

(2018) 11 CHH CK 0039
In the Chhattisgarh High Court
Case No : First Appeal No. 20 of 2005

Stephonos Mar Theodosius

APPELLANT

Vs

Waman Rao, Shri Dhar Joshi and Ors

RESPONDENT

Date of Decision : 28-11-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 96
Transfer of Property Act, 1882 — Section 54

Citation : (2018) 11 CHH CK 0039

Hon'ble Judges : Ram Prasanna Sharma, J

Bench : Single Bench

Advocate : B.P. Shama, Sudeep Agrawal, N.K. Vyas

Final Decision : Partly Allowed

Judgement

1. This first appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 30-11-2004 passed by 7th Additional District Judge, Durg (FTC) in Civil Suit No.27/A of 2002 wherein the said court dismissed the suit filed by the appellant/plaintiff for specific performance of contract for land bearing Survey No.536/23 area 6.63 acres situated at village Kurud, Patwari Halka No.79, Tahsil and District Durg, Chhattisgarh.

2. Original appellant/plaintiff filed a suit against the original defendant/respondent No.1 Waman Rao Joshi (now deceased) for specific performance of contract for the land mentioned as above belonging to him in pursuance of the agreement to sale dated 7-8-1978 entered into between said Wamanrao Joshi (original appellant/original plaintiff) and plaintiff/appellant Stephonos Mar Theodosius.

3. As per suit filed by the original plaintiff/appellant Wamanrao Joshi entered into contract with him to sell his land bearing survey number as mentioned above @ Rs.7500/- per acre. An amount of Rs.100/- was paid to him by the original plaintiff on 7-8-1978. As per agreement sale deed was to be executed and

registered by the Waman Rao Joshi before 30-11-1978 on receipt of balance amount from the original appellant. Written agreement to this effect was executed by both of them on 7-8-1978 and in pursuance of said agreement in writing original plaintiff/appellant was also placed in possession of the land on 7-8-1978 and since then he was in possession of the land in suit and is doing cultivation. It is further alleged that the land adjoining to the suit land belonged to the brothers and mother of said Waman Rao Joshi namely Mukundrao, Manohar Rao, Gajanand Rao and Smt. Parvati Devi which was earlier purchased by the original appellant/plaintiff under different sale deed in the year 1973 and 1977. The original appellant made improvement in the suit land by spending considerable amount and he was always ready and willing to perform his part of contract as agreed. The original appellant by letter dated 10-11-1978, 18-11-1978 and 22-11-1978 requested the said Vaman Rao Joshi to execute the sale deed but he did not turn up and on 23-3-1979 he served a notice to appellant for termination of agreement that is why original appellant filed suit before the trial Court and deposited Rs.49,775/-, the amount of balance consideration in the court on 22-11-1979 in civil court deposit. The original respondent contested the suit on various grounds and after death of original respondent his legal representatives namely Satish Kumar, Sunil Kumar, Sanjay Kumar and Sudhir Kumar who are sons of Waman Rao Joshi contested the suit on the ground that property in question was not in sole ownership of the said Waman Rao Joshi and all the four sons of Vaman Rao Johi were co-parceners of the property because property is ancestral property, therefore, sale deed cannot be executed in favour of the appellant. It was further pleaded by them that Urban Land Ceiling and Regulation Act 1976 (for short, "the Act, 1976") was on operation on the date of said agreement, therefore, the land could not be sold out without prior permission of competent authority and no independent person was entitled to keep more than 2000 sq. meter land in an urban agglomeration, therefore, agreement is not binding on them. It is further pleaded by them that the land in question was later on sold to other defendants, therefore, decree of specific performance cannot be passed. After recording evidence and hearing the parties, the trial Court dismissed the suit on the following grounds:

I) The land is situated in an urban agglomeration, therefore, agreement between the parties is barred by Section 27(2) of the Act, 1976.

ii) As the original appellant/original plaintiff was in possession of more than 2000 sq. meter of land in an urban area, the original appellant/original plaintiff was not the sole owner of the property in question, but his sons namely Satish Kumar, Sunil Kumar, Sanjay Kumar and Sudhir Kumar were co-parceners of the land and the same cannot be sold without their consent.

Iii) As Sunil Kumar, Sanjay Kumar and Sudhir Kumar were minors at the time of agreement to sell the property cannot be sold without permission of the District Judge.

iv) Though the original appellant/plaintiff was always ready and willing to

perform his part of contract, decree cannot be passed in his favour.

4. Learned counsel for the appellant would submit as under:

i) It is admitted that the land in question was allotted to share of original respondent Waman Rao Joshi as per registered partition deed (Ex.P/13) and he was Karta of the family, therefore, alienation by him of the said property even without legal necessity is not void as per law laid down in the matter of Raghubanchmani Prasad Narain Singh vs. Ambika Prasad Singh (dead) by his Legal Representatives and others, reported in AIR 1971 SC 776, therefore, he was well within his right to enter into agreement.

ii) As the possession of the land was given to the original appellant on the date of agreement and the original appellant was in possession of the land, therefore, execution of the sale deed in favour of other respondents is ineffective because sale completed only after delivery of possession of immovable property as per Section 54 of the Transfer of Property Act, 1882 (for short, "the Act, 1882"), therefore, any sale deed executed in favour of respondent is sham transaction which does not confer any right on them regarding suit property.

iii) The land in question is agricultural land for which Act, 1976 is inapplicable. Village Kurud in which property is situated, is not within the ambit of the said Act and not area of agglomeration.

iv) When the property in question can be sold by Manager of Joint Hindu Family even without legal necessity, there is no requirement for seeking permission of the District Judge for selling property in question.

5. On the other hand, learned counsel for the respondents would submit that the finding regarding applicability of the Act, 1976 by the trial court is just and proper and other findings are also based on factual and legal aspects of the matter and the same is not liable to be interfered while invoking the jurisdiction of the appeal. He placed reliance on the decisions of Hon'ble Supreme Court in the matters of M/s. Citadel Fine Pharmaceuticals vs. M/s. Ramaniyam Real Estates Pvt. Ltd. & another, reported in 2011 STPL 25385 SC, Mugaji Laxman Padule (deceased by LRs) vs. Trimbak Wasudeo Kulkarni and others, reported in 1989 STPL 508 SC and Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Registered) vs. Ramesh Chander and others, reported in (2010) 14 SCC 596.

6. I have heard learned counsel for the parties and perused record of the court below in which impugned judgment/decreed is passed.

7. The first question for consideration of this Court is whether the Act, 1976 is applicable in the present case. Documents Ex.D/9 and D/10 are filed on behalf of the defendant/respondent side which is revenue record of the land in question. Originally the land belongs to Shridhar Joshi who was father of Mukundrao, Waman Rao, Manohar Rao, Gajanand Rao and husband of Smt. Parvati Devi. After passing of said Shridhar Joshi, the property was partitioned between his

successor and the property in question came into share of said Waman Rao Joshi. From this record, it is clearly established the land in question is agricultural land for which the Act, 1976 has no applicability. Again, the land is situated at village Kurud and no official witness was examined before the trial Court to say that the village Kurud is in agglomeration area for that Act. Development Plan of Bhilai (Ex.D/19) is not related to Ceiling Act, therefore, same is of no help to the respondent.

8. From the record, it is clear that no proceeding was initiated by the competent authority of the Ceiling Act which shows that the land in question was not in the ambit of the Ceiling Act. Bishop Stephonos Mar Theodosius was examined as PW/1 and K. A. Abraham was examined as PW/2. From the respondent/defendant side, son of Waman Rao Joshi namely Satish Kumar was examined as DW/1. All the witnesses examined by the parties were common witnesses and they are not official witnesses, therefore, on the basis of their statement, it cannot be concluded that the Act, 1976 is applicable in the said property, therefore, finding arrived at by the trial Court is not sustainable and same is reversed.

9. It is decided that the land in question is not within the ambit of the Act, 1976. From the written agreement to sell (Ex.P/1), it is established that the property in question was handed over to the original appellant and he was in possession of the suit property from the date of agreement i.e., 7-8-1978. From Ex.P/11 which is reply of original respondent to the notice served to him, it is clear that he handed over possession to the original appellant. From notice Ex.P/8 and P/11 served by the original appellant before 30-11-1978 which was bench mark for execution of sale deed, it is clear that original appellant was always ready and willing to perform his part of contract, so much so he deposited the entire amount of consideration in civil court deposit before the trial Court after filing the suit which shows his willingness and readiness to perform his part of contract and the trial Court also concluded that the original appellant was always willing and ready to perform his part of contract. Finding of the trial Court is not challenged before this court and therefore, the said finding attained finality.

10. When property in question was handed over to the original appellant, the same is not delivered to any of the respondent in whose favour sale deed was executed by the said Waman Rao Joshi or his adult son namely Satish Kumar Joshi. Section 54 of the Act, 1882 clearly shows that sale is completed when seller places the buyer or such other person as he directs in possession of the property. In the present case, since possession was already delivered to the original appellant, the same could not be handed over to any of the respondent, therefore, sale deed executed in their favour is sham transaction.

11. Now the point for consideration of this Court is whether sale deed can be executed in favour of the appellant as per agreement to sell for the land measuring 6.63 acres. In the present case, property is not alienated by the original respondent Waman Rao Joshi but he entered into agreement to sell only

to which his four sons namely Satish Kumar Joshi whose date of birth is 11-3-1958 as per Ex.D/18, Sunil Kumar Joshi whose date of birth was 28-1-1962 as per Ex.D/17, Sanjay Kumar Joshi whose date of birth is 11-5-1971 as per Ex.D/16 and Sudhir Kumar Joshi whose date of birth is 11-9-1973 as per statement of Satish Kumar Joshi (DW/1) were born before agreement and co-parcener and they were having right in the property right from their birth. All the four sons of Waman Rao Joshi have objected agreement to sale, therefore, Waman Rao Joshi could have entered into agreement for only 1/5th of the property in question. i.e., 1 acre and 32 point 6 decimal because the land in question is not alienated by the Manager Waman Rao Joshi and it is yet to be alienated, therefore, the law laid down in the matter of the Raghubanchmani (supra) is not applicable to the present case.

12. After re-assessing the entire evidence, this court is of the view that a decree for specific performance of land bearing survey No.536.23 area measuring 1 acre 32 point 6 decimal be granted in favour of the appellant and rest of the land is within the right of all four sons of Waman Rao Johi.

13. Accordingly, the appeal is partly allowed. Decree in favour of the appellant and against the respondents No. 1(a) Satish Kumr Joshi, 1(b) Sunil Kumar Joshi, 1(c) Sanjay Kumar Joshi and 1(d) Sudhir Kumar Joshi is passed as under.

I) All the above named four respondents shall execute a sale deed in favour of the appellant on or before 5-2-2019 for land bearing Survey No. 536.23 area measuring 1 acre 32 point 6 decimal situated at village Kurud, Patwari Halka No. 69, Tahsil and District Durg, failing which the trial Court shall execute the sale deed for the same in favour of the appellant. Said four respondents will get Rs.10,000/- as consideration deposited in court at the rate of Rs.7500/- per acre. Rest of the amount deposited in court shall be returned to the appellant/legal representatives. Rest of the land i.e., 5 acres and 30 point 4 decimal can be alienated by respondents No. 1(a) Satish Kumar Joshi, 1(b) Sunil Kumar Joshi, 1(c) Sanjay Kumar Joshi and 1(d) Sudhir Kumar Joshi and other legal representatives of Waman Rao Joshi.

II) The appellant/legal representative will remain in possession of 1 acre 32 point 6 decimal of land after registration and will hand over possession of rest of 5 acres 30 point 4 decimal of land to the above four respondents and other representatives of Waman Rao.

iii) Map of 1 acre 32 point 6 decimal of land shall be produced by the appellant before the Registrar/Trial Court which shall be part and parcel of the sale deed.

iv) Parties to bear their own costs.

v) Pleaders' fee, if certified be calculated as per schedule or as per certificate whichever is less.

vi) A decree be drawn up accordingly.