

A VIMALESHWAR NAGAPPA SHET
v.
NOOR AHMED SHERIFF & ORS.
(Civil Appeal Nos. 4279-80 of 2011)

B MAY 11, 2011

[P. SATHASIVAM AND H.L. GOKHALE, JJ.]

Code of Civil Procedure, 1908 – s. 96(3) – Pursuant to death of the original owner of the property in question, his sons, daughters as also minor grandson succeeding to their respective share in the property – Co-sharers-sons and daughters entering into an agreement to sell the entire property with appellant-buyer – Non-execution of sale deed by co-sharers despite having received certain amount – Suit for specific performance – Decreed by trial court – Appeal before High Court – High Court fixing the market value of the property – Defendant No. 3-minor grandson, who was not party to the agreement, proposing to purchase the share of the co-sharers by paying the value to the appellant – Counsel for the appellant on instructions from the appellant agreeing to the said proposal – High Court directing co-sharers to execute the sale deed to the extent of their share in the suit property – On appeal, held: Order of the High Court shows that it is a consent order – No appeal lies from a decree passed by the court with the consent of the parties – Defendant No. 3 has right to purchase, to exclude the outsider who holds an equitable right of purchase of the shares of other defendants – He was not bound by the agreement executed by other defendants to the extent of his share – Since defendant No. 3 did not join the other co-sharers, no agreement of sale could be entered with the appellant for the entire property including the minor's share – Thus, the agreement of sale covering the entire property was void and ineffective – Also, before the High Court, both parties

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including the appellant agreed for a reasonable market valuation – Statement made by the counsel before the High Court, cannot be challenged before Supreme Court – Partition Act, 1893 – s. 4. A

Concession – Concession made by counsel, on a question of fact – Effect of – Held: Is binding on the client – However, concession on a question of law, is not binding. B

After the death of 'M', his surviving sons-Defendant Nos. 1, 2 and 4 succeeded to the extent of 2/11th share and his surviving daughters- Defendant Nos. 5 to 7 succeeded to 1/11th share in the property. Defendant No. 3, grandson of 'M' is a minor and he succeeded to 2/11th share. The division in the scheduled property was not practicable and as such Defendant No. 1, 2 and 4 to 5 desired to sell the property and distribute the sale proceeds between them. Defendant No. 1, 2 and 4 to 5 executed agreement of sale in favour of appellant and received an advance amount. Subsequently, wife of 'M' died. The defendants did not execute the sale deeds and as a result the appellant filed a suit for specific performance. The trial court decreed the suit and directed the defendant to execute the sale deed in terms of the agreement of sale. The defendant Nos. 2, 3 and 7 filed an appeal. The defendant No. 3 was not a party to the agreement and he proposed to purchase the 9/11th share by paying the value to the appellant. The High Court fixed the market value of the property. The counsel for the appellant on instructions from the appellant agreed to the said proposal on the condition that defendant No. 3 would pay the said amount within three months, in default, the appellant would be entitled to the relief of specific performance. The High Court directed defendant No. 1, 2, 4 to 7 to execute the sale deed of their share to the extent of 9/11 area in the suit property by making a convenient division of the property. Thereafter, an application was filed for deleting some C
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A words from the judgment and the same was dismissed.
Therefore, the appellant filed the instant appeals.

Dismissing the appeals, the Court

B HELD: 1.1. Since defendant No. 3 was not a party to
the agreement of sale, he is not bound by the agreement
executed by other defendants to the extent of his share.
From the evidence and the materials, it is clear that the
suit property is dwelling house. In view of s. 4 of the
Partition Act, 1893, defendant No. 3 has right to purchase
C to exclude the outsider who holds an equitable right of
purchase of the shares of other defendants. [Paras 5 and
6] [399-A-C; G-H]

D 1.2. The appellant was aware that defendant No. 3
who was a minor had a share in the property and the
application made by the other defendants before the civil
court for appointment of defendant No. 2 as guardian of
the said minor was not pursued and was dismissed,
consequently, his share remained unsold to the
E appellant. As a matter of fact, agreement of sale did not
refer to defendant No. 3 at all or his share in the property.
However, in the plaint, the appellant clearly admitted the
share of defendant No. 3 who was a minor and the fact
that no guardian was appointed for the minor and
Defendant No. 2 was not his natural guardian. Without
F defendant No. 3 joining the other co-sharers, no
agreement of sale could be entered with the appellant for
the entire property including the minor's share.
Consequently, the agreement of sale covering the entire
property was void and ineffective. [Paras 7 and 8] [399-
G H; 400-A-D]

H 1.3. Section 20 of the Specific Relief Act, 1963 confers
discretionary powers. The value of property escalates in
urban areas very fast and it would not be equitable to
grant specific performance after a lapse of long period of

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time. Apart from all the material aspects before the High Court, both parties including the appellant agreed for a reasonable market valuation. [Paras 9, 10] [400-E-G]

M. Meenakshi and Ors. vs. Metadin Agarwal (2006) 7 SCC 470; Nirmala Anand vs. Advent Corporation (P) Ltd. and Ors. (2002) 5 SCC 481; Parakunnan Veetill Joseph's Son Mathrew vs. Nedumbar Karuvila's Son and Ors. (1987) Supp. SCC 340 – relied on

1.4. A concession made by a counsel on a question of fact is binding on the client, but if it is on a question of law, it is not binding. The High Court has recorded in the impugned judgment that the counsel agreed with instructions from the plaintiff and reiterated this fact in its order passed in the application while rejecting the plea of the counsel for the appellant that he did not give consent that he had no instructions from his clients. The statement made by the counsel before the High Court, as recorded in the impugned judgment and order, cannot be challenged before this Court. [Paras 11 and 12] [401-C-F]

State of Maharashtra vs. Ramdas Shrinivas Nayak and Anr. (1982) 2 SCC 463; Shankar K. Mandal and Ors. vs. State of Bihar and Ors. (2003) 9 SCC 519; Roop Kumar vs. Mohan Thedani (2003) 6 SCC 595; Guruvayoor Devaswom Managing Committee and Anr. vs. C.K. Rajan and Ors. (2003) 7 SCC 546; Nedunuri Kameswaramma vs Sampati Subba Rao and Anr. (1963) 2 SCR 208, 225; B.S. Bajwa and Anr. vs. State of Punjab and Ors. (1998) 2 SCC 523 – relied on.

1.5. As per Section 96 (3) of the Civil Procedure Code, no appeal lies from a decree passed by the court with the consent of the parties. The reading of the impugned judgment and order of the High Court, more particularly, the concluding paragraph, clearly show that it is a

A consent order. Thus, under Article 136, generally this Court would not interfere with the order of the High Court which has done substantial justice. [Paras 13 and 14] [401-G-H; 402-A-B]

B 1.6. Since the impugned order of the High Court was stayed, while ordering of notice, defendant No. 3 is granted 3 months' time from today to pay Rs. 11,42,590/- and in the event of default, the directions of the High Court are to be applied and implemented. Defendant Nos. 1, 2, 4 to 7 are directed to return the sum of Rs.1,53,000/- which they have received towards sale consideration with interest at the rate of 9 per cent from the date of payment within a period of eight weeks from today to the plaintiff. [Para 15] [402-C]

D Case Law Reference:

	(2006) 7 SCC 470	Relied on.	Para 9
	(2002) 5 SCC 481	Relied on.	Para 9
E	(1987) Supp. SCC 340	Relied on.	Para 9
	(1982) 2 SCC 463	Relied on.	Para 11
	(2003) 9 SCC 519	Relied on.	Para 11
	(2003) 6 SCC 595	Relied on.	Para 11
F	(2003) 7 SCC 546	Relied on.	Para 11
	(1963) 2 SCR 208	Relied on.	Para 12
	(1998) 2 SCC 523	Relied on.	Para 12

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4279-4280 of 2011.

H From the Judgment & Order dated 3.3.2009 of the High Court of Karnataka at Bangalore in RFA No. 52 of 2000 & 28.8.2009 in MCVL No. 13474 of 2009.

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S.N. Bhat for the Appellant.

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P.P. Rao, Mahalakshmi Pavani, Utav Sidhu, Filza Moonis,
G. Balaji, Apeksha Sharan for the Respondents.

The Judgment of the Court was delivered by

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P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the final judgment and orders dated 03.03.2009 and 28.08.2009 of the Division Bench of the High Court of Karnataka at Bangalore in R.F.A. No. 52 of 2000 and Misc. Civil No. 13474 of 2009 in R.F.A. No. 52 of 2000 respectively whereby the High Court disposed of the appeal and dismissed the application.

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3. Brief facts:

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(a) The property in question originally belonged to one C.S. Abdul Momin Sheriff and he died leaving behind his wife Hajiba Tabsasum and Defendant Nos. 1, 2 and 4 (sons), Defendant Nos. 5 to 7 (daughters) and Defendant No. 3, who is the son of Late Ismail Sheriff, son of Abdul Momin Shariff. After his demise, each of the surviving sons succeeded to an extent of 2/11th share and each of the daughters succeeded to 1/11th share in the property. As the division in the scheduled property was impractical, Defendant Nos. 1, 2 and 4 to 7 desired to sell the schedule property and to distribute sale proceeds between them. On 02.05.1988, they agreed to sell the property to one Vimalleshwar Nagappa Shet-plaintiff (appellant herein) for a consideration of Rs.3,10,000/-, executed agreement of sale and received advance consideration of Rs.10,000/-. Subsequently, on 06.05.1988, the wife of C.S Abdul Momin Sheriff died.

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(b) Till 15.06.1989, the plaintiff paid a sum of Rs.1,53,000/-, in all, on various dates. As the defendants did not execute the sale deed, the plaintiff filed a suit for specific performance being O.S. No. 91 of 1991 in the Court of the Civil Judge at

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A Chikmangalur. By order dated 01.10.1999, the trial Court decreed the suit in favour of the plaintiff and directed the defendants to execute the sale deed in terms of agreement of sale dated 02.05.1988. Aggrieved by the said judgment and decree of the trial Court, Defendant Nos. 2, 3 and 7 filed appeal being R.F.A. No. 52 of 2000 before the High Court of Karnataka at Bangalore.

C (c) The High Court taking into account the submission of the counsel for the appellants and respondents, fixed the market value of property at Rs.300/- per sq. ft. The total area of property is 4,655 sq. ft. (48' x 90'), therefore, the total market value of property would be Rs.13,96,500/-. The High Court, by its judgment dated 03.03.2009, while holding that as Defendant No.3 was not a party to the agreement and he proposes to purchase the 9/11th share by paying value to the plaintiff and the value of 9/11th share would be Rs. 11,42,590/- and the counsel for the plaintiff on the instruction from the plaintiff agreed to the said proposal on the condition that Defendant No.3 would pay the said amount within three months, in default, the plaintiff would be entitled to the relief of specific performance disposed of the appeal directing defendant Nos. 1,2 and 4 to 7 to execute the sale deed of their share to the extent of 9/11 area in the suit property by making convenient division of the property.

F (d) Thereafter, an application being Misc. Civil No 13474 of 2009 in R.F.A. No. 52 of 2000 was filed for deleting some words from the judgment and the same was dismissed. Challenging the judgment of the High Court in appeal and the order made in the application, the appellant-plaintiff has filed these appeals by way of special leave petitions before this Court.

G 4. Heard Mr. S.N. Bhat, learned counsel for the appellant and Mr. P.P. Rao, learned senior counsel for the respondents.

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5. It is not in dispute that the property in question belonged to Abdul Momin Sheriff. After his death, each of the surviving sons succeeded to an extent of 2/11th share and each of the daughters succeeded to 1/11th share. It is also not in dispute that the agreement of sale was executed only by Defendant Nos. 1, 2 and 4 to 7. The total share of Defendant Nos. 1, 2 and 4 to 7 is 9/11 and the share of the Defendant No. 3 who did not join the execution of agreement of sale would be 2/11. Inasmuch as the Defendant No. 3 was not a party to the agreement, he is not bound by the agreement executed by other defendants to the extent of his share.

6. From the evidence and the materials, it is clear that the suit property is dwelling house. In that event, Section 4 of the Partition Act, 1893 is relevant which reads as under:-

“4. Partition suit by transferee of share in dwelling-house.—

(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.”

In view of the above provision, Defendant No. 3 has right to purchase to exclude the outsider who holds an equitable right of purchase of the shares of other defendants.

7. It is pertinent to point out that plaintiff was aware that

A Defendant No. 3 who was a minor had a share in the property and the application made by the other defendants before the Civil Court for appointment of Defendant No. 2 as guardian of the said minor was not pursued and in fact it was dismissed, consequently, his share remained unsold to the plaintiff.

B 8. As a matter of fact, agreement of sale dated 02.05.1988 does not refer to Defendant No. 3 at all or his share in the property. However, in the plaint, the plaintiff clearly admitted the share of Defendant No. 3 who was a minor and the fact that no guardian was appointed for the minor and Defendant No. 2 was not his natural guardian. Without Defendant No. 3 joining the other co-sharers, no agreement of sale could be entered with the plaintiff for the entire property including the minor's share. Consequently, the agreement of sale covering the entire property was void and ineffective.

D 9. It is settled law that Section 20 of the Specific Relief Act, 1963 confers discretionary powers. [vide: *M. Meenakshi & Ors. vs. Metadin Agarwal* (2006) 7 SCC 470, *Nirmala Anand vs. Advent Corporation (P) Ltd. & Ors.* (2002) 5 SCC 481, *Parakunnan Veetill Joseph's Son Mathrew vs. Nedumbara Karuvila's Son & Ors.* (1987) Supp. SCC 340]. It is also well settled that the value of property escalates in urban areas very fast and it would not be equitable to grant specific performance after a lapse of long period of time.

F 10. Apart from all these material aspects before the High Court, both parties including the plaintiff/present appellant agreed for a reasonable market valuation. This factual position is clear from paragraph 7 of the High Court judgment which reads as under:-

G "7. The counsel for appellants and respondents submitted that the market value of property is Rs. 300/- per sq. ft. The total area of property is 4,655 sq. ft. (48' x 90'). The total market value of property would be Rs. 13,96,500/-. The value of 9/11th share would be Rs. 11,42,590/-. Defendant No. 3 proposes to

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purchase the 9/11th share by paying value to the plaintiff. The counsel for the plaintiffs with the instructions from the plaintiff agreed to the said proposal on the condition that the Defendant No. 3 should pay the said amount within three months. In the event of default, the plaintiff would be entitled to the relief of specific performance. The Defendant Nos. 1, 2 and 4 to 7 shall execute sale deed of their share to the extent of 9/11 area in the suit property by making convenient division of the property. Accordingly, the appeal is disposed of.”

11. The statement made by the counsel before the High Court, as recorded in the impugned judgment and order, cannot be challenged before this Court. [vide: *State of Maharashtra vs. Ramdas Shrinivas Nayak & Anr.* (1982) 2 SCC 463, *Shankar K. Mandal & Ors. vs. State of Bihar & Ors.* (2003) 9 SCC 519, *Roop Kumar vs. Mohan Thedani* (2003) 6 SCC 595, *Guruvayoor Devaswom Managing Committee & Anr. vs. C.K. Rajan & Ors.* (2003) 7 SCC 546]

12. It is also clear that the High Court has recorded in the impugned judgment dated 03.03.2009 that the counsel agreed with instructions from the plaintiff and reiterated this fact in its order dated 28.08.2009 in Misc. Civil No. 13474 of 2009 in the above-mentioned RFA while rejecting the plea of the counsel for the appellant herein that he did not give consent that he had no instructions from his clients. A concession made by a counsel on a question of fact is binding on the client, but if it is on a question of law, it is not binding. [vide: *Nedunuri Kameswaramma vs Sampati Subba Rao & Anr.* (1963) 2 SCR 208, 225, *B.S. Bajwa & Anr. vs. State of Punjab & Ors.* (1998) 2 SCC 523, 525-526]

13. As stated earlier and the reading of the impugned judgment and order of the High Court, more particularly, para 7, which is concluding paragraph, clearly show that it is a consent order. As per Section 96 (3) of the Civil Procedure Code, no appeal lies from a decree passed by the court with the consent of the parties.

A 14. For all these reasons, more particularly, the statement of fact as noted in para 7 of the impugned judgment and order of the High Court, under Article 136, generally this Court will not interfere with the order of the High Court which has done substantial justice.

B 15. Since this Court has stayed the impugned order of the High Court while ordering of notice on 08.07.2010, Defendant No. 3 is granted 3 months' time from today to pay the amount as noted in para 7 of the impugned judgment and in the event of default, the directions of the High Court in the same para are to be applied and implemented. Defendant Nos. 1, 2, 4 to 7 are directed to return the sum of Rs.1,53,000/- which they have received towards sale consideration with interest at the rate of 9 per cent from the date of payment within a period of eight weeks from today to the plaintiff.

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D 16. Accordingly, the appeals fail and the same are dismissed with the above direction. No order as to costs.

N.J.

Appeals dismissed.