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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 257 OF 2023
WITH
INTERIM APPLICATION NO. 3395 OF 2023**

Smt. Ratna W/o. Narayan Shetty

Age : 66 years, Occu : Housewife

R/o. 52 Shanti Nagar Society

Vijapur Road, Solapur

Through power of attorney holder

Sachin Narayan Shetty

Age : 45 years Occupation : Service

R/o. 52 Shanti Nagar Society

Vijapur Road, Solapur

Appellant

(Original Defendant No.1)

Vs.

Kumar Anandrao Hegde (Dead)

Since deceased through LRs

1. Smt. Nirmala W/o. Kumar Hegade

Age : 44 years, Occu : Housewife

R/o. Ashok Nagar, Vijapur Road

Solapur

2 Smt. Arti W/o. Parmeshwari Aigole

Age : 25 years, Occ : Housewife

R/o. Bhaski, Tal-Akkalkot, Solapur

3. Shri Sunil S/o. Kumar Hegade

Age : 22 years, Occu : Education

R/o. Ashok Nagar, Vijapur Road

Solapur

4. Chi. Vikki S/o. Kumar Hegade
Age : 17 years, Occu –Education
Smt. Nirmala Kumar Hegade
(Guardian of minor respondent no.4.)
R/o. Ashok Nagar, Vijapur Road Respondent Nos. 1 to 4
Solapur (Original Plaintiff Nos. 1 to 4)
5. Shanti Nagar Co-op Housing Society, Respondent No.5.
Vijapur Road, Solapur (Original Defendant No.2.)

Mr. Ashok B. Tajane a/w. Mr. Y.G. Thorat for the Appellant.

Mr. Bhushan Walimbe a/w. Mr. Suhas Inamdar for Respondent Nos.
1 to 4.

CORAM : GAURI GODSE, J.

DATE : 9th AUGUST 2024

ORAL JUDGMENT :

1. Heard learned counsel for the parties. This Second Appeal is filed by the original defendant no.1 (“defendant”) to challenge the judgment and decree of the First Appellate Court in favour of the respondents-plaintiffs.

2. The First Appellate Court has reversed the findings of the Trial Court dismissing the suit. The First Appellate Court has set aside the Trial Court’s decree, and the registered sale deed in favour of the defendant is declared void and, thus, cancelled. The impugned

decree also declares the resolution and the membership letter issued in favour of the defendant as illegal. Therefore, by setting aside the sale deed, the First Appellate Court directed the defendant to hand over possession of the suit property to the plaintiffs.

3. The suit property comprises land and the constructed structure in a society comprising backward class members. The land was allotted in favour of the society (defendant no. 2) for the benefit of the backward community members under a letter of allotment at Exhibit 87 issued by the learned Collector. The plaintiffs' father, being a member of the backward community, was allotted land; as the original allottee, he had executed the sale deed in favour of the defendant, transferring the property in her name. Heirs and legal representatives of the original allottee challenged the sale deed and the resolution passed by the society's Administrator permitting the original allottee to transfer the property after obtaining permission from the learned Collector. The main ground of challenge in the suit is the execution of the sale deed without any permission from the learned Collector.

4. The learned counsel for the appellant submitted that the First Appellate Court failed to frame proper points for determination about

the validity of the resolution passed by the society and transfer of membership in the name of the defendant. He further submitted that one of the plaintiff's grounds was regarding the vendor's mental state of mind while executing the sale deed. However, according to the learned counsel for the appellant, the First Appellate Court cast a negative burden on the defendant to prove that the vendor had executed the sale deed in a proper state of mind.

5. Learned counsel for the appellant further submits that the suit against the society was not maintainable for want of notice under Section 164 of The Maharashtra Co-operative Societies Act, 1960 ("MCS Act"). He further submits that during the vendor's lifetime, he never challenged the sale deed in favour of the defendant. However, after his death, his legal heirs filed the suit. Learned counsel for the appellant supported the findings recorded by the Trial Court by referring to the issues framed in the suit and the relevant findings. He thus submitted that the Trial Court rightly held that the Civil Court would have no jurisdiction to record any finding on the validity of the resolution passed by the society. Learned counsel for the appellant thus submitted that the Second Appeal raises substantial questions of law on the aforesaid points and hence would require consideration by this Court.

6. Learned counsel for the appellant supported the defendant's contentions regarding the payment of the consideration amount by relying upon specific admissions given by the plaintiffs in the cross-examination. He further submits that the defendant has always resided in the suit property as a tenant for 15 to 20 years; hence, the original vendor executed the sale deed in her favour after following the necessary procedures and obtaining permission from the Administrator. He submits that sub-section 4 of Section 78 of the MCS Act empowers the Administrator to make all the decisions on behalf of the society; hence, in view of the valid resolution issued by the Administrator, even the membership was transferred in the name of the defendant.

7. Learned counsel for the appellant thus submits that the Second Appeal would also require consideration on the ground that after accepting the consideration amount and the defendant already being in possession of the suit property, the heirs and legal representatives of the vendor would not be entitled to raise any objection to the execution of the sale deed in favour of the defendant.

8. Learned counsel appearing for the respondents-plaintiffs supported the impugned decree. He submits that there is no

dispute that the transfer could not have been effected without valid permission from the learned Collector. He submits that, admittedly, no such permission has been issued by the Collector. He submits that the sale deed is executed only on the resolution issued by the Administrator, which also clarifies that the permission is granted to transfer subject to obtaining necessary permission from the Collector. With reference to the objection raised regarding notice under Section 164 of the MCS Act is concerned, learned counsel for the respondents submitted that there is no relief claimed against the society; hence, for want of any such notice, the suit filed for challenging the sale deed cannot be said to be not maintainable. He submits that the suit is for a substantial relief for challenging the sale deed, which is executed in favour of the defendant, and that setting aside the resolution and the membership would only be a consequence of the relief of invalidity of the sale deed.

9. Learned counsel for the respondents relied upon the finding recorded by the First Appellate Court in paragraphs 27 and 28 of the impugned judgment, which deals with the objection to the notice under Section 164 of the MCS Act. He thus submitted that by relying upon the decision of this court in the case of ***B. Y. Chavan and Another Vs Association of Tenants of the Bombay Catholic***

*Housing Society and Others*¹, the First Appellate Court has rightly held that the suit filed for challenging the sale deed was maintainable.

10. Learned counsel for the respondents also relied upon the decision of this court in the case *of S.M.Kamble and Others Vs Jt. Registrar and Others*² and *Sanjivani Kailas Borade Vs Kashinath Huseni (Waghe) Valher and Another*³. He submits that it is a well-settled principle of law that the challenge to the execution of the sale deed would be a subject matter of challenge in the Civil Court and that the challenge to the resolution of the society or ground of membership would be an ancillary relief.

11. Learned counsel for the respondents also relied upon a finding recorded by the First Appellate Court that the defendant failed to produce any documents supporting the contentions that the entire consideration amount was paid to the vendor. With regard to the authority of the learned Administrator to issue the resolution for the transfer of the suit property, learned counsel for the respondents pointed out sub-section (4) of Section 78, which indicates that the Administrator would be empowered to perform the functions of the

1 2-11(5) Bom CR 133

2 2008(1) Bom C.R. 695

3 2018 (5) Bom C.R. 591

society in terms of the directions issued by the learned Registrar. He submitted that nothing was produced on record to indicate that the learned Administrator was empowered to issue permission to transfer the suit property. Thus, the learned counsel for the respondents submitted that no fault can be found in the reasons recorded by the First Appellate Court, and the grounds raised on behalf of the appellant do not involve any question of law required to be considered by this court.

12. I have considered the submissions made on behalf of the parties. Perused the papers. It is not in dispute that the suit land is the subject matter of allotment of land by the learned Collector in favour of the society formed for the benefit of the backward community. It is also not in dispute that the suit property could not have been transferred without the prior permission of the learned Collector. The findings recorded by both courts indicate that the sale deed was executed only based on the resolution/permission issued by the learned Administrator of the society. The findings recorded by both courts also clearly indicate that the resolution/permission issued by the learned Administrator clearly stated that the transfer could have been made only after necessary permission from the Collector. A perusal of the original allotment letter in favour of the

society produced at Exhibit – 87 clearly states that the transfer by the allottee shall not be effected without permission of the Collector.

13. As far as the ground with regard to framing points for consideration is concerned, even though a specific point on the ground of validity of the resolution and membership is not framed by the First Appellate Court, there are specific reasons recorded by the First Appellate Court while deciding the point on the validity of the sale deed. It is a well-settled principle of law that the findings recorded by the First Appellate Court if found within the parameters of Order 41 Rule 33 of the Code of Civil Procedure 1908, no interference will be called for in the impugned judgment on the technical point of framing a specific point for consideration.

14. The next ground argued on behalf of the appellant with reference to the negative burden cast upon the defendant is concerned; the reasons recorded by the First Appellate Court indicate that the Court has referred to the pleading of the parties. It is the case of the plaintiffs that the original allottee/vendor was not residing in the suit property, and hence, after the death of the original vendor, the plaintiffs, upon getting the knowledge about the transaction, filed the suit. One of the grounds raised to challenge the sale deed was regarding the vendor's mental condition.

However, the main reasons for the challenge were the need for permission from the Collector and the powers of the learned Administrator. Thus, the reasons recorded by the First Appellate Court are not only with regard to the defendant's burden to prove the state of mind of the vendor. It is only considered as one of the grounds raised to challenge the sale deed. Once the validity of the sale deed was supported by the defendant and the ground regarding mental condition was pleaded and supported by oral evidence of the plaintiffs, the First Appellate Court found it fit to refer to the evidence of the defendant, which does not indicate any rebuttal on the pleadings and evidence of the plaintiffs. After examining the pleadings and evidence on record, the First Appellate Court also held that the defendant failed to prove payment of the total consideration to the vendor. Thus, I do not find any substance on the said grounds raised on behalf of the appellant.

15. The First Appellate Court also considered the issue regarding the requirement of notice under Section 164 of the MCS Act. The main relief in the suit is on the validity of the sale deed on the grounds of wanting necessary permission from the learned Collector in terms of the conditions of allotment. Admittedly, no such permission was taken. Hence, the validity of the resolution issued

by the Administrator of the society and grant of membership to the defendant would necessarily depend upon the validity of the sale deed. The issuance of the resolution by the Administrator of the society and grant of membership will not validate the sale deed.

16. The Administrator of the Society issued a resolution dated 15th November 2010, permitting transfer subject to obtaining permission from the learned Collector. Based on the resolution, membership was granted by the Administrator on 16th November 2010. The document of sale was executed and registered on 19th November 2010. The original allottee/vendor expired on 8th November 2012. The plaintiffs, i.e., the heirs of the original allottee/vendor, filed an application before the learned Registrar, Cooperative Societies, making a grievance on 11th March 2013 about the aforesaid transfer. By letter dated 4th April 2013, the learned Registrar, Cooperative Societies, informed the plaintiffs to approach the Civil Court for redressal of their grievances. Hence, the suit was filed.

17. Considering the aforesaid facts, the first appellate court followed the legal principles settled by this Court in the case of ***B. Y. Chavan*** and held that the non-issuance of the notice under Section 164 of the MCS Act would not bar the Civil Court's jurisdiction to

decide the suit filed to challenge the sale deed on the ground that it was void and illegal. In the decision of ***B. Y. Chavan***, this Court held that the notice, under Section 164, is to enable the society, upon being informed by the Registrar, to avoid litigation involving time and expense by settling the claim. This Court further held that if a party by its act deprives the plaintiff of an opportunity to approach the Court and seek relief, final or even interlocutory, it is axiomatic that it does not wish to avail the benefit or opportunity provided by the legislature to avoid the litigation by settling the matter or otherwise. On the question of waiver, this Court held that it matters little whether the conduct prejudicially affects the right to obtain the final relief or even interim relief. Thus, this Court observed that the logical inference would be that the party does not wish to settle the dispute and avoid litigation, thereby waiving its right to such a notice. This Court further held that a view to the contrary would render the provisions of Section 164 arbitrary, unfair, and, in fact, irrational. This Court thus observed that the legislature could not have intended such a consequence, which would enable the defendant, by insisting upon the empty formality of a notice, to defeat a just claim.

18. Thus, in view of the facts of the present case, the legal principles settled by this Court in the aforesaid decision squarely apply to the present case. The plaintiffs are justified in filing the suit to challenge the sale deed without issuing any notice under Section 164. The validity of the resolution issued by the Administrator and the grant of membership would necessarily depend upon the validity of the sale deed, which can be decided only by the Civil Court. Hence, the suit cannot be held as not maintainable for want of notice under Section 164 of the MCS Act.

19. The ground that the vendor did not challenge the sale deed during his lifetime would not validate its execution. Once it is not in dispute that a valid permission of the Collector was necessary for executing the sale deed and that the plaintiffs had filed a suit as heirs and legal representatives of the original allottee, the original allottee not challenging the sale deed during his lifetime would be immaterial. The suit is for a substantial relief for challenging the sale deed, which is executed in favour of the defendant, and setting aside the resolution and the membership would only be a consequence of the relief of invalidity of the sale deed. Thus, the First Appellate Court rightly held that, since the Administrator's permission was on a condition to obtain the necessary permission

from the learned Collector, the sale deed executed without such permission is void in view of the terms and conditions of the original allotment Order at Exhibit 87.

20. Learned counsel for the appellant relied upon the Government Resolution dated 1st June 2015 to contend that the Collector has the authority to grant permission to sell the suit property to a member not belonging to the backward community. The said resolution was never produced before both the Courts to support any of the contentions. Even otherwise, the said Government Resolution is of no assistance to the appellant as it is not even the case of the appellant that any such application for permission was made before the learned Collector. Though it is sought to be argued on behalf of the appellant that the application for permission was made and the same is pending before the learned Collector, nothing is produced on record to support the same. Hence, reliance on the said Government Resolution is of no assistance to the arguments raised on behalf of the appellant.

21. It is in view of the aforesaid reasons none of the grounds raised on behalf of the appellant would require consideration by this Court as they do not raise any substantial question of law.

22. The Second Appeal does not raise any substantial question of law; hence, the second appeal is dismissed. In view of the dismissal of the Second Appeal, pending Civil Applications are disposed of as infructuous.

23. At this stage, learned counsel for the appellant seeks a stay to the execution of the impugned decree on the ground that the appellant has been residing in the suit property for the last 20 years. On the request made by the learned counsel for the appellant, execution of the impugned decree shall remain stayed for eight weeks, subject to the appellant filing an affidavit-cum-undertaking in this Court stating that the appellant is in possession of the suit property, and she shall not create any third party interest and part with the possession of the suit property. The appellant shall also undertake that if the Hon'ble Apex Court does not pass any favourable order, the appellant shall hand over the possession on expiry of the period of eight weeks. The necessary affidavit shall be filed within two weeks.

[GAURI GODSE, J.]

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