

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

CIVIL APPLICATION (C.A.S.) NO.1432 OF 2018 IN
SECOND APPEAL STAMP NO.18718 OF 2018

1. M/s. Sharma Construction Company,
A partnership firm having its
Office at 17, Corporation Market,
Old Post Office Road, Gokulpeth,
Nagpur through its partners.
2. Anil s/o. Radheshyam Sharma,
Partner of M/s.Sharma Construction,
Aged about 51 years, Occ.
Agriculturist/Business.
3. Umesh s/o. Radheshyam Sharma,
Partner of M/s. Sharma Construction,
Aged about 48 years, Occ.
Agriculturist/Business.
4. Ritesh s/o. Radheshyam Sharma,
Partner of M/s. Sharma Construction,
Aged about 45 years, Occ.
Agriculturist/Business.

5. Narmadadevi wd/o. Radheshyam Sharma,
Aged about 67 years, Occ.Agriculturist/
Housewife being the legal heir of
deceased Kalawati Lalchand Sharma.
6. Radheshyam Lalchand Sharma (HUF),
Acting through its Karta Anil s/o.
Radheshyam Sharma, Aged about
51 years, Occ.Business.

All the appellants are residents of
218, Shankar Nagar,
Nagpur-440 010.

..... APPLICANTS

// **VERSUS** //

1. Praveenkumar s/o. Lilapat Bansal,
Aged 29 years, Occ. Business.
2. Ashokkumar s/o. Lilapat Bansal,
Aged 27 years, Occ. Business.

Respondent Nos. 1 and 2 are
r/o. C-1, Sanjay Apartments,
274, Dharampeth Extension,
Nagpur.

3. Ramdas s/o. Govinda Wagde (Dead)
Through his Legal Representatives.
- 3a. Smt.Renuka wd/o. Ramdas Wagde,
Aged about 70 years, Occ. Household.
- 3b. Indrapal Ramdas Wagde,
Aged major, Occ. Agriculturist.

Respondent nos.1a and 1b r/o. Sant Kabir Ward, Near Khode Primary School, Hinganghat, District Wardha.

- 3c. Dhiraj Ramdas Wagde,
Aged about 33 years, Occ.Agrilst.,
r/o.Pradnya Nagar, Nanduri Road,
Hinganghat, District Wardha.
- 3d. Smt.Ujwala Wasudeo Gawande,
Aged about 33 years, Occ. Agrilst.,
r/o. Sant Kabir Ward, Near Chokha
School, Hinganghat, District Wardha.
- 3e. Yashodhara Suresh Thool,
Aged about 36 years, Occ.Household,
At post Monda, Tq.Hingna, District
Nagpur.
- 3f. Smt.Sangita Manoj Nitnaware,
Aged about 35 years, Occ.Household,
r/o. Rahulnagar, Somalwada, Nagpur.

Respondent nos.3a, 3d to 3f are L.Rs.
of Respondent No.3/Original defendant
no.1.

- 4. Smt. Lilabai wd/o. Eknath Wagde,
Aged major Occ. Household.
- 5. Hemant s/o. Eknath Wagde,
Aged major, Occ. Agriculturist.
- 6. Yuvaraj s/o.Eknath Wagde,
Aged major, Occ. Agriculturist.
- 7. Manoj s/o. Eknath Wagde,
Aged major, Occ. Service.
- 8. Pradnya d/o. Eknath Wagde,
Aged major, Occ. Agriculturist,
Respondent Nos. 4 to 8 are

residents of Plot No.9, Old
Subhedar Layout, Nagpur.
(Original Defendant nos. 4 to 8) RESPONDENTS

Mr.Yash Maheshwari, Advocate with Mr.Shraddhanand
Bhutada, Advocate for the Applicants.
Mr.Palash K. Mohta, Advocate for Respondent Nos.1 & 2.
Mr.V.J.Dharkar, Advocate for Respondent Nos.4 to 8.

Date of reserving the Order : 13.11.2019.
Date of pronouncement of the Order : 18.11.2019.

CORAM : VINAY JOSHI, J.

ORDER :

1. The appellants who are strangers to the proceeding have sought leave to file appeal challenging the Judgment and decree dated 13th December, 2016 passed by the District Judge-17, Nagpur in Regular Civil Appeal No.263 of 2012 (F.A.No.700 of 2009), which has confirmed the decree of specific performance, dated 5th January, 2009 passed in Special Civil Suit No.185 of 2005 by the Joint Civil Judge (Sr.Dn,.), Nagpur. It is the appellants' stand that they were totally unaware about pendency of Special Civil Suit

No.185 of 2005, consequential First Appeal bearing No.263 of 2012 as well as Second Appeal bearing No.23 of 2017 in between respondent nos. 1 and 2 (original plaintiffs) at one side and rest of the respondents (original defendants) at another. It is appellant's case that the decree of specific performance passed in Special Civil Suit No.185 of 2005 which was upheld upto the Second Appeal has substantially affected their rights and they are very much aggrieved by the decree. Moreover, they are prejudicially or adversely affected by the decree, hence they are entitled for leave to file Second Appeal. In this regard, appellants have relied on the Apex Court Judgment in case of **Hardevinder Singh vs. Parmjit Singh and Others**, 2013) 9 SCC 261 wherein it is held that if a Judgment and decree prejudicially affects a person, he can prefer an appeal and leave is to be granted.

2. The respondents in two sets vehemently opposed the application for grant leave, as sought for. It is their contention that the appellants were well aware about long standing litigation going on in between the respondents inter se. It is appellants' calculated move to monitor

pending proceedings and after dismissal of Second Appeal, by stating artificial cause of action about gaining knowledge of litigation, they have come up to re-open the matter which is finally concluded. Moreover, it is alleged that, in earlier round of litigation, appellants have throughout funded original defendants.

3. The respondents would contend that the appellants had raised obstruction in the executing proceeding of the impugned decree of specific performance, but failed. Not only that, the appellants challenged the order of the Executing Court rejecting intervention, but remained unsuccessful in Writ Court. Moreover, it is stated that the appellants had already filed a substantial Civil Suit (Special Civil Suit No.874 of 2017) seeking to set aside the impugned decree passed in Special Civil Suit No.185 of 2005 on the premise of fraud and collusion. It is submitted that already Second Appeal filed against the impugned decree is decided on merits and therefore, at the behest of third party, said decision cannot

be re-opened. Consequently, leave, as sought for, is prayed to be rejected.

4. In order to understand the matter in proper perspective, it is necessary to make brief reference of the long standing litigation.

5. The origin of the litigation lies in execution of two agreements to sell, dated 16.10.1998 executed by two brothers namely Ramdas Wagde and Eknath Wagde (respondent nos. 3 to 8). These agreements to sell were executed in favour of respondent no.1 and 2, who are original plaintiffs. On the basis of these agreements, respondent nos. 1 and 2 (plaintiffs) have filed Special Civil Suit No.185 of 2005 on 24.2.2005 against Ramdas and heirs of Eknath for specific performance of agreement. During pendency of suit, original owners (defendants of R.C.S. No.185 of 2005) sold suit property in favour of present appellants vide two sale deeds dated 2.1.2006 and 20.10.2007. Thereafter, suit for specific performance came to be decreed vide order dt.5.1.2009. Being aggrieved,

vendors filed First Appeal No.263 of 2012 which came to be dismissed on 13.12.2016. In the meantime, the original plaintiffs (first purchasers) filed Execution Petition namely Regular Darkhast No.1184 of 2012 for execution of decree. Feeling aggrieved, vendors again filed Second Appeal No.23 of 2017, which was also dismissed on 4.8.2017. At this stage, present appellants (subsequent purchasers), who were not party to the original Suit, First Appeal or Second Appeal had filed intervention application in execution on 3.11.2017 claiming their independent right. In said obstruction proceedings, learned Executing Court heard both the sides and ultimately, rejected appellant's obstruction vide order dated 26.6.2018.

6. The Executing Court precisely held that, the appellants being subsequent purchasers during pendente lite, are bound by the decree. Feeling aggrieved by the rejection in obstruction proceedings, the appellants filed Writ Petition bearing No.4406 of 2018. It is appellant's stand before the Executing Court and Writ Court that mere prior agreement to sale in favour of the first purchasers

does not create interest. Therefore, the subsequent transaction is not hit by the doctrine of *lis pendens*. Secondly, it is the stand that, by virtue of clause (b) to Section 19 of the Specific Relief Act, they are entitled to defend their title acquired by virtue of two separate sale deeds. In other words, even if they are presumed to be aware of the litigation, they are entitled to lead rebutted evidence to lift the presumption.

7. The Writ Court has recorded categorical finding that since the sale deeds were executed during pendency of suit, the appellants are deemed to be aware of pending litigation, as well as cannot lead rebutted evidence, hence cannot obstruct execution having no independent right.

The said order was carried by the appellants to the Hon'ble Apex Court vide SLP (C) No.18350 of 2019. However, it was dismissed vide order dated 1.8.2019. Meaning thereby, the appellants' stand about non-applicability of doctrine of *lis pendens* and non-entitlement under Section 19(b) of the Specific Relief Act, has achieved finality.

8. In the meantime, particularly, after dismissal of Second Appeal on 4.8.2017, appellant simultaneously choose another course of filing Special Civil Suit No.874 of 2017 against the vendors (original plaintiffs) and the first purchasers for declaration that the decree passed in Special Civil Suit No.185 of 2005 is collusive obtained by fraud and therefore, it is non-est. In the said suit, appellants filed interim application for injunction in terms of Order IIIIX, Rule 1 of the Code of Civil Procedure. However, it came to be rejected. The appellants filed A.O. No.4 of 2019 before this Court challenging refusal of interim injunction; however, remained unsuccessful.

9. In the wake of such position, the litigating instinct never dies, but appellant filed this Second Appeal against the Judgment and decree passed in First Appeal No.700 of 2009 with leave since they were not party. It is to be remembered that already the aggrieved party i.e. original defendants (vendors) had filed Second Appeal No.23 of 2017, which was dismissed on merits. It is not the case of

any body that the dismissal of Second Appeal is challenged in the Apex Court. Due to dismissal of Second Appeal, the decree of specific performance passed by the trial Court in favour of present respondent nos. 1 and 2 (original plaintiffs) had attained finality. In such peculiar facts, again the same Judgment and decree passed in First Appeal No.700 of 2009 is sought to be challenged by present appellants, who were neither party either in trial Court or in both appeals. This assumes significance that after disposal of Second Appeal, leave is sought to file another Second Appeal challenging the same decree under the guise that it has affected adversely against their rights.

10. Learned Counsel for appellants took me through the provisions of Section 52 of the Transfer of Property Act, as well as Section 19(b) of the Specific Relief Act, to agitate his defence which is, in fact, his stand in separate suit (Special Civil Suit No.874 of 2017) which is pending. In fact, these submissions were canvassed in obstruction proceedings as well as in Writ Petition No.4406 of 2018, but were negated. Not only that, the order of Writ Court is

confirmed upto the Apex Court. Since the said aspect is negated by this Court and is pending in Special Civil Suit on large scale, there is no reason to re-consider the same once again.

11. Appellants' learned Counsel vehemently argued that since their rights are adversely affected by the decree of specific performance, they are very much entitled for leave to file appeal. To buttress said submission, reliance is placed on Apex Court Judgment in case of Hardevinder Singh (referred supra). The issue before Hon'ble Apex Court was quite distinct. In that case, the party (then defendant no.5) who sought leave to file First Appeal was, in fact, party to the Original proceedings, but was not made a party in First Appeal. The case in hand lies on different footing as the appellants were nowhere party either in the trial Court or in the First Appeal or in the Second Appeal.

12. Hon'ble Apex Court has laid down a general proposition in above case of Hardevinder Singh that, if a Judgment and decree prejudicially affects a person, he can

prefer an appeal; rather leave can be granted. The said general proposition would not assist the appellants in any manner, particularly on the canvass of long history of litigation. It is not the case that appellants are first time coming to the Court, but they have already canvassed their cause upto Writ Court, but remained unsuccessful. Therefore, in peculiar facts, the above ratio is of no help.

13. Nodoubt the decree of specific performance would work prejudicially against the interest of the appellants, but this case has its own dimensions as mentioned above. The appellants are playing a game of chance. Initially appellants resisted execution. When appellant remained unsuccessful throughout, they filed separate suit. In said suit, filed injunction application and on rejection, approached to this Court (A.O. No.4 of 2019), but failed. It is apparent that when appellants failed in all the proceedings, this one another attempt is made to re-open the Second Appeal which is already disposed on merits. In fact, the lis which was decided up to Second Appeal was squarely relating to the enforciability of

contract between original vendors and first purchasers i.e. present respondent nos. 1 and 2. The so-called cause of action for the appellants is quite distinct for which they have already resorted the remedy of filing separate suit for setting aside the decree. It is needless to say that though the decree passed in R.C.S. No.185 of 2005 (first suit) has attained finality; however, on the premise of fraud, if it is upset, then all the decisions of Higher Courts would not survive. The appellants' grievance has entered through the new door into the Competent Court by filing Special Suit No.874 of 2017 which would meet its own fate. In the wake of such situation, the appellants have no right at all to seek leave and to re-open the concluded matter namely Second Appeal No.23 of 2017.

14. The matter can be seen yet from another angle. Let us assume that if leave is granted to file Second Appeal, then naturally the matter will be re-opened for fresh adjudication. In that eventuality, the original decree for specific performance in between the vendors and first purchasers would again fall for judicial scrutiny.

Concededly, the point of controversy in the said suit was whether original vendors had agreed to sell the suit property, whether the first purchaser was ready and willing to perform his part of contract and his entitlement for decree of specific performance. Admittedly, these issues are no way concerned with existing appellants, who were neither party to the said transaction nor their stand was for consideration in lis. Therefore, naturally if the matter is re-opened and assuming that it is allowed, in all circumstances, the appellants will have to be arrayed as defendants in the suit. Their pleadings are to be obtained and fresh proceedings are to be conducted on remand. In such fresh proceedings, obviously the defence and counter claim of present appellants would be about setting their right to claim specific performance in precedence to the first purchaser and consequential issues. Naturally, the points which the appellants are trying to agitate about non-applicability of Section 52 of the Transfer of Property Act and entitlement under Section 19(b) of the Specific Relief Act would be the matters in issue. I may say that, already for claiming said relief, separate proceeding is filed by the

appellants bearing Second Appeal No.23 of 2017. The said whole exercise at the cost of disturbing the decree of specific performance which has attained finality would be otis. Therefore, even if the matter is looked from the said angle, revival of the Second Appeal after it's culmination would be nothing, but an abuse of the process of law.

15. Pertinent to note that the learned Counsel appearing for respondents/vendors submitted that, at the behest of the appellants, they sold the property by disclosing that already suit for specific performance is pending. Not only that, it is submitted that the appellants had even funded original vendors for fighting the litigation i.e. original suit, First Appeal No.700 of 2009, Second Appeal No.23 of 2017 and consequential proceedings. The said submission was made to show that the appellants were well aware about entire litigation and they are playing game of chance from Court to Court.

16. Be that as it may, already the Second Appeal is decided on merits. The cause of action which appellants

are trying to canvass by re-opening the appeal is different than the point in controversy which was decided upto Second Appeal. The appellants had already resorted the remedy of filing Special Civil Suit to set aside the impugned decree which is prejudicial to their interest. In such peculiar facts, absolutely there is no propriety in entertaining this application. Rather, it is an attempt to play with the system. It is nothing but wastage of valuable time of Court. Our system should not afford us to succumb to such attacks. Nodoubt the doors of Courts are open in entertaining the genuine litigant, but, certainly the adventurous experiments are to be nipped into the bud. The system is not so fragile which can be usurped by anybody sans the bona-fides. Such tendency needs to be dealt with all seriousness. Already the Courts are flooded with the litigations. If such type of uncalled applications/petitions are entertained, then ultimately, it would result into curtailing time of genuine litigants who are standing in queue. Time has come to impose heavy costs to curtail such tendency. In view of above, the application being totally meritless stands rejected with compensatory

costs of **Rs.10,000/-** to be paid to the High Court Legal Services Sub-Committee, Nagpur within four weeks from the date of this order.

JUDGE

[jaiswal]

