

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

CIVIL REVISION APPLICATION NO. 122 OF 2018

Mrs. Navjyot Singh w/o Inderpal Singh

vs.

Sayyad Irshad Ali s/o Vajid Ali and anr.

Office Notes, Office Memorandum of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri.S.VBhutada, and Shri.Y.J. Maheshwari counsel for petitioner.
Shri. C. A. Lokhande, counsel for respondent No.1

CORAM : MANISH PITALE J.

DATED : 14/01/2020

By this revision application, the applicant (original defendant) has challenged order dated 03/08/2018, passed by the Court of 13th Joint Civil Judge Senior Division and Additional Chief Judicial Magistrate, Nagpur, whereby application for dismissal of suit (Exh.92) has been rejected.

2. The respondent No.1 filed a suit for declaration and mandatory injunction against the predecessor of the present revision applicant in respect of a property situated at Nagpur. It was claimed that the respondent No.1 had entered into an agreement dated 17/09/2004, with original defendant and relief of declaration was claimed to the effect that the defendant had no right to alienate or create third party rights in the suit property in violation of the said agreement and for

mandatory injunction against the defendant in creating third party interest in the suit property. In the said suit itself in paragraph 5 of the plaint, it was specifically pleaded that the original defendant had issued a public notice on 01/07/2005, cancelling the aforesaid agreement.

3. On summons being issued, the defendant filed written statement and in the first paragraph itself it was specifically stated that the agreement in question no longer existed and that therefore, the suit wherein reliefs were claimed on the basis of said agreement was not maintainable.

4. Subsequently, an application for amendment was moved by the respondent No.1, seeking amendment of the plaint to add a prayer for grant of decree of specific performance in respect of the said agreement. Initially, the said application was rejected, but eventually the same was allowed by this Court, as a result of which, prayer for grant of decree of specific performance in respect of said agreement was incorporated in the plaint.

5. Thereafter, issues were struck and the trial commenced. At this stage, the applicant who was brought on record along with respondent No.2 as legal heirs of original defendant No.1, filed an application at Exh.92 seeking dismissal of the suit. The applicant contended that in the absence of a prayer for setting aside cancellation of the aforesaid agreement, the suit

was liable to be dismissed. The applicant specifically placed reliance on judgment of the Hon'ble Supreme Court in the case of **I. S. Sikandar (Dead) by LRs. vs. K.Subramani and others (2013) 15 SCC 27**, to contend that the suit was not maintainable and that it deserved to be dismissed.

6. The said application was opposed by respondent No.1.

7. By the impugned order the Court below rejected the application, holding that validity of cancellation of the agreement by a public notice was in question in the suit, and burden was on the applicant and respondent No.2, as defendants to prove that the agreement was validly cancelled by a public notice dated 01/07/2005. Further it was held that the suit could not be held to be infructuous only because no declaratory relief was sought regarding cancellation of the said agreement. The present revision application is filed by the applicant challenging the said order of the Court below and while issuing notice and granting ad interim relief in favour of the applicant by order dated 07/09/2018, this Court recorded the specific submissions made on behalf of the applicant on the basis of the aforesaid judgment of the Hon'ble Supreme Court in the case of **I. S. Sikandar vs. K Subramani and others** (supra).

8. Mr. S. V. Bhutada, learned counsel appearing for the applicant placed reliance on the decision of Hon'ble Supreme Court and took this Court through the pleadings of the parties and submitted that the impugned order deserved to be set aside and the suit deserved to be dismissed as not maintainable.

9. It was submitted that the Court below had erroneously framed issues even with regard to question of validity of the cancellation of agreement in question, when there was no prayer made on behalf of respondent No.1 in the suit in respect of validity of such cancellation of agreement. It was submitted that the prayers of even the amended plaint do not show that any such prayer was made on behalf of respondent No.1 and that therefore, in view of the aforesaid position of law, the suit ought to have been dismissed by the Court below.

10. On the other hand, Mr. C. A. Lokhande, learned counsel appearing for the respondent No.1, submitted that sufficient pleadings were already on record to demonstrate that the public notice dated 01/07/2005 issued for cancellation of the agreement was wholly unsustainable and that therefore, the suit deserved to be decided on merits. It was submitted that specific issues were also framed by the Court, in respect of the notice and that therefore, the suit ought not to be dismissed at this stage and that full trial was warranted in the facts and circumstances of the present case.

11. Heard learned counsel for the rival parties and perused the material on record. Before appreciating the nature of pleadings in the present case, it would be appropriate to refer to the position of law on which the learned counsel for the applicant has placed much emphasis. In the case of **I. S. Sikandar vs. K. Subramani** (supra), the Hon'ble Supreme Court considered the question of maintainability of suit concerning reliefs sought on the basis of an agreement, which had been cancelled and no prayer concerning validity of such cancellation was made on behalf of the plaintiff. Having considered the position of law, the Hon'ble Supreme Court held that in the absence of prayer to set aside cancellation of the agreement, prayers for declaration, injunction and specific performance made in respect of such an agreement could not be considered by the Court at all and the said suit was not maintainable.

12. The relevant portion of the said judgment of the Hon'ble Supreme Court reads as follows :-

“32.1 (i) Whether the original suit filed by the plaintiff seeking a decree for specific performance against Defendants 1 – 4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the agreement of sale vide notice dated 28/03/1985, rescinding the contract, is maintainable in law ?

32.2 to 36

37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial Court for grant of decree for specific performance in respect of the suit schedule property on the basis of agreement of sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non-existing agreement of sale is wholly unsustainable in law. Accordingly, Point (i) (see para 32.1) is answered in favour of Defendant 5.”

13. The said position of law has been reiterated in a recent judgment of the Hon’ble Supreme Court in the case of **Mohinder Kaur vs. Sant Paul Singh (2019) 9 SCC 358**. In the case of **A. Kanthamani vs. Nasreen Ahmed (2017) 4 SCC 654**, the Hon’ble Supreme Court has only given one word of caution while considering such a contention raised on behalf of the defendants that a contention of the said nature challenging the very maintainability of the suit ought to be raised at the first instance before the Trial Court. In the said case, the defendants sought to raise the same for the first time before the Hon’ble Supreme Court at the time of

consideration of Special Leave Petition under Article 136 of the Constitution and in such circumstances, the Hon'ble Supreme Court refused to consider the said issue raised on behalf of the defendants. In the present case, the pleadings on record indicate that the respondent No.1(original plaintiff) himself stated in paragraph 5 of the plaint itself about the cancellation of the agreement in question by the predecessor of the applicant and respondent No.2, by issuing public notice dated 01/07/2005. Therefore, the respondent No.1 was clearly aware about such cancellation of agreement in question.

14. In the written statement also in paragraph 1 itself at the outset, it was stated by the original defendant that the suit was not maintainable, because the agreement in question did not exist in the face of cancellation of the said agreement by the public notice dated 01/07/2005. Therefore, not only was the respondent No.1 aware about the cancellation of the agreement, but a specific objection with regard to maintainability of the suit was also raised in the written statement.

15. In these circumstances, when an application for amendment of plaint was moved on behalf of respondent No.1, only a prayer for grant of decree of specific performance was sought to be added, in addition to the original prayers for declaration and mandatory injunction. The amendment was allowed and the amended prayer clause of the suit reads as follows :-

“PRAYER :- It is therefore most humbly prayed that this Hon’ble Court be pleased to pass a judgment and decree against the defendant in favour of plaintiff :

1) Declaring that the defendant has no right to alienate, transfer, mortgage or create any third party interest in the suit property in violation of the agreement.

2) granting mandatory injunction against the defendant, her agents, servants, or assign prohibiting her from alienating, transfer and mortgage or create any third party interest in the suit property.

2-A) hold and declare that the defendant 1 committed the breach of the terms and the conditions of the *Bayana Patra* dated 29/08/2004 and the Agreement to Sell dated 17/09/2004 entered into between the defendant 1 and the plaintiff and further that the defendant 1 failed to perform her part of contract;

2-B) hold and declare that the plaintiff is entitled for a Decree of specific performance of contract in relation to the *Bayana Patra* dated 29/08/2004 and the Agreement to Sell dated 17/09/2004 entered into between the defendant 1 and the plaintiff qua the suit property and be further pleased to pass a decree of specific performance in favour of the plaintiff and against the defendants thereby directing them to immediately execute a Sale Deed qua the suit property in favour of the plaintiff and further to hand over the peaceful possession of the suit property to the plaintiff;

3) saddle the cost of the suit on the defendant.

4) grant any other relief deemed fit and proper under the circumstances of the case in the interest of justice.”

16. Thus, even amended plaint does not show that any prayer was made on behalf of the respondent No.1 seeking setting aside cancellation of the aforesaid agreement dated 17/09/2004. A perusal of the prayers made in the amended plaint would show that the reliefs have been sought by the respondent No.1 flowing from said agreement dated 17/09/2004.

17. Applying the position of law laid down by the Hon'ble Supreme Court in the case of **I. S. Sikandar vs. K. Subramani** (supra), it becomes clear that in the absence of such specific prayer for setting aside of cancellation of agreement, the suit itself was not maintainable and that the Court below committed a grave error in proceeding to frame issues on the question of validity of cancellation of the agreement. A perusal of the impugned order passed by the Court below, particularly paragraph 6 thereof, shows that the Court below has proceeded, as if there is prayer seeking cancellation of the said agreement and burden has been placed on the applicant and the respondent No.2 herein to prove that the agreement was validly cancelled by the public notice dated 01/07/2005. This observation of the Appellate Court is wholly untenable on the basis of the material on record. The further observation of the Court below to the effect that the suit could not be said to be

infructuous only because no declaratory relief was sought by the respondent No.1 in respect of cancellation of agreement, is in the teeth of the aforesaid position of law laid down by the Hon'ble Supreme Court. Therefore, it is found that the impugned order is erroneous and it cannot be sustained.

18. Accordingly, the revision application is allowed. The impugned order is quashed and set aside and the suit filed by respondent No.1 is dismissed. No order as to costs.

JUDGE