

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10718 OF 2017

Kalavati Arun Kapare & Ors.

...Petitioners

Versus

Jafar Bajid Khan & Ors.

...Respondents

Mr. Kuldeep Nikam - Advocate for the Petitioners.

Avinash Avhad with Mahesh V. Rawool – Advocate for the
Respondent No. 1

CORAM : MADHAV J. JAMDAR, J.

DATE : 11th MARCH 2021.

P.C. :

1. By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioners are challenging order dated 15.04.2017 passed by learned 6th Joint Civil Judge, Senior Division, Pune below Exh. 24 in Regular Darkhast No. 109 of 2015. By the impugned order the said application was rejected. The said application was filed by the Petitioners-Third Parties under Order 21 Rule 97 of Code of Civil Procedure, 1908 (C.P.C.) inter alia praying that their application for obstruction to the execution of the decree be allowed, they be permitted to lead the evidence and it be declared that they have got legal right concerning the suit Property.

2. It is the contention of Mr. Kuldeep Nikam, learned Counsel appearing for the Petitioners that the Petitioners i.e. Third Parties are the legal heirs and representative of one Mr. Sopan Raghu Kapare. He submitted that although the suit property is joint family property and although suit property is not partitioned amongst heirs by metes and bounds, the Respondent No. 2 i.e. original Defendant No.1 created third party interest by way of agreement to sale dated 30.03.2007 executed in favour of Respondent No.3 i.e. Defendant No.2 and also executed irrevocable power of attorney. Thereafter, the Respondent No.3 (Defendant No.2) executed Isar Pavati dated 02.10.2007 in favour of the Plaintiff i.e. Respondent No. 1, who is the contesting party in the present Writ Petition. He submitted that subsequently sale deed was executed on 03.10.2008 by Respondent Nos. 2 and 3 (i.e. Defendant Nos. 1 and 2) in favour of Respondent No. 4 (Defendant No.3).

3. He submitted that the Respondent No. 1 filed Special Civil Suit No. 1337 of 2008 seeking specific performance of Isar Pavati dated 02.10.2007. He submitted that by the Judgment and Decree dated 06.01.2015 the said suit was decreed. He submitted that the decree passed in Special Civil Suit No. 1337 of 2008, is sought to be

executed by filing Regular Darkhast No. 109 of 2015. He submitted that at the most the Respondent No. 1 is entitled to 2.16 R land out of 26 R land and that is also after the suit land is partitioned by metes and bounds. Therefore, the Petitioners filed application bearing Exh. 24 in Regular Darkhast No. 109 of 2015 under Order 21 Rule 97 of C.P.C. and sought reliefs more particularly set out therein.

4. He submitted that the impugned order was passed on the ground that the defendant No. 1 i.e. Respondent No. 2 is the absolute owner of the suit property and further that in Special Civil Suit No. 1337 of 2008 finding is given that the Respondent No. 2 is the absolute owner of the suit property. He submitted that no such finding is recorded in the said Judgment and Decree passed in Special Civil Suit No. 1337 of 2008. He further submitted that assuming that such finding is recorded as the Petitioners are not parties to the said suit and therefore, the said finding is not binding on them.

5. Mr. Kuldeep Nikam, the learned Counsel of the Petitioner has relied on Judgment reported in **2017(1) Mah LJ 639** in the matter between ***Sunderlal s/o. Ramcharan Aamghe and others Vs. Nagpur***

Improvement Trust and Others wherein it is specifically held that even if the regularization of the Gunthewari development under Section 3 of the Maharashtra Gunthewari Development (Regulation, Upgradation and Control) Act, 2001 was granted, it does not follow that holder of such land or building becomes the owner of such property. He submitted that the legal position as emerging from the said judgment clearly answers contention that in view of issuance of Gunthewari Certificate in favour of Respondent No. 2, he has become absolute owner and therefore, Petitioners have no right, title and interest in the suit property.

6. On the other hand, the learned Counsel for the Respondent No.1 submitted that the Petitioners have complete knowledge about the suit transaction as well as filing of Special Civil Suit No. 1337 of 2008 and decree passed in the same. He submitted that the Petitioners waited till passing of decree and thereafter belatedly filed the present application. He further submitted that the earlier application bearing Exh. 13 was also filed by the same applicants and same was rejected and therefore, the present application is not maintainable. He further submitted that Gunthewari Certificate was issued in favour of the Respondent No.2 and therefore the

Respondent No.2 was the absolute owner of the suit property and thus the Petitioners have no right, title and interest in the suit property.

7. Perusal of record shows that the Respondent No.1 filed Special Civil Suit No. 1337 of 2008 against Respondent Nos. 2, 3 and 4 seeking the specific performance of "Isar Pavati" dated 02.10.2007. The said suit was decreed by Judgment and Decree dated 06.01.2015 by directing that the Respondent Nos. 2 and 3 shall execute sale deed in respect of suit property viz. 4 R land out of Survey No. 58/4 totally admeasuring 26 R situate at Mouje Kondhwa Khurd, Tal.-Haveli, District Pune within a period of three months from the date of order. On failure of the Respondent Nos. 2 and 3 to execute the sale deed, the Respondent No.1 was granted liberty to get the same executed through the Officer of the Court. It was further directed that the Respondent No. 1 shall either pay remaining consideration of Rs. 10,00,000/- (Rs. Ten Lakhs Only) to the Respondent Nos. 2 and 3, or deposit the same in the Court within a period of one month from the date of order. It was further directed that the Respondent Nos. 2 to 4 to deliver the possession of the suit property to the Respondent No. 1 on the date of execution of the sale deed and on the failure of the Respondent Nos. 2 to 4 to deliver the possession, the Respondent No. 1 was granted liberty to recover possession through Court by executing the decree. It is further declared that the sale deed dated 03.10.2008 executed by Respondent Nos. 2 and 3 in favour of Respondent No. 4 is not binding on the Respondent No. 1.

8. The Respondent No. 1 filed Regular Darkhast No. 109 of 2015 for execution of the Judgment and Decree dated 06.01.2015 passed in Special Civil Suit No. 1337 of 2008. In said Darkhast one Rupesh Arun Kapre filed an application bearing Exh. 13 under Order 21 Rule 97 of C.P.C. It appears that the said application was filed on behalf of himself and 23 other co-sharers of the suit property. The said application was rejected by order dated 12.07.2016 passed by the learned 6th Joint Civil Judge, Senior Division, Pune inter alia on the ground that said third party namely Rupesh Kapre has filed application without consent of other legal heirs whose names are mentioned in the application. It is further specifically observed in the said order that none of said 23 persons have either signed the said application nor filed any independent Affidavit supporting the application. Thus although the learned Advocate appearing for the Respondent No. 1 strongly relied on the order passed below Exh. 13 to support his submission that once application at Exh. 13 was rejected subsequent application at Exh. 24 is not maintainable and although the learned Executing Court has also relied on the said aspect while passing the impugned order, paragraph no. 8 of the order passed below Exh. 13 clearly shows that the said application can at the most be treated as filed by Rupesh Kapre in his individual capacity and therefore, the rejection of that application will have no bearing on the present application bearing Exh. 24 filed by the Petitioners.

9. The present Petitioners i.e. Third Parties filed application bearing Exh. 24 in Regular Darkhast No. 109 of 2015 under Order 21

Rule 97 of C.P.C. It is specifically mentioned in the said application that the suit property was originally belonging to Sopan Raghu Kapre. He was having three sons and two daughters namely, Dagadu, Vithoba, Tukaram, Kerabai and Heerabai. It is stated that Heerabai died issueless, Dagadu, Vithoba, Tukaram and Kerabai are having children. It is stated that said Sopan Raghu Kapre expired on 10.06.1966, all these heirs and legal representatives have undivided share in the suit property and that there is no partition by metes and bounds of the suit property. It is stated that even if the suit land is partitioned, the Respondent No.2 will not get share of 4 gunta land which is subject matter of Isar Pavati dated 02.10.2007.

10. The decree holder i.e. Respondent No. 1 has filed reply dated 10.02.2017 to said Exh. 24 application. The Respondent No. 1 has contended that the Petitioners have no locus to file said application, some of the applicants alongwith others have filed earlier application bearing Exh. 13 and as the same was rejected the application at Exh. 24 is not legally maintainable. It is contended that as Gunthewari certificate is issued in favour of Respondent No. 2, the Respondent No. 2 is the absolute owner of the suit property.

11. The Hon'ble Supreme Court in the Judgment reported in (2005) 6 S.C.C. 733 in the matter between Kasturi Vs. Iyyamperumal and others has considered very important aspect about necessary and proper party particularly in the context of the suit for specific performance. Paragraphs 2, 3, 15, 16, 19 of the said Kasturi

Judgment are relevant for this case:-

“2. The only question that needs to be decided in this case is whether in a suit for specific performance of contract for sale of a property instituted by a purchaser against the vendor, a stranger or a third party to the contract, claiming to have an independent title and possession over the contracted property, is entitled to be added as a party/defendant in the said suit.”

“3. Before we take up this question for decision in detail, the material facts leading to the filing of this case may be narrated at a short compass. The appellant herein has filed the suit against the respondent Nos.2 and 3 for specific performance of a contract entered into between the second respondent acting as a Power of Attorney of the third respondent on one hand and the appellant on the other for sale of the contracted property. In this suit for specific performance of the contract for sale, the respondent Nos.1 and 4 to 11, who were admittedly not parties to the contract and setting up a claim of independent title and possession over the contracted property, filed an application to get themselves added in the suit as defendants. The trial court allowed the application on the ground that as the respondent Nos.1 and 4 to 11 were claiming title and possession of the contracted property, they must be held to have a direct interest in the subject-matter of the suit, and therefore, entitled to be added as parties defendants in the suit as their presence would be necessary to decide the controversies raised in the present suit. The High Court in revision confirmed the said order and accordingly against the aforesaid order of the High Court this Special Leave

Petition was filed at the instance of the appellant which on grant of special leave was taken up for hearing in presence of the parties.”

“15. In the case of Vijay Pratap & Ors. Vs. Sambhu Saran Sinha & Ors. reported in 1996(10) SCC, 53, this Court had taken the same view which is being taken by us in this judgment as discussed above. This Court in that decision clearly held that to decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, in our view, a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character. As discussed above, in the event any decree is passed against the respondent Nos.2 and 3 and in favour of the appellant for specific performance of the contract for sale in respect of the contracted property, the decree that would be passed in the said suit, obviously, cannot bind the respondent Nos.1 and 4 to 11. It may also be observed that in the event, the appellant obtains a decree for specific performance of the contracted property against the respondent Nos.2 and 3, then, the Court shall direct execution of deed of sale in favour of the appellant in the event respondent Nos.2 and 3 refusing to execute the deed of sale and to obtain possession of the contracted property he has to put the decree in execution. As noted hereinafter, since the respondent Nos.1 and 4 to 11 were not parties in the suit for specific performance of a contract for sale of the contracted property, a decree passed in such a suit shall not bind them and in that case, the respondent Nos.1 and 4 to 11 would be at

liberty either to obstruct execution in order to protect their possession by taking recourse to the relevant provisions of the CPC, if they are available to them, or to file an independent suit for declaration of title and possession against the appellant or respondent No.3. On the other hand, if the decree is passed in favour of the appellant and sale deed is executed, the stranger to the contract being the respondent Nos.1 and 4 to 11 have to be sued for taking possession if they are in possession of the decretal property.”

“16.....In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff/appellant on one hand and Respondent Nos. 2 & 3 and Respondent Nos. 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of the respondent Nos.1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinafter, the respondent Nos.1 and 4 to 11 would not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale.”

“19.....It is well settled that in a suit for specific performance of a contract for sale the lis between the appellant and the respondent

Nos.2 and 3 shall only be gone into and it is also not open to the Court to decide whether the respondent Nos.1 and 4 to 11 have acquired any title and possession of the contracted property as that would not be germane for decision in the suit for specific performance of the contract for sale, that is to say in a suit for specific performance of the contract for sale the controversy to be decided raised by the appellant against respondent Nos.2 and 3 can only be adjudicated upon, and in such a lis the Court cannot decide the question of title and possession of the respondent Nos.1 and 4 to 11 relating to the contracted property.”

12. It is well settled legal position as held by the Hon'ble Supreme Court in the said Kasturi Judgment that in a suit for specific performance of a contract for sale, the issue to be decided is the enforceability of the contract entered into between the parties and whether the Plaintiffs are ready and willing to perform their part of the contract and whether they are entitled for the decree for specific performance of contract. It is also well established that the issues regarding the right, title and interest in the suit property of the strangers to the contract are beyond the scope of the suit for specific performance of the contract and therefore such suit for specific performance cannot be converted into a regular title suit. Therefore, the present Petitioners who are claiming that they have got undivided share in the suit property were neither necessary or proper parties to the suit, otherwise that would amount to converting the suit which is for specific performance into suit for title. In the judgment of Kasturi, it is clearly held that strangers to the contract cannot be impleaded as

party in suit for specific performance. It is further held that if the decree is passed in favour of the Plaintiffs then the strangers to the contract have to be sued seeking possession, if such strangers are in possession of the property. It is also held that such strangers can object to the execution of the decree.

13. In the light of above legal position if the facts of the present case are examined then it is clear that said Special Civil Suit N. 1337 of 2008 was filed by the Respondent No. 1 against the Respondent Nos. 2 to 4 for specific performance of the “Isar Pavati” dated 02.10.2007. The said “Isar Pavati” dated 02.10.2007 was executed by the Respondent No. 3 in favour of the Respondent No. 1. Thus it is absolutely clear that the Petitioners are not parties to the said Visar Pavati and therefore are neither the necessary party nor the proper party to the said suit. Therefore, the rejection of the said Exh. 24 application on the ground that the Petitioners were aware about the said transaction and said suit proceedings is without any legal and valid reasons. It is very clear that even if the Petitioners would have applied in the said suit for impleading them as the parties then also the said application could not have been treated as legally maintainable. Thus the learned Executing Court overlooked the above legal position while rejecting the application at Exh. 24 on the ground that the Petitioners were aware about the said transaction and also about the said suit.

14. The learned Executing Court in the impugned order proceeded on the basis that while passing judgment and decree dated

06.01.2015 in Special Civil Suit No. 1337 of 2008 the learned Trial Court has recorded finding that the Respondent No. 2 is the absolute owner of the suit property and the same is not ancestral property. On perusal of the said judgment particularly paragraph 16 shows that in fact the learned Trial Court has observed that the Respondent No. 1 is co-owner of the suit property and that finding is recorded on the basis of 7/12 extract of S. No. 58/4 (Exh.64) and mutation entry (Exh. 65). In any case any finding recorded in the Special Civil Suit No. 1337 of 2008 cannot bind the applicants. Therefore, it is clear that the finding regarding ownership, if any recorded in Special Civil Suit No. 1337 of 2008 is not binding on the present Petitioners.

15. The learned Trial Court while recording finding that the Respondent No. 2 is the absolute owner of the 4 R land out of said survey No. 58/4 has relied on the Zonal Regulation Certificate issued in favour of the Respondent No.2. The learned Counsel of the Petitioner rightly relied on the Judgment in the matter of Sunderlal (Supra) wherein it is specifically held that even if the regularization of the Gunthewari development under Section 3 of the Maharashtra Gunthewari Development (Regulation, Upgradation and Control) Act, 2001 was granted, it does not follow that holder of such land or building becomes the owner of such property. Thus it is very clear that issuance of Gunthewari Certificate/Zonal Certificate does not confer any title. In any case all these findings recorded in the said Judgment and Decree dated 06.01.2015 are not binding on the present Petitioners.

16. The reasons recorded by the learned Trial Court regarding collusion between the Respondent No.2(Defendant No.1) and the present Petitioners and that the present Petitioners kept quiet till passing of decree and filing of execution are of no relevance as the Petitioners could not have been impleaded as party to the said suit. It is very clear that they are neither necessary nor proper party to the said suit which has been filed for the Specific Performance.

17. Thus it is clear that the learned Executing Court has not considered several factual and legal issues and rejected the application without giving cogent and legal reasons.

18. In the light of above discussion, following order is passed:-

ORDER

a) The impugned order dated 15.04.2017 passed by the Learned 6th Joint Civil Judge Senior Division, Pune below Exh. 24 in Regular Darkhast No. 109 of 2015 is quashed and set aside.

b) The learned Executing Court to decide the application bearing Exh. 24 filed in Regular Darkhast No. 109 of 2015 after giving opportunity to all the parties.

c) The Writ Petition is disposed of in above terms.

[MADHAV J. JAMDAR, J.]