A MOHAMMAD HAFIZULLAH & ORS.

*v.*

JAVED AKHTAR & ORS.

(Civil Appeal No.4712 of 2007)

B JULY 2, 2014

**[ANIL R. DAVE AND R.K. AGRAWAL, JJ.]**

*Civil Procedure - Interference with findings of fact in appeal - Scope - Residential property in question having three* C *co-owners and not divisible by metes and bounds - Respondent no.3 having one-fourth share in the property - Respondent nos. 1 and 2 filing suit for specific performance in respect of the share of respondent no.3 alleging fraud against the appellants and illegal execution of transfer deed* D *in favour of the appellants in respect of such share of respondent no.3 in the property - Trial court decreeing the suit - Decree affirmed by High Court in appeal - Held: Concurrent findings of the courts below with regard to fraud were findings of fact - After appreciation of the entire evidence, the trial* E *Court as well as appellate Court came to a conclusion that a fraud had been committed, whereby share of respondent no.3 had been sold in favour of the predecessor-in-interest of the appellants - Findings of fact arrived at by the Courts below were correct - No cause for interference by Supreme Court* F *with the orders passed by the Courts below.*

**The residential property in question was not divisible by metes and bounds. Three-fourth share of the property was purchased by respondent nos. 1 and 2 in pursuance of the permission granted by the High Court by order** G **dated 16th July, 1984. Remaining one-fourth share of the property belonged to 'K' (respondent no.3).**

**Respondent nos.1 and 2 filed suit for specific performance against 'K' (respondent no.3) praying that**

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she be directed to effect sale of her share in the property in question in their favour in pursuance of the order passed by the High Court dated 16th July, 1984 and that the sale deed dated 11th July, 1985, whereby the property had been sold to 'S' be cancelled. The case of respondent nos.1 and 2 was that a fraud had been committed by 'S' and in pursuance of the said fraud, the share of 'K' had been transferred to her; that though permission was granted to 'K' to sell her share to respondent nos. 1 and 2 or their nominee on 16th July, 1984, share of 'K' was not sold to them or their nominee and they had never appointed 'S' to act as their nominee and they were not bound by the order whereby 'K' was directed to sell her share to 'S' as they were not given any notice when the orders dated 28th June, 1985 and 9th September, 1985 were passed by the High Court.

The appellants, who are heirs of 'S' in whose favour share of 'K' had been transferred, however contended that 'S' was the rightful owner of one-fourth share belonging to 'K' as 'S' had purchased her share in her individual capacity and not as a nominee of respondent nos. 1 and 2. The suit was decreed. The decree was affirmed by the High Court in appeal. Hence the present appeal.

Dismissing the appeal, the Court

HELD:1. Upon perusal of the order dated 16th July, 1984 passed by the High Court, one can clearly visualise that there must had been an understanding between 'K' (respondent no.3) on one hand and respondent nos. 1 and 2 on the other that one-fourth share of the property belonging to 'K' would be sold to respondent nos. 1 and 2. The property in question was not divisible by metes and bounds and therefore, a Receiver had to be appointed. Three-fourth share of the property had been

A purchased by respondent nos. 1 and 2 in pursuance of the permission granted by the High Court by an order dated 16th July, 1984. If the property was not divisible, one can very well believe that owner of three-fourth share of an indivisible property would be ready and willing to B purchase the remaining one-fourth share of the said property and normally no outsider would ever think of purchasing one-fourth share of an indivisible part of a residential house. These factors clearly denote that there must be some understanding among 'K' and respondent C nos. 1 and 2 in relation to purchase of the share of 'K'. [Paras 20, 21] [153-B, C, E-H; 154-A]

2. There is nothing on record to show that respondent nos. 1 and 2 had appointed 'S', the wife of Mohammad Hafizullah - a lawyer and uncle of respondent D nos. 1 and 2 as their nominee. There is nothing to show that any notice had been issued to respondent nos. 1 and 2 before order dated 28th June, 1985 was passed. By virtue of the said order, 'K' had been directed to execute sale deed in favour of 'S'. Moreover, no notice was E issued to respondent nos. 1 and 2 when the order dated 28th June, 1985 had been modified. If an order had been passed in favour of respondent nos. 1 and 2 on 16th July, 1984, there was no reason for the High Court not to hear these two persons while passing a fresh order, whereby F buyers had been changed from respondent nos. 1 and 2 to 'S' . [Para 22] [154-B-D]

3. The findings with regard to the fraud are findings of fact. After appreciation of the entire evidence, the trial G Court as well as appellate Court have come to a conclusion that a fraud had been committed, whereby one-fourth share of 'K' had been sold in favour of 'S' . The findings of fact arrived at by the Courts below are correct. The orders passed by the Courts below are just and proper. [Paras 23, 24] [154-E-G]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No.4712 of 2007.

From the Judgment and Order dated 26.06.2007 in A.P.D. No. 614 of 2005 of the High Court of Calcutta.

Ranjit Kumar, Arjun Krishnan for the Appellants.

R.D. Upadhyay, Asha Updhyay for the Respondents.

The Judgment of the Court was delivered by

**ANIL R. DAVE, J.** 1. Being aggrieved by the judgment and order dated 26th June, 2007, delivered in A.P.D. No.614 of 2005 by the High Court of Calcutta, this appeal has been filed against the concurrent findings arrived at by the High Court in the aforestated appeal.

2. Facts which are relevant for the purpose of determination of the present appeal in a nutshell are as follows:

It is an admitted fact that as per the consent decree passed in Suit No.1274 of 1957 by the Calcutta High Court, the property, a residential house, situated at 34, Elliot Road, Kolkata, belonged to Shri Nagendra Bala Guha, Shri Hari Ranjan Guha and Smt. Kanak Nahar. The said three owners owned one-half, one-fourth and one-fourth share respectively of the said property. In this appeal, we are concerned only with one-fourth share of the said property, which belonged to Smt. Kanak Nahar, who is respondent no.3 in this appeal.

3. As the property belonged to the aforestated three persons and as it was not possible to divide the same by metes and bounds, a prayer had been made to the High Court for permitting sale of three-fourth share of the property belonging to Shri Nagendra Bala Guha and Shri Hari Ranjan Guha to present respondent nos.1 and 2 i.e. Shri Javed Akhtar and Shri Parvez Akhtar, who are brothers. In the said proceedings, Smt. Kanak Nahar had also filed an application with a prayer that

A she be also permitted to sell her one-fourth share to the present respondent nos.1 and 2 – Shri Javed Akhtar and Parvez Akhtar.

4. The said application had been granted by an order dated 16th July, 1984 by the High Court. With regard to the B share of Smt. Kanak Nahar, the High Court was pleased to observe as under, in the said order :

> "..... and it is further ordered that in the event of defendant Smt. Kanak Nahar selling her share to the C proposed purchasers Javed Akhtar and Parvez Akhtar or their nominee or nominees, the names of the purchasers need not be recorded in the suit and they need not continue the suit and it is further ordered that the said defendant Smt. Kanak Nahar be at liberty to sell her share to the proposed D purchasers Javed Akhtar and Parvez Akhtar or their nominee or nominees and....."

5. The aforestated facts denote that Smt. Kanak Nahar must have discussed the matter with regard to sale of her share with Shri Javed Akhtar and Shri Parvez Akhtar, and they must E have decided to purchase the share of Smt. Kanak Nahar.

6. As the three-fourth share of the property in question was to be purchased by Shri Javed Akhtar and Shri Parvez Akhtar, one can very well presume that except the aforestated two F persons, no other person would be interested in purchase of the remaining one-fourth share in the property, which was a residential house and it was impossible to divide the same by metes and bounds. Smt. Kanak Nahar's prayer before the High Court seeking permission to sell her share also to Shri Javed G Akhtar and Shri Parvez Akhtar appears to be quite reasonable as the said sale would bring an end to a long drawn litigation which had started in 1957. The High Court, therefore, had rightly permitted Smt. Kanak Nahar to sell her share to Shri Javed Akhtar and Shri Parvez Akhtar.

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7. After the permission had been granted by the High Court with regard to sale of three-fourth share in the property in dispute in favour of Shri Javed Akhtar and Shri Parvez Akhtar, necessary formalities had been completed and three-fourth share of the said property had been transferred in favour of Shri Javed Akhtar and Shri Parvez Akhtar. A B

8. The dispute involved in this appeal starts with an application submitted by Smt. Shamima Khanam to the High Court with a grievance that Smt. Kanak Nahar was not showing her willingness to execute the sale deed with respect to her share in her favour, though she was bound to sell her share to Shri Javed Akhtar and Shri Parvez Akhtar or their nominee. The said application was granted on 28th June, 1985, whereby Smt. Kanak Nahar was directed to execute sale deed and convey her share to Smt. Shamima Khanam, as a nominee of Shri Javed Akhtar and Shri Parvez Akhtar. C D

9. Ultimately, Smt. Kanak Nahar, through her husband Shri Ajit Nahar, sold her share to Smt. Shamima Khanam by sale deed dated 11th July, 1985, but once again, Smt. Shamima Khanam approached the High Court for modification of the order dated 28th June, 1985 to the effect that she should not be treated as a nominee of Shri Javed Akhtar and Shri Parvez Akhtar. E

10. The High Court, by an order dated 6th September, 1985, modified the earlier order, without recording any reason for the same and by observing that Smt. Shamima Khanam was not a nominee of Shri Javed Akhtar and Shri Parvez Akhtar. F

11. So far as the present litigation is concerned, it was initiated by the present respondent nos.1 and 2 i.e. Shri Javed Akhtar and Shri Parvez Akhtar by filing Suit No.209A of 1986 for specific performance against Smt. Kanak Nahar praying that she be directed to effect sale of her share in their favour in pursuance of the order passed by the High Court dated 16th G H

A July, 1984 and the sale deed dated 11th July, 1985, whereby the property had been sold to Smt. Shamima Khanam be cancelled. The said suit had been decreed by an order dated 22nd September, 2005 and being aggrieved by the judgment and decree dated 22nd September, 2005, an appeal had been B filed by the heirs of Smt. Shamima Khanam in whose favour Smt. Kanak Nahar had already conveyed her share. The said appeal has been dismissed by the impugned judgment.

12. The case of the present respondent nos.1 and 2, viz. Shri Javed Akhtar and Shri Parvez Akhtar in the suit filed for C specific performance was that a fraud had been committed by Smt. Shamima Khanam and in pursuance of the said fraud, the share of Smt. Kanak Nahar had been transferred to her. Though permission was granted to Smt. Kanak Nahar to sell her share to Shri Javed Akhtar and Shri Parvez Akhtar or their nominee D on 16th July, 1984, share of Smt. Kanak Nahar was not sold to them or their nominee and they had never appointed Smt. Shamima Khanam to act as their nominee and they were not bound by the order whereby Smt. Kanak Nahar was directed to sell her share to Smt. Shamima Khanam as they were not E given any notice when the orders dated 28th June, 1985 and 9th September, 1985 were passed by the High Court.

13. The learned counsel appearing for the appellants, who are heirs of Smt. Shamima Khanam, in whose favour share of F Smt. Kanak Nahar had been transferred, had submitted that Smt. Shamima Khanam was the rightful owner of one-fourth share belonging to Smt. Kanak Nahar as Smt. Shamima Khanam had purchased her share in her individual capacity and not as a nominee of Shri Javed Akhtar and Shri Parvez Akhtar. G The learned counsel had submitted that upon perusal of the order dated 16th July, 1984, whereby permission was granted to Smt. Kanak Nahar to sell her share in favour of Shri Javed Akhtar and Shri Parvez Akhtar, it is clear that there was no direction to sell her share to Shri Javed Akhtar and Shri Parvez Akhtar, but she was merely permitted to sell her share and there H

was no obligation on the part of Smt. Kanak Nahar to sell her share to Shri Javed Akhtar and Shri Parvez Akhtar as there was no agreement to sell the property in question in their favour. In absence of any such agreement to sell, there could not have been any permission to sell her share to Shri Javed Akhtar and Shri Parvez Akhtar. It had been specifically submitted by the learned counsel that Smt. Kanak Nahar had willingly sold her share to Smt. Shamima Khanam and therefore, the judgment delivered by the High Court of Calcutta on its original side in favour of Shri Javed Akhtar and Shri Parvez Akhtar is bad in law. According to the learned counsel, the Court ought to have seen that there was a valid conveyance deed executed in favour of Smt. Shamima Khanam and as there was no agreement to sell in favour of Shri Javed Akhtar and Shri Parvez Akhtar, there was no question of passing a decree for specific performance.

14. It had been further submitted that one of the heirs of Smt. Shamima Khanam was a minor, who had not been represented properly before the High Court and therefore, without appointment of a guardian, the Court could not have passed any order against the minor who was one of the legal heirs of Smt. Shamima Khanam.

15. The learned counsel had put much stress on his submission that in absence of any agreement to sell executed by Smt. Kanak Nahar, the suit for specific performance filed by Shri Javed Akhtar and Shri Parvez Akhtar could not have been decreed, especially when the property in question had been validly transferred in favour of late Smt. Shamima Khanam. It had been, therefore, submitted by him that the decree passed by the learned Single Judge of the High Court was not just and proper and deserved to be set aside.

16. On the other hand, it had been submitted on behalf of the respondents, especially for respondent nos.1 and 2 i.e. Shri Javed Akhtar and Shri Parvez Akhtar that by an order dated 16th July, 1984, liberty had been granted to Smt. Kanak Nahar to sell her share to them and the Court had also referred to Shri

A Javed Akhtar and Shri Parvez Akhtar as proposed purchasers in the said order and therefore, it cannot be said that there was no understanding or agreement in.relation to sale of the share of Smt. Kanak Nahar in favour of Shri Javed Akhtar and Shri Parvez Akhtar.

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17. The learned counsel had strenuously argued that a fraud had been committed by or on behalf of Smt. Shamima Khanam. He had drawn our attention to the fact that when order dated 28th June, 1985 was passed by the High Court directing Smt. Kanak Nahar to execute the sale deed in favour of Smt. C Shamima Khanam in pursuance of an application submitted by Smt. Shamima Khanam, the High Court had not given any notice to Shri Javed Akhtar and Shri Parvez Akhtar, in whose favour a final order had been passed on 16th July, 1984, whereby Smt. Kanak Nahar was permitted to sell her share to D Shri Javed Akhtar and Shri Parvez Akhtar. He had further submitted that Smt. Shamima Khanam had never been appointed as a nominee of Shri Javed Akhtar and Shri Parvez Akhtar and the order dated 28th June, 1985 had been passed in pursuance of a fraudulent behaviour of Smt. Shamima E Khanam. It had further been submitted that even the order dated 28th June, 1985, had been modified without issuance of any notice to Shri Javed Akhtar and Shri Parvez Akhtar. Thus, according to the learned counsel, a fraud had been committed by or on behalf of Smt. Shamima Khanam, who had been F represented by her heirs and the order passed in pursuance of the said fraud as well the transfer effected by Smt. Kanak Nahar were bad in law and they were rightly set aside by the High Court by the impugned judgment.

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18. According to the learned counsel, the trial Court as well as appellate Court have come to a conclusion that a fraud had been committed and commission of fraud being a matter of fact, this Court should not reverse the said finding or should not re-appreciate the evidence in this appeal, which is virtually in the nature of a second appeal. He had, therefore, submitted that H the appeal deserved to be dismissed.

19. Upon hearing the learned counsel for the parties, in our opinion, the High Court was justified in dismissing the appeal and affirming the decree for specific performance. A

20. Upon perusal of the order dated 16th July, 1984 passed by the High Court, one can clearly visualise that there must had been an understanding between Smt. Kanak Nahar on one hand and Shri Javed Akhtar and Shri Parvez Akhtar on the other that one-fourth share of the property belonging to Smt. Kanak Nahar would be sold to Shri Javed Akhtar and Shri Parvez Akhtar. In our opinion, it is not necessary to go into the fact whether any written agreement to sell had been entered into between Smt. Kanak Nahar on one hand and Shri Javed Akhtar and Shri Parvez Akhtar on the other. The fact remains that the High Court had permitted Smt. Kanak Nahar to sell her share to the proposed buyers, viz. Shri Javed Akhtar and Shri Parvez Akhtar or to their nominee. Had there not been any understanding among these two parties, viz., the buyer and the seller, possibly the High Court would not have referred to the names of Shri Javed Akhtar and Shri Parvez Akhtar as proposed buyers of the share of Smt. Kanak Nahar. B C D E

21. It is also pertinent to note that it was not possible to divide the property by metes and bounds. The entire problem had arisen because the property was not divisible by metes and bounds and therefore, a Receiver had to be appointed. There is no dispute with regard to the fact that three-fourth share of the property in question had been purchased by Shri Javed Akhtar and Shri Parvez Akhtar in pursuance of the permission granted by the High Court by an order dated 16th July, 1984. If the property was not divisible, one can very well believe that owner of three-fourth share of an indivisible property would be ready and willing to purchase the remaining one-fourth share of the said property and normally no outsider would ever think of purchasing one-fourth share of an indivisible part of a residential house. These factors clearly denote that there must be some understanding among Smt. Kanak Nahar and Shri F G H

A Javed Akhtar & Shri Parvez Akhtar in relation to purchase of the share of Smt. Kanak Nahar.

22. There is nothing on record to show that Shri Javed Akhtar or Shri Parvez Akhtar had appointed Smt. Shamima Khanam, the wife of Mohammad Hafizullah – a lawyer and uncle B of Shri Javed Akhtar and Shri Parvez Akhtar as their nominee. There is nothing to show that any notice had been issued to Shri Javed Akhtar and Shri Parvez Akhtar before order dated 28th June, 1985 was passed. By virtue of the said order, Smt. Kanak Nahar had been directed to execute sale deed in favour C of Smt. Shamima Khanam. Moreover, no notice was issued to Shri Javed Akhtar and Shri Parvez Akhtar when the order dated 28th June, 1985 had been modified. It is important to note that if an order had been passed in favour of Shri Javed Akhtar and Shri Parvez Akhtar on 16th July, 1984, there was no reason for D the High Court not to hear these two persons while passing a fresh order, whereby buyers had been changed from Shri Javed Akhtar and Shri Parvez Akhtar to Smt. Shamima Khanam.

E 23. The findings with regard to the fraud are findings of fact. After appreciation of the entire evidence, the trial Court as well as appellate Court have come to a conclusion that a fraud had been committed, whereby one-fourth share of Smt. Kanak Nahar had been sold in favour of Smt. Shamima Khanam. We F had gone through the evidence which had been produced by the learned counsel appearing for the present appellants. Even upon perusal of the said evidence, we are not persuaded to believe that the findings of fact arrived at by the Courts below are not correct.

G 24. For the aforestated reasons, we are of the view that there is no substance in this appeal and the orders passed by the Courts below are just and proper and therefore, we dismiss the appeal with no order as to costs.

H Bibhuti Bhushan Bose Appeal dismissed.