

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Appeal from Order No. 422 / 2021
Alongwith
Interim Application No. 3270 / 2021
in
Appeal from Order No. 422 / 2021

Santosh Dnyanoba Gawade and Others ... **Appellants**
Versus
Prakash Nensukh Navlakha and Others ... **Respondents**

* * * * *

Senior Advocate Mr. Anil Anturkar alongwith Tushar Sonawane a/w Ranjeet Shinde, Advocate for Appellants.

Mr. R.D. Soni alongwith V.R. Kasle i/by Ram and Co., Advocate for Respondents.

* * * * *

CORAM : SANDEEP K. SHINDE, J.
RESERVED ON : 29th MARCH, 2022.
PRONOUNCED ON: 7th APRIL, 2022.

ORAL JUDGMENT :

1. In the Special Civil Suit No. 102/2020 instituted by the Respondents-Plaintiffs, seeking cancellation of registered sale deeds, perpetual

injunction and alternatively for recovery of Rs. 3,57,50,073/-, the learned trial Court at intermediate stage, vide order dated 11th February, 2021 restrained the Appellants-Defendants from creating the third party rights in the suit properties. That order is challenged, under Order-43 Rule -1(r) read with Section 104 of the Civil Procedure Code.

2. Briefly stated facts of the case are like this; Plaintiff executed instrument of registered sale deed, dated 26th February, 2020, in respect of suit properties in favour of Defendant No.1 and 2 for lump sum consideration of Rs. 4,00,00,000/-. The sale deed was registered with Sub-Registrar Haveli No.6 at Pune. Towards the consideration, Defendant No.1 and 2 paid part of it, by RTGS and issued postdated cheques. Six cheques were returned unpaid in the month of April and July, 2020. Thereafter Plaintiffs did not deposit eleven cheques (all

postdated) as requested by the Defendant No. 1 and 2. It is Plaintiffs case that during June to August, 2020, Defendants paid Rs. 6,00,000/- by RTGS. Thus, out of Rs. 4,00,00,000/-, the Defendant No.1 and 2 paid only Rs. 79,7417/-; leaving balance of Rs. 3,20,25,829/-. In spite of these facts, Defendant No.1 and 2 sold suit properties to the Defendant No. 3 to 14 by executing sale deeds dated on 3rd July, 2020; 7th July, 2020; 6th August, 2020; 14th August, 2020 and 19th August, 2020. Although the Defendant No. 1 and 2 were repeatedly called upon to pay balance purchase price, they evaded to pay under one pretext or other. Constrained thereby, Plaintiffs filed suit on 21st September, 2020, against the Defendants seeking following reliefs;

(a). cancellation of the sale deeds in respect of properties described in Paragraph No.1 (i) to 1(iii) of the plaint;

(b). declaration that the sale deeds in respect of properties described in Paragraph 1(iv) to 1(viii)

of the plaint are not binding on them;

(c). alternatively for recovery of amount of Rs. 3,57,50,073/-;

(d). for consequential relief for injunction and other reliefs.

3. Pending suits, Plaintiffs sought injunction to restrain Defendants from creating third party rights/ interest in the suit properties.

4. Defendant No.1 and 2 denied the suit claim, they contended, that on execution of the sale deed and upon its' registration, title in the suit properties has passed on to them and therefor, suit seeking cancellation of the sale deeds was maintainable. Their case is after acquiring title vide sale deeds executed in July, August and September, 2020 they sold the suit properties to the Defendant No. 3 to 14. Besides it is their case that, before executing the sale deed dated 26th February, 2020, they paid

Rs. 2,14,96,199/- in cash to the Plaintiffs towards consideration of purchase price, when transaction was captured in the CCTV. In support thereof, they produced a pendrive. As such according to them, they owe Rs. 976657/- to the Defendants. Therefore, it is their case, that Plaintiffs cannot seek cancellation of the sale deed, and at the most; the suit may be maintainable only for recovery of balance consideration. It is their contention that after executing the sale deed, the revenue record of the suit properties were altered. Thus, relying on the revenue records, respecting the suit properties, Defendant No.3 to 14 purchased the same from them under different sale deeds. As such Defendant No.3 to 14 are bonafide purchasers. On these grounds, the Defendant no.1 and 2 opposed the temporary relief sought by the Plaintiffs.

5. Defendant No. 3 to 14 claimed that they were bonafide purchasers inasmuch as they performed due

diligence before buying the suit properties, by verifying title of Defendant No.1 and 2. Also they had verified the revenue records respecting the suit properties, which at the material time was showing the names of Defendant No.1 and 2, as its owners. Further they asserted their possession in the suit plots sold to them by the Defendant No.1 and 2. On these grounds, they resisted the temporary relief sought by the Plaintiffs.

6. The learned trial Court vide order dated 11th February, 2021 restrained the Defendants from creating the third party right in the suit property. That order is under challenge.

7. Heard. Mr. Anil Anturkar, learned Counsel for the Appellants and Mr. R.D. Soni, learned Counsel for the Respondents.

8. Mr. Anturkar, learned Senior Counsel for the Appellants, contended that upon execution of the

sale deed, dated 26th February, 2020 by the Plaintiffs in favour of the Appellants-Defendants No.1 and 2, sale was complete and title in the suit properties had passed on to the Defendants. Relying on the judgment of the Apex Court in the case of Vidyadhar 1999 3 SCC 573, Mr. Anturkar, submitted that actual payment of whole of the price at the time of execution of the sale deed is not sine-qua-non for completion of the sale and therefore non-payment of part of sale price, would not affect validity of the same. To put it differently, once title in the property has already passed, even if the balance sale consideration is not paid, the sale could not be invalidated. Mr. Anturkar, learned Senior Counsel relying on the judgment in the case of Dahiben 2020 (7) SCC 366, contended that even if the averments of the Plaintiffs are taken to be proved, that entire sale consideration had not infact being paid, it could not be a ground for cancellation of the sale deed and the Plaintiffs may

take recourse to other remedies in law for recovery of the balance consideration. Mr. Anturkar, submitted in this case assuming, but without admitting, out of total consideration of Rs. 4 Crores, balance amount payable was Rs. 3,20,25,829/-, even then, in view of the averments in Paragraph No. 13 of the plaint, for unpaid part purchased price and interest accrued thereon, the Plaintiffs were entitled to recover the said amount, as the suit properties were agreed to be charged and having been charged Under Section 100 of Transfer of Property Act. Submission is that herein, Plaintiffs' remedy in law is to recover the balance consideration, but not to seek relief of cancellation of the registered sale deeds. In the next place, Mr. Anturkar submitted that the statement of facts contained in Clause No. 10, 11, 12 and 13 of the sale deed, if taken together, intention of the parties to pass the ownership and title in the suit property to the Appellant-

Defendant No.1 and 2, was clearly discernible. For that reason, Mr. Anturkar submitted that in this case, ownership and title in the suit property was transferred to the Appellants No. 1 and 2 and further Defendant No.1 and 2 sold the properties for consideration to Defendant No.3 to 41. Therefore the learned Judge could have not restrained the Defendants from creating further third party right. Mr. Anturkar, further argued that, there was reliable evidence on record suggesting that before executing the sale deed by Plaintiffs in favour of Defendant No.1 and 2, on 2nd January, 2020, Defendant No.1 and 2 had paid Rs. 2,14,96 199/- in cash to the Plaintiffs and this transaction was captured in the CCTV. Mr. Anturkar submitted, the pendrive containing the footage has been taken on record by the learned trial Court vide order dated 11th February, 2021. Submission is that although the said pendrive has been taken on record, the learned trial Court declined to rely on the data/stored in

the device-pendrive, for want of certificate under Section 65-B of the Evidence Act. Mr. Anturkar submitted that the requirement of the certificate under Section 65-B of the Evidence Act, is not a mandatory at the time of production of electronic record and therefore, learned Judge could not have disregarded data (electronic evidence) stored in the pendrive, while passing the impugned order. Therefore, according to Mr. Anturkar, the learned trial Court has committed an error by restraining the Defendant No. 1 and the subsequent purchasers being Defendant No. 3 to 41 from creating the third party right in the suit property.

9. Mr. Soni learned Counsel appearing for the Respondents countered the arguments of the Appellants and submitted, that to ascertain whether ownership or title to the property has passed to purchaser, the true test of passing of property is the intention of parties. Mr. Soni would rely on the judgment of the Apex Court in the case of

Kaliperumal AIR 2009 SCC 2122, wherein the Apex Court has held that normally ownership and title to the property will pass to the purchaser on registration of the sale deed, with effect from date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer, if payment of consideration is a condition precedent for passing of the property. The answer to the question, whether the parties intended that transfer of ownership should be nearly, by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from recitals of the sale deed.

10. Therefore, question that falls for consideration is, whether in this case, Plaintiffs intended the transfer of the suit properties to take place to Defendant No.1 and 2 upon execution and registration of the sale deed dated 26th February, 2020, or whether they intended the transfer of the property to take place, only after receipt of entire consideration ?

11. Execution of sale deed dated 26th February, 2020 respecting the suit properties in favour of Defendant No. 1 and 2, for lumpsum consideration of Rs. 4 Crores and its registration with the Sub-Registrar, Haveli-6, Pune are not disputed facts. Towards consideration of the sale, the Defendant No.1 and 2 paid part of agreed amount by RTGS and issued postdated cheques. Clause No.10 of the sale deed provided, that in the event of dishonor of any of the cheques, for any reason whatsoever, the Defendant No.1 and 2 would be liable to pay interest

@ 2% per month on the outstanding amount of purchase price. The said clause also provided, that if Defendant No.1 and 2 further failed to pay the amount with interest within a period of three months, the instrument of sale shall automatically be rendered invalid and terminated.

(emphasis supplied).

Clause No.11 of the sale deed, lays down that there would be a charge on the said properties of such unpaid purchase price. Clause No.13 provided, in the event of dishonor of any postdated cheques, the vendors cannot take recourse to remedy other than cancellation of the sale deed. According to the Plaintiffs, out of total consideration of Rs. 4 Crores, they have received only an amount of Rs. 79,74,171/- leaving balance of Rs. 3,20,25,289/-. Primary evaluation of these recitals and in particular clause 10 and 13 imply, that the parties intended the transfer of suit property to take place, only after receipt of entire consideration.

Meaning thereby, merely by execution and registration of the sale deed, parties did not intend to transfer ownership and title to the property to the Appellant No.1 and 2. The judgment cited by Mr. Anturkar, also underlines, the same principle, that in order to constitute a sale, the parties must intend to transfer the ownership of the property and the intention is to be gathered from the recitals of the sale deed, the conduct of the parties and evidence on record. Insofar as conduct of the parties is concerned, Mr. Anturkar, learned Senior Counsel for the Appellants vehemently submitted that before execution of the sale deed on 2nd January, 2020, the Appellants paid Rs. 2,14,96,199/- in cash to the Plaintiffs, as a part of consideration and the said amount matches with the amount of postdated cheques. Precisely for this reason, though the postdated cheques were dishonored, the Plaintiffs did not initiate action against the Defendant No.1 and 2. Mr. Anturkar

submitted, that had the Defendant No.1 and 2 not paid the cash the Plaintiffs, would not have conceded the request of the Defendants, for not depositing nine postdated cheques. According to Mr. Anturkar, a prudent person would put all possible efforts to recover the dues either by prosecuting the drawer once cheques were dishonoured. However, Plaintiffs having not done so it must be held that Plaintiffs had received cash. It is therefore the contention of the Appellants, that in spite of receiving the part consideration in cash, the Plaintiffs instituted the suit to recover the amount in excess of agreed consideration. Therefore the Appellants the conduct of the Plaintiffs disentitles, to claim the equitable relief of injunction, as sought by them.

12. Mr. Soni, learned Counsel for the Respondent submitted, assuming but without admitting that the Defendants had paid cash to the Plaintiffs on 2nd

January, 2020. Yet, there is no evidence to signify as to how much amount was paid?; Whether Rs. 2,14,96,199/- less or more. Moreover, even if it is assumed that Defendants had paid Rs. 2,14,96,199/-, it cannot be assumed the alleged payment was towards the agreed consideration, under the sale deed. Mr. Soni has rightly submitted that the all postdated cheques were bearing the date 25th March, 2020 and 25th April, 2020. It means cheques were issued after alleged payment of cash made on 2nd January, 2020. Submission is, had Defendants paid cash in January, 2020, there was no occasion for issuing the postdated cheques of March and April, 2020. I have no reason to disagree with Mr. Soni.

13. Having regard to the facts of the case and particularly the statement of facts contained in the recitals of the sale deed prima facie in my view, the parties never intended to transfer the title in the suit properties to the purchasers and therefore

the payment of entire consideration was a condition precedent for transfer of proprietary rights in the suit properties. This fact is clearly discernible from the recitals in Clause No. 10 and 13 of the sale deed.

14. Insofar as the CCTV footage captured and data stored device in pendrive is concerned; the judgment in the case of Avadud Kushe in Criminal Writ Petition 54/2016 relied on by Mr. Anturkar, does not further his case, reason being the issue in the said judgment was, at what stage the certificate under Section 65B of the Evidence Act is to be produced. Admittedly, the device (pendrive) stores the electronic evidence, of secondary in nature and therefore unless the certificate under Section 64B is produced, the Court could not have considered such electronic evidence. The reliance placed by the Appellants on the judgment of the Apex Court in the case of Arjun Khotkar 2020 7 SCC is equally irrelevant because the pendrive, in which the CCTV

data of alleged transaction is stored is not a primary but a secondary evidence. Thus, keeping in mind facts of the case, it is to be held that the execution of sale deed dated 26th February, 2020 and its registration has not transferred title in the suit properties to the Defendant No.1 and 2. As a consequences, Defendant No. 1 and 2 could not have transferred the title to Defendant No.3 to 41. For all that reasons, impugned order does not call for any interference. As a result, the appeal is dismissed, including Interim Application therein.

(SANDEEP K. SHINDE, J.)

MOHAMMAD
NAJEEB
MOHAMMAD
QAYYUM

Digitally signed
by
MOHAMMAD
NAJEEB
MOHAMMAD
QAYYUM
Date:
2022.04.07
14:54:44 +0530

NAJEEB....