

SUPREME COURT OF INDIA

Laxman Tatyaba Kankate

Vs.

Taramati Harishchandra Dhattrak

C.A.No.6509 of 2005

(Dr.B.S Chauhan and Swatanter Kumar JJ.)

08.07.2010

JUDGEMENT

Swatanter Kumar, J.

1. Civil Judge, Senior Division, Shirampur, District Ahmednagar (for short `the Trial Court'), in a suit for specific performance and in the alternative for recovery of Rs. 10,000/-, vide his judgment and decree dated 25th July, 1995 partially decreed the suit of the plaintiff (respondent herein), dismissing her claim for specific performance, ordered refund of earnest money with interest at the rate of 6% per annum pendente lite and future, with proportionate cost.

2. Against this decree, the respondent filed an appeal before the District Judge, Ahmednagar (hereinafter referred to as `the First Appellate Court'), who, vide his judgment and decree, dated 28th November, 2000, decreed the suit in its entirety. The Court granted decree for specific performance in respect of the land in question and upon grant of permission by the competent authority, as contemplated under Section 12 (c) of the Maharashtra Re-settlement of Project Displaced Persons Act, 1976, (hereinafter referred to as `the Re-settlement Act') and also by the Society, as contemplated under Section 47(2) of the Maharashtra Cooperative Societies Act, 1960, (for short `the Societies Act'), the appellants were entitled to specific performance upon payment of the balance sale consideration of Rs. 30,000/-. It also directed the appellants to submit an application seeking permission from the competent authority and execute a registered sale deed in favour of the respondent herein.

3. The legality and correctness of the aforesaid decree was challenged by the appellants before the High Court of Judicature at Bombay at its Aurangabad Bench in Second Appeal No. 96 of 2001 which came to be dismissed vide judgment dated 17th July, 2001. Aggrieved from the aforesaid concurrent decrees passed by the Courts, the present appeal under Article 136 of the Constitution of India has been preferred by the appellants.

4. The necessary facts are that, according to the respondent, an agreement to sell dated 08.01.1991 was entered into between the parties in terms whereof the appellants had agreed to sell the land admeasuring 1H. 60 R. in Village Pimpri Lokai, Taluka Shrirampur, District Ahmednagar in Block No. 220, the boundaries of which were stated in the plaint. A sum of Rs. 10,000/- was paid at that time and it was agreed that upon obtaining the permission from the competent authority, the demarcation of the land would be effected and the possession of the suit land would be given.

5. The appellants were expected to execute the sale deed in favour of the respondent, as the respondent was always ready and willing to perform her part of the contract. Though the appellants assured that they would execute the sale deed in favour of the respondent, they failed to do so. A notice dated 05.06.1992 was served upon the appellants but no sale deed was executed.

6. Thereafter, according to the respondent, the appellants also started causing obstruction in the peaceful possession of the respondent and one of such incidents occurred on 11.07.1992, which compelled the respondent to file the suit for specific performance, and in the alternative, for the refund of earnest money along with damages. One Vitthal Laxman Kankate also applied to the Court, vide Exh. 23, to be impleaded as a party, as he claimed right and interest in the said land. This application was allowed.

7. The suit was contested by the appellants who took various legal objections including, that the suit was bad for non-joinder of the necessary parties and, thus, was not maintainable. On merits, it was stated that no agreement, as alleged, was executed between the parties and the entire case, as pleaded by the respondent, was false. It was also averred that defendant No. 2 in the suit (appellant No. 2 in the present appeal) had also filed a suit wherein injunction was granted in favour of the said party.

8. A plea was also taken that the agreement to sell was not a registered document, as such, the same could not be acted upon. The appellants also took the stand that there was rapid increase in the market value of the land and, therefore, they could not have agreed to sell the property at the price indicated in the agreement. However, it was really not in dispute that the plaintiff and the defendants were acquainted to each other. The learned Trial Court, on the basis of the record before it, noticed that the appellants claimed that they wanted to obtain a loan for a sum of Rs. 2,000/- from the respondent and had agreed to sign certain papers by way of security, that the respondent, on the pretext, got certain blank papers signed from the appellant as well as his son and that there was no intention to sell the property in question.

9. On the pleadings of the parties, the Trial Court framed the following issues and gave findings thereon:

“Issues Findings 1 Does the plaintiff prove that the Proved defendant agreed to sell the field for Rs. 40,000/-? 2 Does the plaintiff prove that the amount Proved Rs. 10,000/- was paid as earnest money? 3 Does the plaintiff prove that amount of Proved

Rs. 30,000/- was agreed to be paid at the time of execution of sale deed? 4 Does the plaintiff prove that the sale deed Proved was to be executed within 1 month from the permission of the Competent Authority? 5 Does the defendant prove that the Not proved plaintiff paid Rs. 2,000/- only as loan and the signature were obtained on blank stamp paper by way of security? 6 Does the plaintiff prove that she was Proved ready and willing to perform her part of contract? 7 Whether the plaintiff is entitled for a Not proved decree of Specific Performance? 8 Whether the suit is bad for non-joinder of Does not necessary party? survive 9 What relief and order? as per final order Additional issues 1 Whether the agreement is binding on Yes the defendant No. 2.

2 Does plaintiff prove that by way of Yes alternate relief, she is entitled to refund of earnest money with damages?"

10. The learned Trial Court decided all the material issues in favour of the respondent and, while upholding the agreement in favour of the respondent, it also returned a finding in favour of the respondent that she was always ready and willing to perform her part of the contract and had paid a sum of Rs. 10,000/- as earnest money. It may be noticed, that the stand taken by the appellants, that the signatures were obtained on blank papers, was answered by the Court in the negative. Despite these facts, the learned Trial Court, as already noticed, partially decreed the suit and directed the appellants to pay a sum of Rs. 10,000/- with interest at the rate of 6% per annum and without any additional amount of damages, as prayed by the respondent. The learned First Appellate Court, while setting aside the decree passed by the Trial Court only for payment of money, passed the decree for specific performance while otherwise affirming the conclusions arrived at by the Trial Court. The First Appellate Court returned the findings in favour of the respondent and held as under :

“Therefore, the sale is permissible with the prior permission of the government. Admittedly, the respondent No. 1 has agreed to obtain permission from the government prior to sale transaction.

Therefore, there would not be legal bar while granting a relief of specific performance. The authority cited by the learned counsel for appellant is directly in point. The facts of the said authority and the facts of the present case are identical one.

Hence, the reasons on account of which the learned trial court was not pleased to grant a relief of specific performance cannot be accepted. After having come to conclusion that there is no bar of section 12 of the Re-settlement Act, the another reason on account of which the learned trial court was not pleased to grant the said relief, is proper or not is to be considered. The learned trial court has observed that in view of provisions of the Section 48(e) of the Societies Act, the agreement for sale is void one, and hence it can't be enforced. According to learned trial court there was charge on the suit land in favour of the society i.e. since the respondent no. 1 has

taken the loan amount. The learned trial court has relief on the entry in the record of rights, while coming to conclusion that there was charge of the society of the suit land in view of the loan transaction, and the appellant was aware of it in view of her admission that she had seen the entry. Consequently, the learned trial court has come to conclusion that there is a bar while granting relief of specific performance u/s 48 (e) of the Co.op. societies Act. In my opinion, in view of the authority reported in the case of *Narayan vs. Macchindra*¹, it can't be said that there would be any legal bar while enforcing the agreement Exh.45.

x x x x x x x x x Therefore, there would not be any legal impediment while granting a relief of specific performance subject to certain conditions i.e. prior permission of the state government and permission from the society of village Pimprilokai, taluka Newasa. There are no reasons on record so as to prevent the appellant from claiming a relief of specific performance. The respondents were not able to show as to why discretion should not be grant a relief of specific performance. Since the agreement for sale, Exh. 45, is lawful one, it can be safely enforced. Consequently, the finding in respect of point No. 2 is answered in the affirmative.”

11. In view of the findings in respect of point Nos. 1 and 2, it logically follows that the judgment and decree of the learned trial court have to be set aside, and suit filed by appellant is decreed, which is for a relief of specific performance however subject to certain conditions i.e. regarding prior permission of the state government of society of village Pimprilokai. Incase, both authorities are not pleased to grant permission then appellant would be entitled to claim refund of the earnest amount from respondents which is to the tune of Rs. 10,000/-."

12. The findings and the conclusions of fact and law arrived at by the Courts were affirmed by the High Court which sustained the decree passed by the First Appellate Court.

13. The learned counsel appearing for the appellants vehemently argued that the decree for specific performance could not have been passed by the Courts against the appellants, as the property was mortgaged to the cooperative society, and the property being under the charge of the society, no title could be passed in favour of the respondent. Secondly, it was contended that the Courts have failed to appreciate the evidence in its correct perspective and the judgment under appeal is liable to be set aside. Lastly, it was contended that during the pendency of the proceedings, the value of the land has increased tremendously and it would be unjust and unfair to pass a decree for specific performance in favour of the respondent.

14. At the very outset, we may notice that all the three Courts have returned all the findings of fact in favour of the present respondent. Such findings are based upon proper appreciation of evidence and no legal infirmity can be traced in them. It is hardly permissible for this Court to go into such questions of facts alone, in exercise of its jurisdiction under Article 136 of the Constitution of India.

15. From the judgment of the learned Trial Court, it is apparent that the appellants had not placed any such argument or specific plea before that Court. In fact, as is evident from the afore reproduced issues, no such issue was either claimed or framed, in this regard. It is rightly contended by the learned counsel appearing for the respondent that the appellants had not adduced any evidence that the property in question had been mortgaged or was under the charge of the society. Be that as it may, the provisions of clause (d) of Section 48 of the Societies Act, places a restriction upon alienation of the whole or any part of the land or interest in the property unless and until the whole amount borrowed by the member of the society has been repaid with interest. In other words, the restriction is conditional and once the loan of the society has been cleared, the society obviously cannot have any objection to transfer the said property. No effort was made by the appellants to bring on record any evidence to show as to what was the extent of money currently due to the society, if at all, and for what amount the property had been mortgaged in favour of the society. In the absence of any specific evidence in that regard, the Court will have to draw an adverse inference against the appellants for not producing before the Court the best available evidence. In any case, the appellants cannot take advantage of their own wrong. Coming to the other submission, that the land could not be transferred in favour of the respondent in view of the restriction contained in Section 12 (1) (c) and Section 12 (2) of the Re-settlement Act, the bare reading of these provisions show that the Government can grant permission for transfer of the property, subject to such conditions, as it may deem fit and proper.

16. In the present case, the appellants have neither claimed any issue nor led any evidence before the Court to substantiate even this plea. Furthermore, the learned First Appellate Court while relying upon the judgment of this Court in the case of *Nathulal v. Phoolchand*², had dealt with both these contentions rightly and in accordance with the law. We see no reason as to how a presumption can be raised against the respondent on face of the fact that the appellants chose not to lead any evidence on either of these aspects. These contentions raised on behalf of the appellants are, therefore, without any substance. The learned counsel appearing for the appellants drew our attention to Section 13 (1) (c) of the Specific Relief Act, 1963 (for short 'the Act'), which clearly postulates that where a person contracts to sell immovable property with an imperfect title and the property is encumbered for an amount not exceeding the purchase money, the purchaser has the right to compel the seller to redeem the mortgage and obtain a valid discharge and then specifically perform the contract in its favour. Even from this point of view, the right of the present respondent is fully protected.

17. It will also be useful to refer to the provisions of Section 20 of the Act which vests the Court with a wide discretion either to decree the suit for specific performance or to decline the same. Reference in this regard can also be made to the case of *Bal Krishna v. Bhagwan Das*³ where this Court held as under :

“13.The compliance with the requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The

plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court.

14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.”

18. Similar view was taken by this Court in the case of *Mohammadia Cooperative Building Society Ltd. v. Lakshmi Srinivasa Cooperative Building Society Ltd. & Ors.*³, where the Court reiterated the principle that jurisdiction of the Court to grant specific performance is discretionary and role of the plaintiff is one of the most important factor to be taken into consideration. We may also notice that in the case of *P.V. Joseph's son Mathew v. N. Kuruvila's Son*⁴, this Court further cautioned that while exercising discretionary jurisdiction in terms of Section 20 of the Act, the Court should meticulously consider all facts and circumstances of the case. The Court is expected to take care to see that the process of the Court is not used as an instrument of oppression giving an unfair advantage to the plaintiff as opposed to the defendant in the suit.

19. The discretion of the Court has to be exercised as per the settled judicial principles. All the aforesaid principles are squarely satisfied in the present case and it is the appellants before us who have taken advantage of the pendency of the proceedings. They have used the sum of Rs. 10,000/-, which was given as earnest money for all this period, as well as, have enjoyed the fruits of the property. The present case does not fall within the ambit of any of the aforesaid cases specified under Section 20 (2) of the Act. In the present case, it is not only lawful but even equity and facts of the case demand that a decree for specific performance should be granted in favour of the respondent. Besides all this, the respondent before us has agreed to pay much higher consideration than what was payable in terms of the agreement to sell between the parties.

20. The onus to prove that the respondent had obtained signatures of the appellants on blank papers on the pretext of advancing a loan of Rs. 2,000/- was entirely upon the appellants. No evidence, much less cogent documentary or oral evidence, was led by the appellants to

discharge this onus. The averment has rightly been disbelieved and the plea was rightly rejected by the concerned Courts in the judgment under appeal. The appellants led no evidence and nothing was brought to our notice, even during the course of the hearing, to show that this plea could be accepted. It is a settled principle of law that before the First Appellate Court, the party may be able to support the decree but cannot challenge the findings without filing the cross objections. As it appears from the record, the present appellants have neither filed cross objections nor their appeal challenging the findings recorded by the learned Trial Court. In fact, the entire conduct of the present appellants shows that they have not only failed to prove their claim before the Courts of competent jurisdiction but have even not raised proper pleas in their pleadings.

21. It was contended on behalf of the appellants that there has been considerable increase in the price of the land in question. Though that may be true, it cannot be a ground for denying the decree of specific performance to the respondent. The learned First Appellate Court, by a well reasoned judgment, has granted the relief of specific performance instead of only granting refund of money, as given by the Trial Court. The judgment of the First Appellate Court has been upheld by the High Court and we see no reason whatsoever to interfere with the concurrent findings of facts and law as stated in the judgment under appeal.

22. However, the learned counsel appearing for the respondent volunteered and after taking instructions stated that they would be willing to pay a sum of Rs. 1,50,000/- instead of Rs. 40,000/- as the total sale consideration. We find this offer of the respondent to be very fair.

23. We have already held that the defence taken up by the appellants in the suit was totally unbelievable. There is no reason or ground as to why the relief of specific performance should be declined to the respondent. She satisfied all the requirements of Section 20 of the Act. Even then, if we examine this case purely from the point of view of equity, the offer now made by the respondent substantially balances the equities between the parties and the very argument raised on behalf of the appellants that there has been increase in the price of the land in question loses its significance. Now, no prejudice will be caused to the appellants in any manner whatsoever.

24. For the reasons afore recorded, we see no legal or other infirmity in the judgment under appeal. While dismissing the present appeal, we direct that the respondent will abide by her offer and would pay a total sale consideration of Rs. 1,50,000/- and upon payment of Rs. 1,50,000/- - Rs. 10,000/- = Rs. 1,40,000/- and complying with the conditions stated in the judgment dated 28th November, 2000 of the First Appellate Court, the sale deed shall be registered in favour of the respondent in terms of the decree passed by the First Appellate Court subject to the above modifications.

25. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.

¹1994 Mh. L.J.558

²*AIR 1970 SC 546*

³*(2008) 12 SCC 145*

⁴*(2008) 7 SCC 310*

⁵*AIR 1987 SC 2328*