

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 14895 OF 2019

DATTATRAY MOHANRAO DARANDALE AND OTHERS
VERSUS
ABDUL RAHEMAN SHAIKH ABUD AMODI AND OTHERS

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Advocate for the Petitioners : Shri M. R. Sonwane

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 16th DECEMBER, 2019

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PER COURT :

1. The Petitioners, who are original defendant Nos. 1 to 3 in Special Civil Suit No. 53/2012, are aggrieved by the order dated 04/10/2019 passed by the Trial Court, by which, application Exhibit 67 seeking deletion of issue No. 4 and seeking addition of an issue with regard to defendant No. 4 being a middleman, has been rejected.

2. The learned Advocate for the Petitioners has strenuously criticized the impugned order. He submits that defendant No. 4 has received a part payment of the said transaction with regard to the 19 Acres of land

which the plaintiff had purchased. Issue is whether defendant No. 4 was permitted to receive the amount on behalf of the Petitioners. No issue on this count has been framed. So also, issue No. 1 which is rightly framed, mandates the plaintiff to prove that defendant Nos. 1 to 3 executed an agreement to sell in favour of the plaintiff. Unless the plaintiff proves the legality and genuineness of the agreement, issue No. 4 as to whether these defendants prove that the agreement to sell is bogus and sham, would not be necessary.

3. Reliance is placed upon the judgment of the Honourable Apex Court in the matter of ***Subhra Mukherjee and another Vs. Bharat Coking Coal Ltd. And others (2000) 3 SCC 312*** and a judgment delivered by this Court in the matter of ***Girjabai Sambhaji Jadhav and others Vs. Kanta Damji Shah and others, (2012 (12) LJSOFT 202)***.

4. I have considered the submissions of the learned Advocate for the Petitioners and have gone through the petition paper book with his assistance. It is the

plaintiff, who has come forward with his suit seeking specific performance contending that he was ever ready and willing to perform his part of the contract. The burden, therefore, has been placed on the plaintiff to prove that defendant Nos. 1 to 3 (the Petitioners herein) have executed an agreement to sell in favour of the plaintiff on 01/10/2018.

5. Needless to state, with this issue having been framed, the plaintiff has to prove the legality and the genuineness of the said agreement. Pieces of evidence that would be brought on record in documentary and oral form, would be considered by the Trial Court while deciding issue No.1 and, therefore, whether the payment made by the plaintiff has rightly reached the defendants to execute an agreement to sell, would also be considered by the Trial Court. For the said purpose, I do not find that an additional issue needs to be filed.

6. The Honourable Apex Court has held in *Subhra Mukherjee (supra)*, that a party that makes an

allegation has to prove. The Petitioners have specifically pleaded in the written statement that the agreement to sell is bogus and sham. One who avers/pleads, has to prove. The Honourable Apex Court has held that whether the transaction in question was a bonafide or genuine transaction will have to be proved by the plaintiff and thereafter the defendant can prove that the transaction was sham and fictitious.

7. Considering the above, I do not find that the Trial Court has wrongly held that issue No. 4 does not deserve to be deleted. The impugned order cannot be branded as being perverse or erroneous. This petition, being devoid of merit is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

shp/-