

(1962) 12 BOM CK 0007
In the Bombay High Court
Case No : Appeal No. 153 of 1957

Abdul Kayum Ahmad and Others

APPELLANT

Vs

Damodhar Paikaji Kinhekar and Another

RESPONDENT

Date of Decision : 06-12-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 92, 101
Specific Relief Act, 1877 — Section 12, 21, 27

Citation : AIR 1964 Bom 46 : (1963) 65 BOMLR 505 : (1964) ILR (Bom) 17 : (1963) MhLj 738

Hon'ble Judges : Paranjpe, J

Bench : Single Bench

Advocate : B.R. Mandlekar, for the Appellant; S.N. Kherdekar, for the Respondent

Judgement

1. In this second appeal by the defendants Nos. 2 to 4 against two concurrent decisions granting a specific performance of an agreement to sell the house to the plaintiff, the only question raised before me was whether a monetary compensation for breach of agreement would have been a more appropriate relief than a decree for Specific performance.

2. On 26-12-1952, the defendant No. 1, who owned the house in suit, entered into an agreement with the plaintiff to sell that house to the plaintiff for a consideration of Rs. 2000/-. The sale deed was to be executed within two years. That agreement was registered and Rs. 1000/- out of the agreed price of Rs. 2000/- were paid as earnest money before the Sub-Registrar, the balance of Rs. 100/- being payable at the time of the registration of the sale deed, In the meantime, a creditor of the defendant No. 1 attached the suit house in execution of a decree in Civil Suit No. 46-B of 1946 and the plaintiff got that house released from attachment on 18-11-1953 by depositing the decretal amount of Rs. 186-10-0 for and on behalf of the judgment-debtor. It was agreed between the plaintiff and the defendant No. 1 that Rs. 100- out of this deposit of Rs.

186-10-0 was to be appropriated towards the balance of the price of the suit house. On 26-12-1054, the defendant No. 1 wrote a letter to the plaintiff to extend the time for executing the sale deed till 21-4-1955 and the plaintiff granted that extension. In the meantime, the house in suit was again attached by the mother of the present appellants-defendants NOS. 2 to 4 on 9-8-1954 in execution of her decree in Civil Suit No. 115-A of 1953. That house was put to sale and was auctioned by the executing Court on 18-3-1955. the auction being knocked in favour of the decree-holder who had bid with the permission of the Court. On 15-4-1955 the plaintiff gave the notice (Exhibit P-7) to the defendant No. 1 to remind him that the sale in his favour was to be executed by 21-4-1955 and to say that it would not be possible to execute that sale as per the agreement dated 26-12-1953 unless the auction sale was set aside in the meantime. He also said in that notice that, in case, the auction stood and was confirmed, the plaintiff will have no alternative but to demand back the consideration for the sale. On 16-4-1955, the defendant No. 1, who was a judgment-debtor, deposited the decretal amount plus 5 per cent thereof as per Order 21, Rule 89, of the CPC in order to get the sale set aside. On 28-4-1955, the plaintiff gave another notice to the defendant No. 1 to call upon him to execute the sale in his favour as per the agreement dated 26-12-1952. The plaintiff also gave one notice, dated 30-4-1955, to the defendant No. 2 to intimate to him his prior agreement with the defendant No. 1 for the purchase of the suit house and to tell him not to take a sale Of that house because of the subsisting agreement, dated 26-12-1952. However, these notices were disregarded by the defendants and the defendant No. 1 executed the sale deed (Exhibit P-4) in favour of the defendants Nos. 2 to 4 with respect to the suit house for a consideration of Rs. 2200/-. The executing Court had not passed an order setting aside the sale in favour of the decree-holder on that day but that order was passed on 1-7-1955. These facts were found by the Courts below and cannot be questioned in this second appeal.

3. The plaintiff had sued for specific performance of his agreement on the allegation that he had performed his part of the contract by paying the full consideration, but the defendant No. 1 had not, carried out his part and had instead sold the house to the defendants Nos. 2 to 4 despite their having knowledge about the prior agreement in favour of the plaintiff. The defendant No. 1 had contested the suit first by denying that he had received Rs. 1900/- at the time of the agreement and by further alleging that the agreement, dated 26-12-1952, was collusively brought about for shielding his property from his other creditors. The defendants Nos. 2 to 4, who are the appellants in this Court, claimed that they were bona fide purchasers for value and the prior agreement in favour of the plaintiff was bogus and collusive. The Courts below overruled these defences and decreed the claim for specific performance on finding that the defendants Nos. 2 to 4 were not bona fide purchasers for value without notice of the plaintiff's right.

4. Shri. B. R. Mandlekar, learned Counsel for the appellants, urged that the

Courts below had erred in exercising their discretion in favour of the plaintiff and they should have exercised their discretion by only passing a decree for money in favour of the plaintiff. A relief for specific performance is, doubtless, a discretionary one, but it is also settled law that an appellate Court will not interfere with the discretion of the Courts below unless it were to be shown that the discretion was exercised by them arbitrarily or capriciously. In the instant case, it was not even attempted to be shown that the Courts below had exercised their discretion wrongfully in that manner. As I would show in the sequel, I find that the discretion was exercised by the Courts below judiciously and on proper and reasonable grounds and, therefore, I do not think that this Court can interfere with that discretion even if it were to be said that some other view of the matter could have been taken.

5. Coming to the merits of the question, Shri Mandlekar brought to my notice Section at (a) and Section 12 of the Specific Relief Act and urged that in view of these two provisions, specific relief ought not to have been granted and only a decree for compensation for money should have been passed. Those provisions are in the following words :

"Section 12, Except as otherwise provided; in this chapter, the specific performance of any contract may in the discretion of the Court be forced-

x x x x

(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

Section 21. The following contracts cannot be specifically enforced :

(a) a contract for the non-performance of which compensation in money is an adequate relief;"

6. According to him, granting pecuniary compensation for non-performance of the agreement would afford adequate relief to the plaintiff and, therefore, specific performance ought not to be allowed. Shri Mandlekar submitted that these sections require the Court to consider the equities-between the parties to the agreement, so that the-subject-matter of the agreement may be saved for the promisor and the promisee may be adequately-compensated in money. Upon this very argument, these sections appear to me to be entirely inapplicable to the facts of the present case. Here the promisor, defendant No. 1, has already parted with the house in favour of the appellants and there is no question of saving that house for the promisor, who cannot get back the house even if he were to be required to give to the plaintiff monetary compensation only. The submission of Shri Mandlekar seemed to imply that these sections could also be availed of by the subsequent purchasers, even if they had purchased the property with full knowledge of the prior agreement by the vendor. No authority was shown in support of that suggestion. These sections appear to be only for the benefit of the promisor, so that the property may be saved for him and not

for the benefit of subsequent purchasers, particularly when they have entered upon the venture of the purchase with full knowledge of the prior agreement. The appellants, who are subsequent purchasers, cannot claim to take up cudgels for the defendant No. 1 and to urge on his behalf that only a decree for monetary compensation should be passed against him. It would be interesting to note that the defendant No. 1, who alone could have sought protection of those sections, has not cared to do so and has not joined in this prayer of the appellants. Moreover, there is nothing on record to show that the defendant No. 1 is or would be in a position to pay monetary compensation, if decreed.

7. Shri Mandlekar then submitted that in the notice (Exhibit P-7), the plaintiff himself had pointed out to the defendant No. 1 that in case the sale in favour of the mother of the present appellants was not set aside, it may not be possible for him to enforce the agreement and he would have to fall back on the other relief of return of the consideration. Shri Mandlekar wanted to construe this notice to mean that the plaintiff himself was not keen on getting the property but was only content with getting back his money, I am afraid that is not a proper interpretation of the notice and it ignores the first part of the notice wherein the plaintiff had called upon the defendant No. 1 to get the sale set aside by taking proper steps. That advice was given to him by the plaintiff. It would be pertinent to note in this connection that on receipt of this letter on 16-4-1954 the decretal amount plus 5 per cent thereof was deposited in the Court that very day by the defendant No. 1. Apparently, therefore, it would mean that the defendant No. 1 accepted the advice given by the plaintiff and took steps to deposit the amount under Order 21, Rule 89, of the Code of Civil Procedure, so that the property would be free and would be available to the plaintiff, as per the original agreement, dated 26-12-1962.

7a. Shri Mandlekar then strenuously urged that the decretal amount and the 5 per cent commission deposited on 16-4-1955 had come from these appellants or from their mother and had been deposited by them for saving the property for the defendant No. 1. In the first place, that was, not the case of the appellants in the Courts below and I cannot permit this entirely new case on facts to be put forth in this second appeal for the first time. I have gone through the written statement of these appellants with Shri Mandlekar in Court and he had to admit that no such case had been set up in the trial Court. He, however, wanted me to infer that this amount must have been deposited by the appellants alone. It is impossible for me to accept this suggestion because, in case, the appellant deposited that money for saving the property for the defendant No. 1, as was contended by Shri Mandlekar, that purpose was completely lost because the property was not saved for the defendant No. 1 but a sale-deed thereof was taken by the defendants-appellants subsequently. There was no warrant for the suggestion that this amount was paid by the defendants-appellants for and on behalf of the original defendant No. 1.

8. Shri Mandlekar again reiterated that stand for supporting his claim that the

defendants appellants were bona fide purchasers for value. I may mention that no question of their bona fides would arise in the context of the established facts.

If the decree-holder wanted to set aside the sale for saving the property of the defendant No. 1, who was the judgment-debtor, there was no necessity at all for depositing any amount under Order 21, Rule 89 of the CPC for payment to the purchaser; because the decree-holder herself was the purchaser in that case and the sale could have been set aside on a joint request of the decree-holder, that is, the mother of the present appellants and the defendant No. 1, but that had not happened. Instead, the judgment-debtor was required to deposit the amount as per Order 21, Rule 89 of the CPC which would mean that these appellants or their mother were not consenting to have the sale set aside and that was managed by the defendant No. 1, only in accordance with the advice given to him by the plaintiff in the notice (Exhibit P-7) to which I have already referred earlier. If there were any bona fides on the part of the defendants-appellants as was being repeatedly urged on their behalf, I should have expected them to go to the plaintiff at least after receiving the notice, dated the 30th April, 1955, from him and then either return his consideration or to obtain his consent to the sale which was eventually brought about in their favour. Nothing of the sort was done. On the contrary, these appellants did not even care to reply to the plaintiff's notice, dated the 30th of April, 1955, and took the sale-deed behind the back of the plaintiff and without even informing him about it.

9. The learned Counsel for the appellants was ignoring one important legal position when advancing his case of the supposed bona fides of the appellants. It will have to be remembered that the sale was held on 18-3-1955. Under Order 21, Rule 92 of the Civil Procedure Code, a sale shall be confirmed unless it is set aside under Order 21, Rules 89, 90 and 91. In this case, the amount was deposited within thirty days as per Order 21, Rule 89 of the Civil Procedure Code, but the sale had not yet been set aside and the matter was still sub judice. The actual order of setting aside the sale, which could have been passed on the 16th, April, 1955, was actually passed on 1-7-1955 and these appellants took the sale in their favour on 21-6-1955 while that auction sale was "still in force and had not been set aside. That would mean that it was a sale pendente lite and it would not affect the rights or interest of the plaintiff which was acquired by the registered agreement, dated 26-12-1952. That aspect also must be kept in view while considering the question of the alleged bona fides.

10. It was not the case of the appellants that they had no notice of the plaintiff's agreement. Their only stand was that the agreement was collusive and bogus and they have failed in establishing that allegation. They have, therefore, not explained why or how they purchased the property with notice of that agreement, particularly after the plaintiff gave them another personal notice on 30th April, 1955. When they purchased this house in spite of the knowledge of the prior agreement in favour of the plaintiff, they obviously did so at their own risk and it was now not open to them to say that they were poor persons who

were being put to a loss due to the collusion as between the plaintiff and the defendant No. 1. It is quite clear that there was some collusion, but it was not between the plaintiff and the defendant No. 1 and it appeared to be between the defendant No. 1 on the one hand and the present appellants on the other. Apparently, after carrying out the advice of the plaintiff as per the notice (Exhibit P-7) by depositing the amount under Order 21, Rule 89 of the CPC for getting the sale-deed set aside, the defendant No. 1 seems to have got in touch with the present appellants who had managed to get him round and to secure the sale of the house in their favour to the detriment of the plaintiff. This conduct on their part would certainly not be an Indication of bona fides.

11. The learned Counsel for the appellants then urged that there were more equities in favour of the defendants-appellants than in favour of the plaintiff. However, he did not show which were those greater equities in favour of the appellants as claimed. The only thing which he could pinpoint in this connection was that the appellants had paid Es. 2200/- while the plaintiff had paid Rs. 2000/- as per the findings of the Courts below. The mere fact that the appellants had paid Rs. 2200/-. would be neither here nor there when it would be seen that they did it, if at all they had paid that or any consideration, with the knowledge that the plaintiff had acquired a right to get a sale-deed of this house on the strength of the agreement, dated 26-12-1952. By merely purporting to pay a larger consideration for that house, the defendants Nos. 2 to 4 cannot say that equities are more in their favour. Again, a person claiming equities must come with clean hands. In the instant case, these appellants have not only tried to steal a march over the plaintiff by securing this sale in the circumstances which I have discussed at considerable length but they had gone to the length of raising false defences in the suit. Under the circumstances, no question of equities in favour of the appellants could arise.

12. I would like to point out that, in the trial Court, the defendant-appellants had not raised this contention that the decree for specific performance should not be passed or that a decree for money only should be passed. They are raising this point for the first time in this Court. For the reasons which I have explained above, it is not possible to accept their submission.

13. Shri Mandlekar then submitted that, in case, the decree for specific performance is to be affirmed, it should be made conditional on the plaintiff paying back the consideration to the defendants-appellants or on the condition that the plaintiff at least paid Rs. 900/- which was deposited in the Court on 16-4-1955 for having the sale set aside. As adumbrated, the defendants Nos. 2 to 4 entered upon this venture with full knowledge of the plaintiff's agreement and the rights thereunder and obviously they did it at their own risk. I do not think that there would be any question, of ordering any payment to the defendants Nos. 2 to 4 who apparently came to the rescue of the defendant No. 1 but really they wanted the sale for their own benefit. Moreover, the assumption that these appellants, had paid Rs. 900/- or any part of the amount deposited in

Court on 16-4-1955 had no foundation in the record and they could not claim any part of the amount which they have not proved to have deposited on behalf of the defendant No. 1. If they have lost the consideration or any part of it as a result of their colluding with the defendant No. 1, it is open to them to seek their own remedies against the defendant No. 1. I find that there is no reason to levy any condition to the decree for specific performance.

14. The appeal is devoid of substance and is dismissed with costs.

15. Appeal dismissed.