

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

**CIVIL APPEAL NOS. 4279-4280 OF 2011
(Arising out of SLP (Civil) Nos. 16595-16596 of 2010)**

Vimaleshwar Nagappa Shet Appellant(s)

Versus

Noor Ahmed Sheriff & Ors. Respondent(s)

J U D G M E N T

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.

3) Brief facts:

(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 $2/11^{\text{th}}$ share and each of the daughters succeeded to $1/11^{\text{th}}$ 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.

(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 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) 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.

(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.

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

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 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.

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.

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.

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:-

“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 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.

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.

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.

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

.....J.
(P. SATHASIVAM)

.....J.
(H.L. GOKHALE)

NEW DELHI;
MAY 11, 2011.

