

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.7422 OF 2016

Sanjay Badrinath Ganguli

.. Petitioner

` vs

(Heir of Orig.Defendant)

1. Ranjit Theofile Shenoy

2. Aloysius Petrick Shenoy

3. Hariprasad Ganguli (Decd)

4. Ravindra Balwant Lad

.. Respondents

Mr.Nitesh V.Bhutekar for Petitioner

Mr.Cyrus Ardeshir with Mr,Ravi Gandhi, Ms.Mahek Kamdar

and Mr.Rishab Ranka I/b Kanga & Co for Respondent no.4

CORAM : K.K.TATED, J

DATE : 24th JANUARY, 2019

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1. Heard learned counsel for the parties.

2. This Court by an order dated 26.2.2015 issued notices to the respondents stating that in view of the narrow controversy involved, the Writ Petition may be heard and disposed of finally at the stage of admission. Hence matter is taken up for final hearing.

3. By this Writ Petition, under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 25.9.2014 passed by

the City Civil Court, Mumbai in Notice of Motion No.310 of 2014 in Suit No.2865 of 1981 rejecting their application to set aside the consent terms dated 21.1.1995 and to restore the Suit No.2865 of 1981 for further trial. In the present proceedings, the respondent nos.1 and 2 (Original plaintiffs) filed Suit no.2865 of 1981 against the respondent no.3 (deceased) for specific performance of the contract with the following prayers :

- (a) for a decree and order of this Hon'ble court directing the defendant to specifically perform his part of the contract to sell the said land being piece of land bearing Survey No.7, Hissa No.22 of Bandra Village to the plaintiff no.2 and/or his nominee namely the plaintiff no.1 herein at and for a price of Rs.17,000/- and to execute a proper deed of conveyance in respect of the said property to affect the transfer of the said property in favour of the plaintiff no.2 and/or plaintiff no.2;
- (b) that pending the hearing and final disposal of the suit, the defendant, his servants and agents and/or any other person or persons claiming by, under or through him, be restrained by a temporary injunction and order of this Hon'ble Court, from dealing with disposing off or encumbering upon the said property in any manner whatsoever;
- (c) for ad interim injunction in terms of prayer (b) above.
- (d) for costs of and incidental to this suit ; and
- (e) for such other and further reliefs as the nature and circumstances of the case may require.

4. In that suit, the original Plaintiff/Defendant filed consent terms dated 21.1.1995. As per consent terms Defendant agreed to transfer the suit property i.e. land bearing Survey no.7 Hissa No.22 of Bandra Village admeasuring about 847 sq yds situate near Mount Mary

Church, Bandra, Bombay-400 050 in favour of the original Plaintiff, Para 3 of the consent terms reads thus:

“3. Decree as prayed in terms of prayer (a) of the plaint. Defendant acknowledges the receipt of Rs.17,000/- towards the payment of price in respect of the suit property in full as also a sum of Rs.5,33,000/- out of an amount of Rs.5,83,000/- payable as and by way of damages aggregating to Rs.,6,00,000/- in the aggregate. The decree when drawn up to operate as a conveyance of the suit property in favour of the plaintiff. The decree when drawn up to be duly stamped within 2 weeks thereof and to be lodged for registration within a period of 4 months from the date of such stamping.”

5. Thus, the Consent terms were accepted by the trial Court on 27.1.1995 and roznama dated 27.1.1995 reads thus:

“Consent terms signed by the Advocates and parties filed by the parties present in Court. Admit execution and contents of the consent terms marked as Exhibit 'A'.”

6. In view of the Consent terms, S.C.Suit No.2865 of 1981 was finally disposed of. Thereafter, the Petitioner, grand-son of the original defendant preferred a Notice of Motion No.310 of 2014 for setting aside the Consent terms dated 21.1.1995 on the ground of fraud committed by the original plaintiff and Suit No.2865 of 1981 be heard on its own merits. In support of the notice of motion, the petitioner filed affidavit in support of the notice of motion on 4.10.2013. Para 9, para 10 and 13 of the said affidavit reads thus:

“9. I say and submit that the plaintiff has obtained the said decree by fraud on Court with the intention to grab the suit property from the defendant. Even if it is assumed that the said consent terms to be genuine and truthful the same cannot vest any title or right in favour of the plaintiff. As per the consent terms the parties had agreed to transfer the suit property by Rs.6,00,000/- which is clear from para 3 and 4 of the consent terms. As per the said consent terms an amount of Rs,17,000/- was paid, an amount of Rs,5,83,000/- was yet payable and out of which Rs.50,000/- was to be adjusted towards half share in expenses of stamp duty and registration. However the said remaining amount or any amount was never paid to the defendant by the plaintiff. According to the terms total expenses for stamp and registration were of Rs.,1,00,000/- (i.e. Rs.50,000/- x 2) whereas according to the provision of the Stamp Act prevailing at the relevant time the stamp duty was Rs.,42,000/- and other amount towards registration expenses were transferred.”

10. It is also pertinent to note that the said purported decree was not stamped by the plaintiff any time as per the terms of the consent terms. The plaintiff failed to pay the stamp and registered the same. As per the purported terms of the consent terms, it was agreed that the decree when drawn be within 2 weeks thereof and to be lodged for registration within a period of 4 months from the date of such stamping. Thus, assuming the said consent terms are not recorded by fraud, the plaintiffs are not abided by the terms of the same and it can be said to be binding on the defendant. Even otherwise the execution of the said consent decree is time barred as the decree is alleged to be dated 27th January 1995.

13. I say and submit that the defendant was highly qualified person who worked as high rank officer of the Central Government and he was called by British Government to join their services after retirement from Indian Services. In this background, looking at the terms of the compromise and the language used in those terms including some meaningless sentences, it can be seen that it is impossible that the defendant would ever sign such compromise after reading and understanding it. Even otherwise, if had he been willing to sign the said compromise, the defendant would have certainly corrected the language in the compromise.”

7. The trial Court after hearing both the sides dismissed the petitioner's notice of motion and hence the present writ petition.

8. Learned counsel Mr.Bhutekar appearing on behalf of the Petitioner submitted that the trial Court erred in coming to the conclusion that the petitioner failed to make out any case for setting aside the Consent terms dated 21.1.1995. He submits that a bare reading of the Consent terms, shows that the same was obtained by the original plaintiff by committing fraud on the deceased Defendant. He submitted that the deceased was not keeping well at that time. He submits that a bare reading of the consent terms shows that the same was not drafted properly. These points were not considered by the trial Court at the time of passing of the impugned order. Hence, the said order is required to be set aside.

9. Learned counsel for the Petitioner further submits that they obtained hand writing expert's opinion from Mr.B.S.Biradas showing that *prima facie*, the signature of the original defendant does not tally on the said consent terms. He further submitted that in the year 1995, the original defendant was not keeping well. He was not in a position to move from his house. In support of his contentions, he submits affidavit dated 27.3.2008 of Dr.Champak Amarchand Jain. He submitted that a bare reading of the affidavit of the said Doctor shows that in 1995, the

defendant was not in a position to move and execute the Consent terms. He submitted that, these facts were not considered by the trial Court at the time of passing the impugned order. Hence, the consent terms were required to be set aside by allowing Notice of Motion No.310 of 2014. He further submitted that once fraud is proved, then the order is required to be set aside. He submitted that the Petitioner by filing their affidavit-in-support of the notice of motion, placed on record the way in which the original Plaintiff committed fraud on the original Defendant. These facts were not considered by the trial Court at the time of passing of the impugned order. Hence, the said order is required to be set aside. He further submitted that if the present writ petition is not allowed, irreparable loss will be caused to the Petitioner.

10. On the other hand, learned counsel Mr.Cyrus Ardeshir appearing on behalf of respondent no.4 submitted that the impugned order was passed by the trial Court after considering the evidence on record, therefore, there' is no question of entertaining the present writ petition. He submitted that admittedly, in the present proceedings, the original Plaintiffs i.e. respondent nos.1 and 2 filed the Suit on 12.5.1981. That Suit was pending for more than 14 years. Thereafter, the parties

settled the matter and filed Consent terms dated 21.1.1995. The Consent terms were accepted by the trial Court. At the time of accepting the same, the trial Court specifically recorded in the roznama dated 27.1.1995 that both the parties were present before the Court. He submits that the original Defendant expired on 22.6.2000. During his life time, he never raised any objection about the Consent terms. He submitted that the respondent no.4 purchased the suit property from the original Plaintiffs i.e. respondent nos.1 and 2 by a Conveyance deed dated 31.7.2011. He submitted that the Conveyance deed is duly registered with the Sub-Registrar. He submitted that respondent no.4 being a bonafide purchaser, there is no question of setting aside the Consent terms after more than 18 years.

11. Learned counsel for the respondent no.4 submitted that during the life time of original Defendant, he never made any application for recalling the order on Consent terms and/or for restoration of the Suit for hearing on its own merits. He submitted that the grand-son of the original Defendant filed Notice of Motion No.310 of 2004 on 4.10.2013. He submitted that the main contention of the Petitioner is that the said Consent terms was not executed by the original Defendant. He submitted

that this cannot be accepted because the Notice of Motion itself was filed after more than 18 years. Not only, that the roznama recorded by the trial Court clearly shows that the original Plaintiff as well as the Defendant were present on that date of Consent terms before the Court.

12. Learned counsel for the respondent no.4 submitted that the Petitioner failed to examine the Advocate on record of the Defendant and/or issued any notice to him in the present proceedings. He submitted that without informing and/or issuing notice to the Advocate on record, there is no question of making any allegation against him. Therefore, there is no substance in the submission made by learned counsel for the petitioner.

13. Learned counsel for the respondent no.4 submitted that a bare reading of the hand writing expert's opinion shows that, he has given same on the basis of photo copies of the documents. He further submitted that the Petitioner failed to examine the said expert in the present proceedings. He submitted that without examining of the author of the report, the same cannot be considered at the time of deciding the matter. Hence, there is no question of entertaining the present Writ petition on

the basis of the Expert's opinion.

14. The learned counsel for the Respondent no. 4 submits that in the similar way, the Petitioner relied on an affidavit dated 27.3.2008 of Dr.Champak Amarchand Jain. He submitted that neither the said doctor entered into the witness box nor placed on record, any documentary proof to show that he was examined and/or he was giving any medical treatment to the deceased defendant. Therefore, the said document cannot be considered in the present proceedings.

15. Learned counsel for the respondent no..4 submits that they are the bonafide purchaser of the suit property. As on today, they are in possession of the same. In any case, the Notice of Motion for setting aside the Consent terms and order, is filed after more than 18 years and also after the death of the original Defendant on 22.6.2000, there is no question of setting aside the Consent terms. Hence, the Writ petition is required to be dismissed with costs.

16. I have heard both the parties at length. Admittedly, in the present proceedings, the Petitioner filed Notice of Motion No.310 of 2004

for setting aside the Consent terms dated 21.1.1995 after more than 18 years and that also after the death of original Defendant who executed the consent terms. The original Defendant died on 22.6.2000. Till that time, he never objected for the Consent terms. Apart from that, a bare reading of para 9,10 and 13 of the affidavit-in-support of the Notice of Motion No.310 of 2014. filed by the Petitioner, shows that the Petitioner failed to make out any case about fraud. Considering the well-reasoned order passed by the trial Court and as the Plaintiffs failed to make out any case of fraud, I do not find any reason to entertain in the present Writ petition.

17. Hence, the Writ petition stands rejected.

No order as to costs.

(K.K.TATED, J)

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