

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**NAGPUR BENCH : NAGPUR****Second Appeal No.137 of 2016**

M/S SAMANIYA IMPEX PRIVATE LTD, BALAGHAT (MP)THR. ITS DIRECTIONS, SUNIL S/
O GOPAL AGRAWAL AND ANOTHER

VS

SMT. PURNABAI ALIAS SHAKUNBAI W/O RAMBHAU MENDHE AND OTHERS

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri Anil Kumar, Advocate for the Appellant/original plaintiff
Shri Nitin Vyawahare, Advocate for the respondent Nos. 1, 2
and 4.

CORAM : ANIL S. KILOR, J.

DATED : 06th DECEMBER, 2021

This appeal is arising out of the judgment and decree dated 09.04.2014 passed in Regular Civil Appeal No.65 of 2012 by District Judge- 3, Assistant Sessions Judge, Gondia, dismissing the appeal and thereby, conforming the judgment and decree dated 04.07.2009 passed by Civil Judge Senior Division, Gondia in Special Civil Suit No.16 of 1998, dismissing the suit for declaration and injunction.

2. The brief facts of the present case are as follows: (The parties are referred to as per their status before the trial Court)

3. The appellant/original plaintiff filed a suit for declaration and injunction. The declaration was sought to the effect

that the decree dated 30.06.1995 passed by Civil Judge Senior Division, Gondia in Special Civil Suit No.2 of 1993 against defendant Nos.1 and 2 in respect of 0.12 HR land part of Khasara No.97/03, situated at Mararroli, Gondia, a suit property, is not binding on the plaintiff and the said decree is nullity and no right is created in favour of defendant No.3 by virtue of the said decree.

4. The plaintiff further sought declaration that the sale deed dated 21.02.1998 executed in favour of the defendant no.3 by virtue of judgment and decree dated 30.06.1995 passed in Special Civil Suit No.2 of 1993, is illegal, null and void and not binding on the plaintiff.

5. The plaintiff also sought a relief of permanent injunction, restraining the defendant No.3 from executing the decree of specific performance of contract against the defendant Nos.1, 2 and 4 or interfering the possession of the plaintiff over the suit property.

6. It is case of the plaintiff that the plaintiff is a private limited company registered under the provisions of the Companies Act. The defendant no.2 is the mother of defendant no.1 and defendant Nos.4 is the husband of defendant No.1. Defendant No.3 is a decree holder in Special Civil Suit No.02 of 1993 passed against the defendant Nos.1 and 2 on 30.06.1995.

7. It is the further case of the plaintiff that the plaintiff purchased the suit property from defendant No.2 on 26.09.1995 by

registered sale-deed. However, on objecting the mutation of the suit property in favor of the plaintiff by defendant Nos.1 and 2 and on obstructing the plaintiff while putting the wire fencing over the suit property by claiming right over the suit property by defendant No.2, on inquiry was made by the plaintiff. The plaintiff thereupon, had learnt that defendant No.3 had filed Special Civil Suit No.02 of 1993 against the defendant Nos.1 and 2 for specific performance of contract in respect of the suit property which came to to be decreed and thereafter Regular Darkhast No.24 of 1995 was filed for execution of decree and therein the sale deed came to be executed in favour of the defendant No.3 on 21.02.1998.

8. The plaintiff further learnt that defendant No.1 had filed a Special Civil Suit No.51 of 1996 against defendant No.2 and the plaintiff, for declaration, partition and separate possession and it came to be decreed and thereby the plaintiff filed an appeal for challenging the said decree.

9. Defendant No.2 by filing written statement denied the case set-forth by the plaintiff. Defendant No.1 claimed joint ownership in the suit property by filing written statement.

10. The defendant No.3 resisted the suit on the ground that the plaintiff was aware about the agreement executed by defendant Nos.1 and 2 in favour of the defendant No.3 and the plaintiff got fraudulently executed the sale deed in its favour. He contended that

the Special Civil Suit No.02 of 1993 was decreed in his favour and the Regular Darkhast No.24 of 1995, was filed for execution of decree, on which, the sale deed was executed in his favour and the possession was handed over.

11. It is further case of the defendant no.3 that the plaintiff has no right to claim any declaration in respect of sale deed dated 21.02.1998 executed by the Court on behalf of defendant Nos.1 and 2.

12. The learned trial Court, after considering the oral as well as documentary evidence, partly decreed the suit vide judgment and decree dated 04.07.2009 in favour of the plaintiff and thereby directed defendant No.2(mother of defendant No.1) to refund Rs.3,00,000/- to the plaintiff along with interest @ 6 % from 26.09.1995 till it's realization.

13. The plaintiff feeling aggrieved by the said judgment and decree preferred an appeal vide Regular Civil Appeal No.65 of 2001 before the District Judge-3, Assistant Sessions Judge, Gondia, which came to be dismissed vide impugned judgment and decree dated 09.04.2014. The same is the subject matter in the present appeal.

14. I have heard learned counsel for the respective parties.

15. Shri Anilkumar, learned counsel for the appellant submits that the defendant Nos.1 and 2 have suppressed the fact of de-

cree passed in favour of defendant No.3 and pendency of execution proceeding at the time of execution of sale deed in favour of the plaintiff by the defendant No.2.

16. It is submitted that though the decree was passed prior to the execution of the sale deed in favour of the plaintiff on 26.09.1995, the sale deed was not executed in favour of defendant No.3 till 21.02.1998, as such because the sale deed of the plaintiff is of prior in time, the same ought to have been held valid by both the Courts-below.

17. He has further argued that both the Courts-below have not considered the fact that the plaintiff is the *bona fide* purchaser and because of suppression of facts by the defendant Nos.1 and 2, the sale deed was executed in favour of the plaintiff.

18. He has lastly argued that the sale deed executed in favour of the defendant No.3 is in respect of 11 R. Whereas, the sale deed executed in favour of the plaintiff is of 14 R and therefore, still this Court can hold in favour of the plaintiff as regards the ownership to the extent of 3 R, if this Court is not convinced and if this Court is going to hold against the plaintiff.

19. On the other hand, Shri Vyawahare, learned counsel for respondent Nos.1, 2 and 4, strongly opposes the appeal and submits that no substantial question of law is involved in this matter and all the arguments made by the learned counsel for the appellant is not

based on any law, but the same relates to the fact and as such, the appellant has failed to fulfill the pre-requirement of entertaining second appeal, the appeal may be dismissed.

20. It is further pointed out that indisputably the decree passed in favour of the defendant No.3 of specific performance of contract is in force and it was never challenged by the plaintiff though the plaintiff was having knowledge about it.

21. It is further submitted that the day on which the decree for specific performance was passed in favour of the defendant No.3 his rights have been crystallized as regards the suit property and therefore, it has no relevance, whether the sale deed executed in favour of the plaintiff is prior in time of the sale deed of defendant No.3.

22. It is further argued that both the Courts have concurrently held in favour of the defendants and in absence of any perversity pointed out in the findings recorded by the both the Courts below, this Court cannot interfere the same.

23. To consider the rival contentions of the parties, I have gone through the record and also perused the judgments and decree of both the Courts-below.

24. In view of the admitted facts that the defendant No.3 filed a suit for specific Performance of Contract against defendant

Nos.1 and 2 and the said suit was decreed on 30.06.1995. As such, on 30.06.1995 the rights of the defendant No.3 were crystallized as regards the suit property. Further, in absence of any challenge to the said decree, it has attained finality.

25. In that view of the matter, the sale deed subsequently executed in favour of the plaintiff on 26.09.1995 will not create any title in favour of the plaintiff and as such, both the Courts-below have rightly denied a decree of declaration sought by the plaintiff.

26. In view of the above referred admitted facts, the date of sale deed executed in favour of the defendant No.3 in execution proceeding on 21.02.1998 has no relevance once the rights of the defendant were crystallized prior to sale deed of the plaintiff.

27. Accordingly, I do not find any substantial question of law is involved in the present matter, particularly, when no perversity has been pointed out by the learned counsel for the appellant in the findings recorded by both the Courts-below.

28. As regards argument advanced by the learned counsel for the appellant in respect of the 0.3 HR is concerned, this Court cannot consider the said request in this appeal as this was never the case of the plaintiff before any of the Courts-below.

29. Accordingly, the appeal is dismissed.

30. No order as to costs.

[ANIL S. KILOR, J.]