

SUPREME COURT OF INDIA

Hamidkhan

Vs.

Ashabi

C.A.No.6711 of 2008

(S.B. Sinha and Cyriac Joseph JJ.)

19.11.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Defendant No. 2 in the Original Suit No. 358 of 1988 filed in the Court of the Additional Civil Judge, Hubli is the appellant, herein. Defendant No. 1 - Respondent No. 8 herein is a charitable trust. By a registered deed dated 5.07.1951, the plaintiff - respondent No. 1 purchased the lease hold rights in respect of the land together with the superstructure standing thereupon from Shri Hasansab Bepari. In the year 1955, the original defendant No. 1 filed a suit against several persons. Plaintiff got herself impleaded as a defendant therein. Defendant No. 1, having regard to the fact that the plaintiff had already purchased the superstructure, agreed to sell the land to her by an agreement dated 26.02.1980 for a consideration of Rs.25,000/-. Out of the said amount, a sum of Rs.8000/- was paid by way of earnest money. The relevant term of the said agreement reads as under:

"The said Rayanal math, being a public math, the necessary permission required to sell the said math properties shall be obtained from the Charity Commissioner, Belgaum and the Deputy Commissioner, Dharwad, and after intimating you about the same and receiving the balance consideration amount within one month thereafter, sale deed shall be executed in the presence of the sub-registrar".

3. Admittedly, in terms of the said agreement, permission from the Charity Commissioner in terms of Section 36 of the Bombay Public Trust Act was required to be taken. On or about 30.10.1982, an order was passed by the Charity Commissioner directing that the land should be sold in public auction and the highest bidder should be permitted to purchase the suit land. Defendant No. 1, purported to be in pursuance thereof and in furtherance of the said order, by a notice dated 22.04.1983, stated:

"As stated above, the Charity Commissioner has granted permission subject to certain conditions. Therefore, you are hereby informed that my client intends to conduct the public auction as per the order of the Charity Commissioner within a few days. If you intend to purchase the said property you may participate in the public auction. You will be entitled to adjust the earnest money paid by you against the bid amount. In case you are unable to purchase the said properties in the public auction, my client is willing to refund the balance of the earnest money paid by you after deducting appropriate amount as mesne profits you your (sic) occupation till now. You are entitled to receive such amount. You may understand that the contracts till now are cancelled. This notice dated 22.4.1983 is for your information."

4. Indisputably, the said order of the Charity Commissioner was set aside by the High Court and the matter was remitted directing it to pass a fresh order. The Charity Commissioner in his order dated 15.04.1987 noticed that the appellant herein had been in possession of the suit property. A deed of sale was executed in his favour by the defendant No. 1 on or about 12.05.1988.

5. Plaintiff - Respondent No. 1 thereafter filed a suit for specific performance of the said agreement dated 26.02.1980 and furthermore questioned the validity of the said deed of sale dated 12.05.1988 in the Court of Principal Civil Judge, Hubli, praying inter alia for the following reliefs:

"It is, therefore, humbly prayed that, the sale in favour of Defendant No. 2 by the Defendant No. 1 being not binding upon the plaintiff, as it is in derogation of the right of the plaintiff to purchase the suit property by a sale agreement dated 26.2.1980; be cancelled by a decree with an ancillary relief of a decree for specific performance against the Defendant No. 1, directing the Defendant No. 1 to sell the suit property to plaintiff at the value at which it has been sold to the Defendant No. 2. In case, if the Defendant No. 1 declines to or does not execute the sale deed of the suit property on receipt of balance of consideration in pursuance of a contract of sale dated 26.2.1980, a Court Commissioner, it is prayed, shall be appointed to execute the sale deed on behalf of the Defendant No. 1 in favour of the plaintiff at the cost of Defendant No. 1 or in the alternative, if this Hon'ble Court does not grant a decree for specific performance, the decree for refund of the earnest money of Rs. 8000/- from Defendant No. 1 payable to plaintiff, at the rate of interest of Rs. 18% per annum on the principle of Rs. 8000/- from 26.2.1980, be passed."

It is not in dispute that the appellant was a nephew of the husband of the plaintiff. He was not in sound financial position. Only out of compassion, the husband of the plaintiff - respondent No. 1 permitted the appellant and his father to live in the suit premises as licensees for a short period. After his father's death, the appellant requested for some more time to vacate.

Appellant, however, connived with the defendant No. 1 and managed to get the suit property transferred in his name. Appellant in the said suit not only denied and

disputed the right of the respondent No. 1 to obtain a decree for specific performance of contract but put forth a plea that he was a bona fide purchaser for value without notice. It was furthermore contended that the suit was barred by limitation.

6. The learned Trial Judge in view of the rival pleadings of the parties inter alia framed the following issues:

"(i) Whether the plaintiff proves that defendant No. 1 executed an agreement of sale on 26th February, 1980?

(ii) Whether the plaintiff proves that she was ever ready and willing to perform her part of the contract?

(iii) Whether the plaintiff proves that when the agreement of sale in her favour was in force, defendant No. 1 executed sale deed in favour of defendant No. 2 on 12.5.1988?

(iv) Whether the plaintiff proves that the sale deed in favour of defendant No. 2 is not binding on her?

(v) Whether the defendant No. 2 proves that the order of the Charity Commissioner is final?

(vi) Whether the defendant No. 2 proves that he is in possession of suit property from the date of sale in his favour?"

7. By reason of a judgment and decree dated 22.01.1993, the said suit was decreed by the learned Trial Judge, stating:

"28. In the light of the above position of law, we have to come to a just decision of the case. Defendant No. 1 says that the execution of the sale deed in favour of the plaintiff become impossible since the charity commissioner did not permit to sell, but asked to sell by public auction. The record goes to show that the order of the charity commissioner dated 30-10-1982 as above was quashed in Cr. P. On the other hand, the Hon'ble High Court observed that the present defendant No. 1 stands himself committed to the petitioner and the charity commissioner is required to consider the agreement of sale. Under the circumstances, there was an opportunity to defendant No. 1 to call upon the plaintiff to get the sale deed executed, but he did not. Even otherwise, the order dated 15-4-1987 also is no way restrain defendant No. 1 in selling the suit properties to the plaintiff subject to settlement concerning price. At this juncture as well, there was an opportunity for defendant No. 1 in asking the plaintiff to get the sale deed executed, but he did not. We do not find any direction from the charity commissioner either in the order dated 30.10.1982 or order dated 15-4-1987 that the suit properties should be sold to defendant No. 2 only. In spite of these circumstances, defendant No. 1 selected defendant No. 2 to sell the suit properties. There was no pre-existing right with defendant No. 2 to purchase the suit

properties from defendant No. 1. In this connection, counsel for plaintiff has argued that it is a plot created by the defendants and there upon (sic) have brought the sale deed in favour of defendant no. 2. To put in other words, the order dated 15-4-1987 was not so fundamental as to be regarded by law as striking at the root of the contract. Thus, execution of sale deed in favour of the plaintiff was not impossible from the point of view of defendant No. 1. When there was possibility in performing his part of the contract on the part of defendant No. 1, where would be the question of application of the doctrine of frustration. Doctrine of frustration would be applicable only when the contract is between defendant No. 1 and the plaintiff is cancelled. We find no such cancellation of the said agreement even till today."The court noticed that the defendant No. 1 did not examine himself as a witness in the suit and opined:

"...If defendant No. 1 had entered into the witness box, cat would have been let out of the bag. In view of the foregoing reasons, we hold that plaintiff has proved that when the agreement of sale in her favour was in force, defendant No. 1 executed a sale deed in favour of defendant No. 2 and we hold that plaintiff has proved that sale deed in favour of defendant No. 2 is not binding on her and accordingly, issues 3 and 4 are answered."It was furthermore held that the appellant is not a bona fide purchaser for value without notice, stating:

"...Under the circumstances, it is impossible to come to a conclusion that defendant No. 2 is a bonafide purchaser without notice, of a valid agreement between plaintiff and defendant No. 2. These facts themselves go to show that defendant No. 2 purchased unlawfully, unauthorisedly and illegally. In this view of the matter, it is held that plaintiff is entitled to a declaration that sale in favour of defendant No. 2 is not binding on her and accordingly, it is held that plaintiff has proved issue no. 7."

8. On the premise that the defendant No. 1 did not obtain the permission of the Charity Commissioner in which event only the plaintiff –respondent No. 1 could perform her part of contract, the suit was held to be not barred by the law of limitation.

9. An appeal preferred thereagainst was dismissed by the Ist Addl. Distt. Judge, Dharwad and by a judgment and order dated 22.12.2001, the learned Appellate Court categorically held:

"24. It is important to note that the plaintiff had purchased not only the leasehold right of the land in question and also the superstructure under Ex. P-4 sale deed. The sale deed is dated 5-7-51. Thereafter, continuously, her name finds place in the records and it is evidenced by Ex. P-2 and 3. Nowhere at any point of time, the name of defendant no. 2 appear in any of the records. It is very well within the knowledge of Deft. No. 1 that the plaintiff had purchased not only the leasehold rights, but also the superstructure. And thereafter, she entered into a sale agreement to purchase the suit property. That being so, how could Deft. No. 1 determine that Deft. No. 2 one was the occupant of the suit property. None of the defendants appear to have applied their mind to verify the records to see as to who is in actual possession of the suit property. Further, Deft. No. 2 also appears to have not made reasonable enquiries

about the title of the suit property. Therefore, the learned trial Judge has rightly held that he could not be bonafide purchaser of the suit property. Deft. No. 1 before executing the sale deed in favour of Deft. No. 2 could have verified as to the nature of possession or occupation Deft. No. 2 was having. Being very well aware of the subsistence of the sale agreement, it could not have executed the sale deed in favour of Deft. No. 2 in respect of the suit property. Therefore, it has to be held that the transaction between the defendants in respect of the suit property was nothing but suppression of material facts and somehow managed to complete the sale. Therefore, the learned trial judge has rightly held that Deft. No. 2 purchased the suit property unlawfully and unauthorisedly and, thus, it was not binding on the plaintiff. It is also important to note that the plaintiff has specifically pleaded in the plaint and it has come in the evidence of PW-1 that they were always ready and willing to perform their part of the contract..."

10. The second appeal filed by the appellant thereagainst has been dismissed by the High Court by reason of the impugned judgment.

11. The substantial questions of law which were framed for its consideration, were:

"1. Whether the courts below could have decreed the suit for specific performance when admittedly the suit agreement dated 26-2-1980 between the plaintiff and the 2nd defendant has been terminated by a cancellation notice dated 22- 4-1983 and in the circumstances whether the suit for specific performance could be said to be within limitation"

2. Whether the property belonging to 2nd defendant which is a charitable institution registered under the Bombay Trusts Act, could be sold without the permission of the charity commissioner?

3. Whether the courts below had jurisdiction to alter the terms of the contract as done now in the impugned decree?"

The High Court answered all the said questions in favour of the respondent No.1, opining:

"In the instant case, as noticed, the contract entered into is more in the form of a contingent contract. The first permission which was accorded by the charity commissioner was not in a good spirit as held by this Court and the same was quashed in the writ petition. Thereafter, the second permission was granted in the year 1987 which was almost nearer to the terms of the contract entered into between the plaintiff and 1st defendant except the variation in the rate of the land and the condition that the sale could be made in favour of the occupant of the property. The suit is filed subsequently i.e. within 1 = years and it cannot be said that it is beyond limitation. As such, the first substantial question has to be answered in favour of the respondent. It is seen that both the trial court as well as the lower appellate court have held that the

plaintiff was ready and willing to perform her part of the contract and also that the sale by 1st defendant in favour of 2nd defendant is not binding on the plaintiff. There is also a finding that the 2nd defendant has not proved that he is in possession of the suit property. While decreeing the suit for specific performance, the trial court has observed that the 2nd defendant is not a bonafide purchaser for value without notice. This is more a question of fact finding the same has been confirmed by the lower appellate court. It is also noticed that the contract is subsisting between the plaintiff and the 1st defendant and that the 1st defendant illegally executed the sale deed in favour of the 2nd defendant. The trial court having noticed that the relief of specific performance is a matter of discretion and has to be exercised sparingly, has come to the conclusion that there are no valid and cogent grounds to refuse the decree of specific performance in favour of the plaintiff."

12. Mr. Sunil Kumar, learned senior counsel appearing on behalf of the appellant, would contend:

“(i) Having regard to Article 54(2) of the Limitation Act, 1963, the suit being barred by limitation, no decree for specific performance of contract could have been passed, and

(ii) In any event, it was not a case where the court should have exercised its discretionary jurisdiction under Section 20 of the *Specific Relief Act, 1963*”

13. Mr. Rajesh Mahale, learned counsel appearing on behalf of the respondents, on the other hand, urged:

“(i) By reason of the purported notice dated 22.04.1983, the agreement was not legally cancelled.

(ii) In any event, the said purported notice being passed on the order of the Charity Commissioner dated 30.10.1982 which having been set aside, limitation would run only from the date when the Charity Commissioner passed its order dated 15.04.1987 and not prior thereto.

(iii) In the suit, the plaintiff - respondent No. 1 having not only prayed for a decree for specific performance of contract but also for cancellation of the deed of sale, it was for the defendant No. 2 to show that he had acquired a valid title thereto.

(iv) In any event, the courts below having arrived at a finding of fact that it was the plaintiff alone who was in possession of the land even in terms of the order of the Charity Commissioner, the land in suit should have been transferred in favour of the respondent No. 1.”

14. In terms of the aforementioned agreement dated 26.02.1980, it was obligatory on the part of the defendant No. 1 to obtain the permission of the Charity Commissioner in terms of Section 36 of the Bombay Public Trust Act, which reads as under:

"(1) Notwithstanding anything contained in the instrument of trust,

(a) No sale, exchange or gift of any immovable property; and

(b) No lease for a period exceeding ten years in the case of agriculture land or for a period exceeding three years in the case of non agriculture land or a building belonging to a public trust, shall be valid without the previous sanction of the charity commissioner may be accorded subject to such condition as the charity commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust.

(c) If the charity commissioner is satisfied that in the interest of any public trust any immovable property thereof should be disposed of, he may on application, authorise any trustee to dispose of such property subject to such condition as he may think fit to impose, regard being had to the interest or benefit or protection of the trust."

15. The fact that as far back as in 1951, the plaintiff purchased the superstructure standing on the land is not in dispute. Defendant no. 1 had filed a suit against the alleged trespassers. Originally, the plaintiff was not impleaded as a party therein. She got herself impleaded as a party at a later stage of the suit. She was arrayed as the defendant No. 3. Plaintiff evidently was not found to be a trespasser. Only because the land on which the superstructure stood belonged to the trust, the agreement of sale was entered into. It was the only sensible way of doing justice to the parties. Respondent No. 1 is a lady. She must have relied upon the defendant No. 1.

16. In view of the concurrent finding of fact, there is no escape from the conclusion that the defendant No. 2 - appellant was a licensee under the plaintiff. He, therefore, did not have any independent title or legal possession. Even if he and his father were in possession of a part of the property, the same was for and on behalf of the plaintiff. It may be true that the Charity Commissioner directed that instead of giving effect to the agreement dated 26.02.1980, the same should be sold in auction but we have noticed hereinbefore that the said order has been set aside by the High Court. It was non est in the eye of law. If that order has been set aside by the High Court pursuant whereto and in furtherance whereof the purported notice dated 22.04.1983 was issued, the performance of contract became dependant upon a fresh order which was to be passed by the Charity Commissioner. The Charity Commissioner could not have ignored the fact that the superstructure standing on the land was owned and possessed by the plaintiff - respondent No. 1. It was, therefore, fair and equitable to allow the said agreement to be given effect to. Even otherwise the Charity Commissioner was to grant permission to the defendant No. 1 to sell the property in favour of the plaintiff. It could not have issued a direction which was otherwise not sustainable. It could not have ignored the fact that the plaintiff was the owner of the superstructure of the property and was, thus, in

lawful possession thereof as well as the fact that the defendant No. 2 was a mere licensee. We do now know what transpired before the Charity Commissioner but even if his order dated 15.04.1987 was to be enforced, the same could be done irrespective of the aforementioned agreement dated 26.02.1980. Even in terms of the said order, it was the plaintiff and the plaintiff alone in whose favour the deed of sale could be executed. Inter alia on a wrong premise that the appellant herein was in possession of the said property, the deed of sale was executed on 12.05.1988 for the sum of Rs. 75,000/-. Evidently, the defendant No. 1 obtained a higher amount. He even had not refunded the earnest money paid by the plaintiff - respondent No. 1. There was no occasion for him to put the appellant in independent possession of the property, as he himself was not in possession thereof, at least since 1951. Even otherwise, being in continuous possession of the superstructure from 1951, the title of the defendant No. 1 became extinguished.

17. Defendant No. 1 for reasons best known to him did not examine himself in the suit. It is not in dispute that he had served similar notices to other persons in whose favour, having regard to the judgment passed in the suit bearing No. L.C. No. 11 of 1955, agreements for sale were entered into. Once the said order of the Charity Commissioner was set aside, steps taken pursuant thereto also became non est in the eye of law as the Charity Commissioner was to apply his mind afresh for enabling him to exercise his jurisdiction in terms of Section 36 of the Bombay Public Trust Act. Relationship of vendor and vendee between defendant No.1 and the plaintiff, therefore, continued. If that be so, the suit for specific performance was maintainable.

18. Even otherwise in a case of this nature, it is eminently fit and proper that this court with a view to do complete justice to the parties should exercise its discretionary jurisdiction under Article 142 of the Constitution of India. Equity in this case, however, has to be balanced. On the one hand, the defendant No. 1 is an old lady and her interest is required to be upheld, on the other, the appellant has also invested a sum of Rs. 75,000/- in 1988 and since then he has been in possession of a part of the property as a vendee in terms of the said registered deed of sale dated 12.05.1988. We, therefore, are of the opinion that the interest of justice would be subserved if the plaintiff - respondent No. 1 is directed to pay a sum of Rs. 2,25,000/- by way of compensation to the appellant. For arriving at the said figure, we have not only taken into consideration the inflation in real estate market, but also the fact that the appellant has been in possession of a part of the property as a licensee of plaintiff - respondent No. 1. Although the appellant is a party to the illegality, we do not intend to deprive him of the amount which he had invested and that is the principal reason we thought that he would be fully compensated if the plaintiff - respondent No. 1 is directed to pay a sum of Rs. 2,25,000/- in his favour being three times of the amount that he had paid to the defendant No. 1 by way of consideration for the execution of the deed of sale dated 12.05.1988. We direct accordingly.

“Appellant shall vacate the premises within one month from the date of deposit of the amount of Rs.2,25,000/- by the plaintiff - respondent No. 1 in the Court of learned Trial Judge and execute a registered deed of sale in favour of the plaintiff - respondent No. 1. In the event, appellant vacates the premises he would be entitled to

withdraw the said sum failing which it would be open to the respondent No. 1 to execute the decree passed in her favour by the learned Trial Judge forthwith and in which event he would be liable to pay all costs to the plaintiff including the costs incurred by him in this Court. Defendant No. 1 shall also refund the amount of earnest money of Rs. 8000/- to the plaintiff with interest at the rate of 9% per annum from the date of institution of suit till realisation as he cannot be permitted to enrich himself unjustly.”

19. For the reasons aforementioned, this appeal is allowed in part and to the extent mentioned hereinbefore as also with the aforementioned observations and directions. No costs.