2024:BHC-NAG:14255

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

SECOND APPEAL NO.134 OF 2023

Keshavprasad Raghunandanprasad Dubey
(deceased) through LRs

1(a) Smt. Jayantibai Wd/o Keshavprasad Dubey
Aged about 87 years, Occ: Housewife,
R/o Keshavkuti, Forest Colony,
Civil Lines, Nagpur.

1(b) Smt. Dr. Mangala W/o Sunil Mishra
Aged about 55 years, Occ: Housewife,
R/o Keshavkuti, Forest Colony,
Civil Lines, Nagpur.

1(c) Smt. Omlata W/o Rajendra Mishra
Aged about 53 years, Occ: Housewife,
R/o Flat No.103, Himalaya Galaxy One,
Kachimet, Amravati Road, Nagpur.

....**APPELLANTS**

...V E R S U S...

Corrected as per Hon'ble Court's order dated 9.1.2025.

Mahendrakumar Bansilal Katariya
Aged about 45 years, Occ: Business,
R/o Plot No.8-A, Keshavkuti, Forest Colony,
Civil Lines, Nagpur.

...**RESPONDENT**

WITH

SECOND APPEAL NO.162 OF 2023

Keshavprasad Raghunandanprasad Dubey
(deceased) through LRs

1(a) Smt. Jayantibai Wd/o Keshavprasad Dubey
Aged about 87 years, Occ: Housewife,
R/o Keshavkuti, Forest Colony,
Civil Lines, Nagpur.

1(b) Smt. Dr. Mangala W/o Sunil Mishra
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R/o Flat No.103, Himalaya Galaxy One,
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Corrected as per Hon'ble Court's order dated 9.1.2025.

...V E R S U S...

Mahendrakumar Bansilal Katariya
Aged about 45 years, Occ: Business,
R/o Plot No.8-A, Keshavkuti, Forest Colony,
Civil Lines, Nagpur. ...**RESPONDENT**

Shri Anand Jaiswal, Sr.Advocate a/b Shri G.B. Sawal, Advocate for appellants.
Shri U.M. Aurangabadkar, Advocate for respondent.

CORAM :- M.W. CHANDWANI, J.
ARGUMENTS WERE HEARD ON :- 07.10.2024
JUDGMENT PRONOUNCED ON :- 20.12.2024

JUDGMENT:

. These two appeals are exception to the judgment and decree dated 25.04.2007 passed by the Civil Judge, Senior Division, Nagpur in Special Civil Suit No.660/2000, which has been confirmed by the District Judge, Nagpur in Regular Civil Appeal No.343/2012, whereby the trial Court decreed the suit of the respondent for specific performance of contract and directed the appellant to execute sale-deed of the suit property in favour of the respondent, while dismissing the counter claim of the appellant for damages on account of unauthorized possession of the suit premises.

2. The plaint depicts that, by agreement dated 15.08.1992, the respondent entered into an agreement with the appellant to purchase half undivided share in the land admeasuring 1350 sq.fts. alongwith construction on the first and second floor with an exclusive use of terrace for total consideration of Rs.4,41,000/-. It was agreed that after receipt of the entire amount of consideration, the appellant shall handover the possession to the respondent. The property was to be released from mortgage on or before 15.11.1992 and thereafter, the sale-deed was to be executed. The last installment of consideration was paid by the respondent on 25.07.1993 and thereby, he got possession of the suit property. However, in spite of multiple requests, the appellant failed to clear all the dues of the bank and failed to release the suit property from mortgage. The appellant cleared the dues in the month of April, 1999 but failed to execute the sale-deed as agreed. The respondent filed a suit for injunction to prevent the disturbance of possession of the suit property and direction for specific performance of contract.

3. The appellant, apart from other grounds, has also come up with a stand that original agreement dated 15.08.1992, which is novated by another agreement dated 09.04.1993 is not binding on the appellant and therefore, the suit for specific performance of contract of earlier agreement dated 15.08.1992 is not maintainable. Rather, a counter claim was filed by the appellant for damages of Rs.1,62,000/- on account of unauthorized possession of the respondent over the suit property.

4. The trial Court heard the suit on merits and came to the conclusion that the terms and conditions mentioned in the previous agreement and new agreement are the same except for the consideration and the fact that the new agreement was prepared in order to save stamp duty and income tax under the Income Tax Act. By judgment impugned the trial Court decreed the suit of the respondent by rejecting the defence of the appellant regarding novation of contract by the impugned judgment. The counter claim of the appellant for damages also came to be dismissed. The appellant made an unsuccessful attempt before the learned District Judge, Nagpur by filing an appeal under Section 96 of the Code of Civil Procedure. Feeling aggrieved with the grant of specific performance of contract and dismissal of counter claim by the trial Court which was confirmed by the first appellate Court, these two second appeals came to be filed.

5. The following substantial questions of law were framed by order dated 08.01.2024 and with the consent of the parties, both the appeals were taken up for final hearing at the admission stage:

> *"1. Whether, considering the description of property mentioned in the Agreements dated 15/8/1992 (Exhibit-82) and 9/4/1993 (Exhibit-109), the finding of both the courts below that the property in both the Agreements is one and the same, is perverse finding?*
> *2. If the first question is answered in affirmative, whether the suit would lie on the basis of the first agreement to sell i.e. Agreement to Sell dated 15/8/1992?"*

6. Mr. Anand Jaiswal, learned Senior Counsel appearing on behalf of the appellant submitted that, after the agreement dated 15.08.1992 there was another agreement dated 09.04.1993 which is not disclosed in the plaint and the suit has been filed for specific performance of contract on the basis of the earlier agreement dated 15.08.1992. The subsequent agreement dated 09.04.1993 contains a different description of the property and different consideration which has also been admitted by the respondent in his written statement to the counter claim filed by the appellant. According to the learned Senior Counsel, execution and contents of the subsequent agreement goes to show that it is a new agreement in law in view of the mandate of Section 62 of the Indian Contract Act, 1872 and the earlier agreement dated 15.08.1992 stands novated by fresh agreement dated 09.04.1993. Consequently, the earlier agreement stands extinguished in law. Therefore, the suit filed on the basis of earlier agreement dated

15.08.1992, incapable of being enforced, ought to have been dismissed. To buttress his submission, he seeks to rely upon the case of ***Andheri Bridge View Co-op. Hsg. Society Ltd. Vs. Krishnakant Andrao Deo and others*** [1].

7. Learned Senior Counsel would submit that as per Section 230A of the Income Tax Act, 1961 a deed of transfer of immovable property having consideration amount of more than Two Lakh Rupees shall not be registered unless a certificate is granted by the Assessing Officer of the Income Tax Department. The income tax clearance certificate was never made in respect of the property mentioned in the earlier agreement dated 15.08.1992 and therefore, the direction given by the trial Court to execute the earlier agreement in decree is against the Income Tax law. On this ground as well, the suit ought to have been dismissed by the trial Court.

8. Lastly, learned Senior Counsel Mr. Jaiswal submitted that, even if the case of the respondent that the other agreement was only for the purpose of tax clearance certificate is accepted, a conjoint reading of Sections 91 and 92 of the Indian Evidence Act would demonstrate that when a document is reduced into writing no evidence of any oral agreement, understanding or statement

1 **AIR 1991 Bombay 129**

between the parties shall be admitted for the purpose of contradicting, varying, adding or even subtracting from its terms. In wake of the bar under Section 92 of Indian Evidence Act, oral evidence contradicting the contents of agreement dated 09.04.1993 cannot be given. According to him, the trial Court as well as the first appellate Court failed to consider these aspects, therefore, the decree passed by the trial Court and confirmed by the first appellate Court is required to be set aside and suit of the appellant needs to be dismissed by allowing the counter claim of the appellant.

9. Conversely, Mr. Aurangabadkar, learned counsel appearing on behalf of the respondent vehemently submitted that, the parties were aware of the fact that it is only the first agreement which is to be executed. According to him, it was the appellant who was responsible for getting the income tax clearance certificate and in furtherance of that, he approached the respondent and made the agreement dated 09.04.1993 having the same description of the property except for reduction in the consideration amount which was done with a clear understanding that this agreement is not to be acted upon but is prepared only for getting clearance from the income tax department. According to him, the material on record, rather the admission of the appellant itself goes to show that the consideration amount which was mentioned in the earlier agreement has been received by the appellant which clearly demonstrates that the agreement which was to be acted upon is the earlier one. The trial Court as well as the first appellate Court has very well appreciated this aspect of the matter and held that both the agreements are similar and accordingly, decreed the suit of the respondent with a direction to the appellant to execute the sale-deed. Therefore, no interference is required in the judgment of the trial Court which has been confirmed by the first appellate Court. According to him, there are two concurrent findings of the Courts below and hence, he prayed for dismissal of the appeals.

10. Having heard the learned counsel for the respective parties and having gone through the judgment impugned and material available on record it transpires that, by the agreement dated 15.08.1992 the appellant agreed to sell the immovable property for Rs.4,41,000/-, the description of property is reproduced here:

> *"½ undivided share of plot and well constructed therein consisting of :*
>
> *THE STRUCTURE on First Floor and Second Floor built up area 1159 sq.feet of the structure/house standing on the*

said plot No.8-A.

SITUATED IN MOUZA : popularly known as Civil Lines, Nagpur, within the limits of Corporation of City of Nagpur AND the Nagpur Improvement Trust, Nagpur and the property is bounded on:

the North : House of Shri Haribhau Nistane on Plot No.7-A

the South : Nine feet lane and house of Shri U.G. Sant on plot No.9

the East : House of Shri S.N. Jadhav on Plot No.8-B

the West: 25 ft. wide Corporation Road.

P.H. No.7, City Survey No.18, Chelta No.58, Sheet No.86/6"

11. It is also a matter of record that on 09.04.1993 another agreement came to be executed wherein the same property carrying a different description particularly in areas has been agreed to be sold to the respondent by the appellant for a consideration of Rs.2,25,000/-. The description of the property is reproduced here:

"½ undivided share of plot containing by admeasurement 139.36 sq.mtr. consisting of :

THE LOAD BEARING STRUCTURE on First Floor built up area 44.825 sq,mt. of the structure / house standing on the said plot No.8-A,

SITUATED IN MOUZA: popularly known as Civil Lines, Nagpur, within the limits of Corporation of City of Nagpur

AND

the Nagpur Improvement Trust, Nagpur and the property is bounded on:

the North : House of Shri Haribhau Nistane on Plot No.7-A

the South : Nine feet lane and house of Shri U.G. Sant on plot No.9

the East : House of Shri S.N. Jadhav on Plot No.8-B
the West: 25 ft. wide Corporation Road.
P.H. No.7, City Survey No.18, Chelta No.58, Sheet No.86/6"

12. Undoubtedly, in both the agreements, the property which is sold is half undivided share in the land of plot no.8-A, Ward No.66, Civil Lines, Nagpur. However, in the earlier agreement, alongwith the half undivided share, construction on the first and second floor with use of terrace has been agreed to be sold for a consideration of Rs.4,41,000/-. Whereas, the subsequent agreement dated 09.04.1993 mentions that half undivided share of the above said portion in the plot of land with construction of the first floor alongwith exclusive use of terrace for consideration of Rs.2,25,000/-. Thus, in both the agreements the plot land is one and the same but in the subsequent agreement, the construction of only the first floor is mentioned, whereas the earlier agreement speaks about the construction of the first as well as second floor.

13. Now, the moot question before me is whether the earlier agreement is substituted by the subsequent agreement and the suit on the basis of the first agreement dated 15.08.1992 would lie?

14. There are concurrent findings of the Courts below that the respondent, pursuant to the agreement dated 15.08.1992 after paying full consideration, got possession of the property mentioned in the agreement dated 15.08.1992 which is fortified by the appellant himself by filing a counter claim for getting possession of the suit property which is subject matter of the agreement dated 15.08.1992. As per the earlier agreement, the possession was to be given after receipt of full consideration. This also substantiates the concurrent findings of the fact that the appellant got the entire consideration of Rs.4,41,000/- mentioned in the earlier agreement dated 15.08.1992. Rather, during cross-examination, a suggestion is given by the appellant that the subsequent agreement dated 09.04.1993 was executed only for the purpose of producing it before the Income Tax Authority for grant of clearance certificate of sale-deed under Section 230(A) of the Income Tax Act. That apart, From No.34A the application for tax clearance filed by the appellant as well as the draft sale-deed which has been annexed with Form No.34A whisper not only about the first floor but also about the second floor as mentioned in the earlier agreement dated 15.08.1992.

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15. Thus, it is apparent on the face of record that the subsequent agreement which has been placed before the authority in respect of the same plot of land was having different consideration and omission of the words "second floor" (perhaps due to typographical error) was just to get the clearance certificate from the Income Tax Authority and was never to be acted upon for the reason that the entire consideration of the earlier agreement that is of Rs.4,41,000/- has been received by the appellant and possession of the suit property mentioned in the agreement dated 15.08.1992 was already with the respondent.

16. This takes me to the next submission of the learned Senior Counsel for the appellant that, in wake of Section 92 of the Indian Evidence Act, oral evidence in contradiction with written agreement cannot be given and in such a case, if the subsequent written agreement is there, then it will override the earlier agreement and therefore, the earlier agreement cannot be specifically enforced.

17. Firstly, though in the subsequent agreement, the word "second floor" is missing in description of the property but in view of subsequent document Form No.34A and the draft sale-deed, the theory of novation will not apply to the case in hand. Therefore, there is no question of applying Section 92 of the Indian Evidence Act. Even otherwise, as per the proviso to Section 92, oral evidence is admissible to show that the document is sham and was not to be acted upon or in cases whenever the true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible.(See *Smt. Gangabai w/o Rambilas Gilda Vs. Chhabubai w/o Pukharajji Gandhi* [1], *Rook Kumar Vs. Mohan Thedani* [2], *Vimal Chand Ghevarchand Jain & Ors. Vs. Ramkant Eknath Jadoo* [3] *and R. Janakiram V. State* [4]*).*

18. Thus, the Court can consider oral evidence if it is adduced to contradict the terms of the written contract. There is ample evidence on record which goes to show that the subsequent agreement dated 09.04.1993 came to be executed only for the purpose of obtaining clearance certificate from the income tax authority and was not to be acted upon particularly, when there is an earlier written agreement dated 15.08.1992. Even otherwise, if the oral evidence is ignored, the draft sale-deed which was prepared after the subsequent agreement being a written document, can be looked into. The draft sale-deed also speaks about the sale of the first and second floors as mentioned in the

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1 **(1982) 1 SCC 4**
2 **(2003) 6 SCC 595**
3 **(2009) 5 SCC 713**
4 **(2006) 1 SCC 697**

agreement dated 15.08.1992. This demolishes the entire defence of the appellant that the agreement dated 15.08.1992 is novated by the agreement dated 09.04.1993.

19. Lastly, the purpose of Section 230A of the Income Tax Act was to certify that the vendor is not in arrears of any payable income tax. The said section has been deleted from the Statute with effect from 01.06.2001 and direction to execute the sale-deed is given by the trial Court vide judgment dated 25.04.2007 when Section 230A was not in force and therefore, I do not agree with the argument of the learned Senior Counsel for the appellant that the decree is passed against the provisions of Income Tax Act. Even otherwise, the draft sale-deed on which the tax clearance certificate was given which is annexed alongwith Form 34A mentions about the first and second floor. Therefore, it cannot be said that the tax clearance was given solely on the basis of subsequent agreement dated 09.04.1993.

20. From the material available on record as discussed above and in view of the fact that the parties complied with all the conditions mentioned in the earlier agreement dated 15.08.1992, it is more than clear that the agreement dated 09.04.1993 was not to be acted upon. Though, the finding of the Courts below that the description of the property mentioned in the agreements dated 15.08.1992 and 09.04.1993 are one and the same is not literally correct but the fact remains that, the subsequent agreement was prepared with the sole intention to obtain income tax clearance certificate so that the earlier agreement dated 15.08.1992 can be performed in its terms. Therefore, the ultimate result of decreeing of the suit by the trial Court and dismissing the counter claim of the appellant, confirmed by the appellate Court cannot be faulted with and therefore, there is no merit in the appeals. Consequently, the appeals fail and they are dismissed.

JUDGE

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