

(2008) 07 BOM CK 0097
In the Bombay High Court
Case No : Second Appeal No. 361 of 1993

Mohammed Inamul Haq	Vs	APPELLANT
Mohammad Idris Qureshi and Others		RESPONDENT

Date of Decision : 04-07-2008

Acts Referred:

Citation : (2008) 5 ALLMR 587 : (2008) 6 BomCR 449 : (2008) 110 BOMLR 2406 : (2008) 6 MhLj 38

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : C.S. Kaptan, for the Appellant; None, for the Respondent

Judgement

A.P. Bhangale, J.—By this appeal the appellant has challenged judgment and order dated 15th July, 1993 passed by Additional District Judge, Akola in Regular Civil Appeal No. 34/1990, whereby the appeal was allowed, setting aside judgment and decree passed in Regular Civil Suit No. 67/1986, decided on 20th October, 1989, in the result the suit by the plaintiff for specific performance of the contract was dismissed refunding earnest money to the plaintiff from original defendant No. 1. This appeal was admitted on following substantial question of law formulated as question No. 9 in the memo of appeal.

Could a purchaser seek specific performance of agreement in respect of proportionate share in the property, if the agreement is admitted ?

2. This second appeal was, thus, admitted for hearing by order dated 15.11.1995.

3. Original plaintiffs Mohd. Inabul Haq (appellant herein) had filed Regular Civil Suit No. 67/1986 for specific performance of agreement to sell as Sthawarachi Isar Chitthi. dated 18.05.1982. Mohd. Idris Quereshi (first defendant) had agreed to sell to the plaintiff a suit block situated in Khatibpura, Ward No. 24, Plot No. 325 as described in para 1 of the plaint. In consideration of the earnest money in the sum of Rs. 2,000/-it appears further that on 01.06.1982 a sum of Rs. 500/- was taken by the first defendant Mohd. Idris Quereshi and in consideration of the

promise that he will obtain power of attorney from other co-sharers of the suit property and will execute sale deed in respect of the suit land. Endorsement was made accordingly on 09.05.1983 in the "Isarchitthi".

4. It is also contended that there was oral partition in the year 1938 amongst the co-sharers of the family of Mohd. Ismail who had four sons viz. Abdul Salam Abdul Jalim, Abdul Kulas and Abdul Rauf. The plaintiff/ appellant herein is son of Abdul Kudas and defendants / respondents are legal representatives of Abdul Rauf. Defendants had filed Regular Civil Suit No. 188/1975 against the plaintiff and his father for recovery of the suit block and the suit was decreed on 16.10.1981. Thereafter the plaintiff agreed to purchase the suit block under the Isarchitthi dated 18.05.1982. After payment of earnest money in the sum of Rs. 2,000/-, Rs. 500/- was paid on 01.06.1982 and on 09.05.1983 a sum of Rs. 500/- was again paid, thus total sum of Rs. 3,000/- out of total consideration agreed in the sum of Rs. 4,000/- was paid. However, the defendant specifically refused to execute the sale deed. Therefore, Regular Civil Suit No. 67/1986 was filed in the Court of Civil Judge Jr.Dn., Akot who by judgment and order dated 26th October, 1989 decreed the suit of the plaintiff for specific performance of contract on the basis of agreement dated 18th May, 1982, directed defendants No. 1 to 8 to execute registered sale deed in respect of the suit block on depositing balance consideration of Rs. 1,000/- in the Court within two months from the date of decree. The said judgment and order was challenged by defendants No. 1 to 8 before the Court of Additional District Judge, Akola, who by impugned judgment and order allowed the appeal with costs, setting aside judgment and order in Regular Civil Suit No. 67/1986, directing that the suit for specific performance of contract is dismissed and the plaintiff is entitled to get total amount of Rs. 3,000/- by way of earnest money from defendant No. 1.

5. According to the learned Advocate for the appellants, herein, by conduct defendant No. 1 had represented to the plaintiff that he is authorised to execute sale deed pursuant to the agreement to sell of the suit block to the plaintiff. Further, according to the learned Advocate for the appellants, the appellant had reason to believe that there was authorisation in favour of first defendant by other defendants No. 2 to 8. Therefore, the first appellate Court ought to have granted decree of specific performance. The learned Advocate for the appellant made reference to *Aminaddin Munshi Vs. Tajaddin and Others*, to urge that, where members of a Mohomedan family live in commensality possessing the family property in common and in jointness, the acquisition by one of the members occupying the position of a managing member, during the jointness of the family will be presumed to be for the benefit of the members of the family not because of any presumption regarding acquisition akin to the joint Hindu family, but because such person is in judiciary relationship with other members and has an obligation to discharge towards other members, and if any property, as acquired, stand in the name of such person, the burden of proving that it was his self-acquired and not the property of the joint family will be on him.

6. I have perused the ruling referred to by learned Advocate for the appellants. It must be stated that concept of joint family is unknown to Mohomedan Law.

7. It appears that the trial Court held that first defendant had executed agreement for sale of the suit property for himself and on behalf of defendants No. 2 to 8 and further held that authorisation given by first defendant for himself and on behalf of defendants No. 2 to 8 were binding on them. The first appellate Court did not agree with the findings of the trial Court and held that the plaintiff did not prove that defendant No. 1 had executed legal and valid agreement of sale in respect of the suit premises in favour of the plaintiff and is not entitled for specific performance of the contract. It is pertinent to note that the first appellate Court considered the factual background of earlier litigation between the parties and observed thus:

No such power of attorney of the present Appellants (Defendants 2 to 8) had come on record in favour of Respondent No. 2 (original Defendant No. 1) and in view of this fact, it is clear that conclusions and observations of the learned trial judge, that there is legal and valid agreement of sale of the Defendants in favour of of the Plaintiff, are not at all proper and legal. On Exh.43 there is signatures of Defendant No. 1 at two places. If at all he had executed the said agreement for himself and on behalf of others, he should have mentioned it specifically to that effect that he had put his signatures for himself and on behalf of his brothers and sisters. But no such specific mention is there.

8. I have perused judgments and orders passed by both the Courts below. At the most, it may be stated that the agreement to sale was binding upon the first defendant Mohammed Idris Quereshi to the extent of his share he is joint owner and can alienate the property. From the document titled as Sthawarachi Isarchitthi. dated 18.05.1982 along with endorsement dated 01.06.1982 and 09.05.1983 considered together do not indicate that other co-sharers had consented for the intended sale in respect of the suit property. Hence, the agreement to sell in favour of the plaintiff in so far as defendants No. 2 to 7 are concerned, therefore, not binding on them. But in so far as first defendant is concerned, the transaction is binding on him. The plaintiff may ask for equitable adjustment in general partition between the co-sharers. I am fortified in my conclusion by ruling in U.G. Srinivasa Rao V. Vinaykumar S. Rao, reported in AIR 2004 Karn 450.

9. Hence, the purchaser can seek specific performance of the agreement in respect of the proportionate share in the property if the agreement is admitted. In the present case, admittedly the agreement was executed by Mohd. Idris Quereshi, first defendant. It would, therefore, be binding on him and not on other defendants. The substantial question of law is answered accordingly.

10. In the result, the appeal is partly allowed.

The plaintiff's suit for specific performance of contract succeeds as against the first defendant only. The suit shall stand dismissed as against defendants No. 2

to 8. The suit transaction of the agreement to sell shall be binding upon the first defendant only. The plaintiff may ask for equitable adjustment in the event of general partition of the suit property. In the alternative the plaintiff is entitled to get back refund of the total amount of Rs. 3,000/-paid by way of earnest money from original first defendant. Decree shall stand modified accordingly.