

SUPREME COURT OF INDIA

Kamlesh Ambalal Contractor

Vs.

Jakshibhai Sajanbhai Bharvad

C.A.No.7008 of 2012

(K.S.Radhakrishnan and Dipak Misra,JJ.)

26.09.2012

JUDGMENT

K.S.Radhakrishnan,J.

1. The application for impalement is allowed.

2. Leave granted.

3. We heard Shri Dushyant A. Dave, learned senior counsel appearing for the appellants and Shri C.A.Sundram, learned senior counsel appearing for the contesting respondents at length. For the disposal of these appeals, we feel it unnecessary to examine the various contentions urged by learned senior counsel on either side. Reference to few facts would suffice since we are inclined to set aside the judgments of all the courts below and direct learned Principal Senior Civil Judge, Ahmedabad (Rural) to take up Regular Civil Suit No. 516 of 2008 filed by the appellants herein for fresh consideration in accordance with law.

4. The appellants herein were the plaintiffs in RCS No. 516 of 2008 filed before the learned Principal Senior Civil Judge, Ahmedabad (Rural). The suit was instituted claiming following reliefs:

“A. To declare that there is no right, title or interest of the defendants on the suit property as mentioned in paragraph No.1 of the suit. B.To declare that defendants, their agents, servants or representatives, assignee, executor, power of attorney holder, legal heirs or any other persons cannot transfer, sell, alienate and assign the suit property as mentioned in paragraph No.1 of the suit to any other person, institution or third party and further to declare that no charge or lien would create by the defendants side of any type on the suit property and further to declare that defendants cannot execute any documents in relation to sell and further to grant the stay in favour of

plaintiff and against defendants. Any other and further relief as may be deemed fit and proper in the interest of suit property. To award the cost on the defendants.”

5. Respondents 1 to 9 were the defendants in that suit and they were stated to have been represented by the Power of Attorney holder (for short „PA holder’). In the body of the plaint, it was stated as follows:

“For and on behalf of as Power of Attorney Holder Shri Bharatbhai Girdharilal Pandya”

6. That suit was instituted on 19.07.2008 and for and on behalf of defendants 1 to 9 therein, PA holder Shri Bharatbhai Girdharilal Pandya accepted the summons, so no separate summons were taken out to defendants 1 to 9. The court appointed a Court Commissioner to survey the suit property. The Commissioner on 20.07.2008 visited the suit property and submitted his report. On 25.07.2008, a compromise was arrived at, not signed by defendants 1 to 9 but by the PA holder and, consequently a consent decree was passed. Defendants 1 to 9 later came to know of such a decree and alleging that it was a collusive decree obtained by the plaintiffs in connivance with the PA holder, filed RCA No. 34 of 2008 before the Court of Presiding Officer, Fast Track Court No.5 at Ahmedabad (Rural). The appeal was elaborately heard by the court and the following order was passed:

“Appeal of the appellant is allowed and order passed below Exh.5 is hereby confirmed. Consent decree dated 25.07.2008 passed by Additional Second (JD) Civil Judge Ahmedabad Rural in RCS NO. 516 of 2008 as per alleged consent terms purshis of parties at Exh.15 are hereby set aside and matter of RCS No. 516 of 2008 is remanded to the court below for being decided in accordance with law and on merits after giving sufficient opportunity to the parties i.e. appellants and respondents to prove their respective contentions in respect of the payment of the amount of consideration. Order passed below Exh.5 in appeal shall have to be implemented till final disposal of the suit before trial court. One copy of this order is sent along with this for the purpose of record. Pronounced in open court today, this 24th April, 2009 in open court.”

7. Aggrieved by the judgment of the lower appellate court, plaintiffs preferred an appeal before the High Court of Gujarat at Ahmedabad and the same was dismissed vide its judgment dated 07.12.2009. Against the said judgment of the High Court, this appeal has been preferred. Respondents herein, who were defendants 1 to 9 before the trial court, produced a document stated to have been executed by them cancelling the power of attorney

on 31.12.2007. In fact, the lower appellate court referred to that cancellation deed dated 31.12.2007 in the judgment, but the same was not produced before that court.

8. Shri C.A. Sundaram, learned senior counsel appearing for the contesting respondents, submitted that they could not produce the cancellation deed because no summons were served on them by the trial court. We are informed that after cancellation of the power of attorney, defendants 1 to 9 had executed a sale deed on 16.07.2008 in favour of one Rajendra Natvarlal Patel.

9. Shri Dushyant A. Dave, learned senior counsel appearing for the appellants, however, submitted that the respondents were effectively represented by the PA holder before the trial court and the parties have rightly agreed for a consent decree and the lower appellate court and the High Court were not justified in setting aside the consent decree passed by the trial court.

10. We are, in the facts and circumstances of the case, inclined to affirm the course adopted by the lower appellate court since, on facts, we are convinced that no effective opportunity was given to defendants 1 to 9 for properly prosecuting their case. The General Power of Attorney executed on 11.10.2005 and its alleged cancellation on 31.12.2007 and the various steps taken by the PA holder before and after its cancellation and their legality are all matters to be examined by the trial court so also the impact of Earnest Agreement dated 11.10.2005 and Possession Agreement dated 11.10.2005 etc. Various other contentions are also raised by the learned senior counsel on either side. Since we are remitting the matter to the trial court for fresh consideration, we are not dealing with those contentions, nor are we expressing any opinion with regard to the impact of the various agreements, sale deeds etc. executed between the parties. In short, we are leaving all the questions open to the trial court to decide in accordance with law. Consequently, consent decree passed by the trial court on 25.07.2008, the judgment of the lower appellate court dated 24.04.2009 and the judgment of the High Court dated 07.12.2009 are set aside and the matter is remitted to the trial court for fresh consideration in accordance with the law. The appeal is, therefore, disposed of, with no order as to costs.