahamad Hushye (PW-3), she filed 7/12 Extract of the Suit property (Exhibit-31) ; mutation entry Nos. 2 and 4 (Exhibit-32 and 33), Sanad (Exhibit-34), map (Exhibit-35), office copy of the notice issued to the Defendants (Exhibit-36) ; reply given by Defendant No. 4 to the notice of the Plaintiff (Exhibit-38) and Agreement for Sale

(Exhibit-48).

10. The Defendants examined one Hasanmiya Ahamad Gadkari (DW-1). They also examined Masud Hasan Gadkar (DW-3). Defendant No. 4 examined himself ; he filed several documents including reply given by him to the notice of the Plaintiff (Exhibit-91), receipt of tax (Exhibit-92), 7/12 extract of Gat No. 1 (Exhibit-93), letter given by Grampanchayat to Defendant No. 4 (Exhibit-94), copy of Grampanchayat resolution (Exhibit-95), assessment list extract of house No. 340 (Exhibit-96) and extract of City Survey Nos. 173 and 166 (Exhibits-97 and 98) and City Survey Map (Exhibit-99).

11. The Trial Court after considering in detail the evidence led by the parties inter alia recorded that Defendant Nos. 1, 2 and 6, who had initially taken a stand / defence that the Agreement for Sale (Exhibit-48) is not executed by them that they were not concerned with the same and had also denied their signatures on the said Agreement, subsequently admitted the signatures on the said Agreement and also admitted the signatures of the attesting witnesses on the same ; however, Defendant Nos. 1, 2 and 6 contended that the signatures of the Defendants and witnesses were not obtained at one place on the same day ; therefore the burden was on the Defendants to establish that the signatures of the Defendants and witnesses were not obtained on 16th February, 2007 ; however, the Defendants did not adduce any evidence to substantiate their defence on this point ; moreover, the evidence of their witnesses i.e. DW-1 and DW-2 is also not consistent with each other on this point.

The Trial Court also held that though the Plaintiff has contended that the other Defendants had assured that Defendant No. 4 has given his oral consent to the Agreement and that they will secure his presence at the time of Sale Deed, the Plaintiff has failed to adduce any evidence to show that Defendant No. 4 has given his oral consent to the Agreement and the Plaintiff has in her cross-examination also admitted that the consideration amount was not received by Defendant No. 4 from her. The Trial Court has further held that admittedly the Agreement for Sale is not a registered document, however as provided in the proviso to Section 49 of the Registration Act, 1908 an unregistered document affecting immovable property required to be registered under the Registration Act, 1908 or the Transfer of Property Act, 1882, may be received as evidence of a contract in a Suit for Specific Performance. The Trial Judge also recorded that he is fortified in his view by the decision of this Court in *Nirav Deepak Modi Vs. Najoo Behram Bhiwadniwala, 2012 (3) Mh.L.J. 370*.

12. As regards the contentions of the Defendants that the Plaintiff cannot claim relief of specific performance of contract in respect of the undivided share of the Defendants, this Trial Court relied on the decision of this Court in *Gopal Ramvilas Gattani Vs. Sheshrao Pundlik Hivarkar by LR's 2008 (6) Mh.L.J.231*, and held that the Plaintiff is entitled to a decree of specific performance of contract to the extent of share of Defendant Nos. 2, 3, 5 and 6. As regards the contention of the Defendants that the Suit property is Gaothan land and owned by the Government and

that previous permission of the Government i.e. Collector is essential prior to effecting any Sale Agreement in respect of the Suit property ; the Trial Court held that though it is denied that the Suit property is Gaothan land, the Sanad of the Suit property (Exhibit-34) shows that the Suit property was transferred in the name of Daud, Ali and Musa Hushye; their names are mutated as owners of the Suit property and the Sanad also shows that the Suit property is transferable, inheritable and can be used by the owners without any condition; hence, the Sanad makes it clear that the Defendants and their predecessors had a right to alienate the property and permission of the Government or the Collector is not required for the same.

13. Since Defendant No. 1 - Ali had passed away during the pendency of the Regular Civil Suit No. 18 of 2009, the Trial Court held that the said Agreement is binding on his legal heirs i.e. Defendant No. 1(A). The Trial Court therefore held that the Plaintiff is entitled, to for the performance of contract excluding share of Defendant No. 4 from the half share of Defendant Nos. 2 to 6. The Trial Court therefore answered Issue Nos. 1 and 2 in the Affirmative, Issue No. 3 in the Negative, Issue No. 4 in Partly Affirmative and Issue No. 5 in the Affirmative and decreed the said Suit and directed Defendant Nos. 1(A), 2, 3, 5 and 6 to execute the Sale Deed in favour of the Plaintiff to the extent of their respective shares in the Suit property described in paragraph 1 of the Plaint within a period of two months from the date of Judgment and Order dated 10th July, 2014.

14. Being aggrieved by Judgment and Order of the Trial Court dated 10th July,

2014, Defendant Nos. 2, 3, 4, 5 and 6 filed Civil Appeal No. 90 of 2014 before the Adhoc District Judge-I, Ratnagiri impugning the same. The Appellate Court after setting out the facts in the matter and after appreciating the oral and documentary evidence led by the parties, held that the Plaintiff has proved that Defendant Nos. 2,3,5 and 6 have executed the Agreement for Sale of the Suit property with her ; the Plaintiff has proved that Defendant Nos. 1, 2, 3, 5 and 6 have accepted the entire consideration and the Plaintiff is entitled to the relief of specific performance as sought and the Judgment and Order of the Trial Court dated 10th July, 2014 is just, proper and legal. The Appellate Court agreed with the Trial Court that the Plaintiff has not proved that Defendant Nos.2, 3, 5 and 6 have not secured the presence of Defendant No. 4 for execution of the Sale Deed. The Appellate Court has therefore dismissed the Appeal.

15. As stated earlier, Defendant Nos. 1, 2, 3, 5, and 6 who had executed the Agreement for Sale in favour of the Plaintiff and who are directed by the Trial Court to execute the Sale Deed to the extent of their respective shares in favour of the Plaintiff, have not filed the above Second Appeal. However, Defendant No. 4, against whom no Order is passed qua his share in the Suit property, has filed the above Second Appeal.

16. The learned Advocate appearing for the Appellant (original Defendant No. 4) has reiterated the same submissions advanced before the Trial Court as well as the Appellate Court as regards which the Trial Court and the Appellate Court after considering the documentary and oral evidence as well as law, gave its concurrent

findings, which needs not interference by this Court. In my view, no question of law therefore arises in the above Second Appeal and the same is therefore dismissed. The above Civil Application is also disposed off.

(S.J.KATHAWALLA, J.)