(2011) 08 BOM CK 0217

In the Bombay High Court

Case No : Appeal From Order No. 2 of 2011

Abhijeet Housing Pvt. Ltd. — APPELLANT

Vs

Mr. Nazir Ahmed Shaikh and Others — RESPONDENT

Date of Decision : 29-08-2011

Acts Referred:

Citation : (2011) 08 BOM CK 0217

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : Sudin Usgaonkar, for the Appellant; A. R. Kantak with Ms. R. Kantak, Advocates for Respondent No.1 2 4 6 to 9, None for Respondent Nos.3 and 5 Though Served, for the Respondent

Judgement

A.P. Lavande, J.—Heard Mr. Usgaonkar, learned Counsel for the appellant, Mr. Kantak, learned Counsel for respondent nos.1, 2, 4, 6 to 9. None appears on behalf of respondent no.3, though served. By this appeal, the appellant takes exception to the order dated 17th August, 2010 passed by the Civil Judge, Senior Division, Panaji in Special Civil Suit No.114/2008 by which the application for temporary injunction dated 8th December, 2008 filed by the appellant seeking temporary injunction against the defendants from alienating the suit property to any third party has been rejected.

2. The appellant is the plaintiff in the above suit filed seeking specific performance of the agreement dated 3rd December, 2006 pursuant to which the suit property was agreed to be sold to the appellant for a consideration of 90 lacs. Along with the suit, the plaintiff filed an application for temporary injunction which was opposed by the defendants. The written statements on behalf of the defendants were filed in April/ May, 2009. On 9th September, 2009 the defendants adopted the written statements for the purpose of temporary injunction. By the impugned order dated 17th August, 2010, the trial Court dismissed the application for temporary injunction on various grounds. Aggrieved by the said order, the plaintiff has preferred the present appeal.

3. On 25th January, 2011 notices were issued to the respondents pursuant to which Advocate A. R. Kantak appeared on behalf of respondent nos.1 and 2 and thereafter, he also put in appearance on behalf of respondent nos. 4, 6 to 9. When the matter came up for admission on 16th August, 2011 after hearing Mr. Usgaonkar, learned Counsel for the appellant and Ms. Kantak, learned Counsel appearing for respondent nos.1,2, 4, 6 to 9, I called upon Advocate Ms. Kantak as to why interim relief sought not be granted against respondent nos.1 and 2, who were parties to the agreement dated 3rd December, 2006 of which specific performance was sought. At that stage, Ms. Kantak, learned Counsel sought adjournment on the ground that Advocate A. R. Kantak would be arguing the matter. The request of Ms. Kantak was granted and thereafter, Mr. A. R. Kantak, learned Counsel was heard. Mr. A. R. Kantak, learned Counsel appearing for the above respondents stated that the suit property has been already sold by the owners thereof even prior to passing of the impugned order. In view of the submission made by Mr. Kantak, respondent nos.1 and 2 were directed to place on record a copy of the sale deed executed by the defendants. In terms of the said order, a copy of the duly registered sale deed dated 7th July, 2009 has been placed on record which discloses that the defendants herein have sold the very suit property in favour of Shri Ramkumar Agarwal and Mr. Eric Sequera. Perusal of the sale deed further discloses that Advocate A. R. Kantak was a witness to the execution of the sale deed before the Sub-Registrar.

4. Since the above facts disclosed that the defendants had suppressed the sale deed dated 7th July, 2009 from the trial Court which prima facie amounted fraud on the Court, learned Counsel appearing for the defendants/ respondents was called upon to show cause as to why appropriate order be not passed against the defendants for suppressing a very relevant document from the trial Court.

5. Mr. Kantak, learned Counsel appearing for the above referred respondents submitted that it was not necessary for the defendants in the suit to disclose the execution of the sale deed dated 7th July, 2009 since the doctrine of lis-pendense is applicable and any transfer made during the pendency of the suit is subject to the final result of the suit and it is not even necessary for the plaintiff to join the transferee as has been held by the learned Single Judge of this Court in the case of Kachhi Properties Vs. Ganpatrao Shankarrao Kadam 2010(5) BCR 43. Learned Counsel further submitted that the act of the defendants in not bringing to the notice of the trial Court the sale deed executed by the defendants does not amount to fraud on the Court and, therefore, no order deserves to be passed against the defendants. Mr. Kantak, placing reliance upon the judgment of the Apex Court in the case of Arunima Baruah Vs. Union of India (UOI) and Others, submitted that there is no suppression of material fact in the present case and the defendants have not taken any advantage by not producing a copy of the sale deed dated 7th July, 2009 before the trial Court. Mr Kantak placed reliance upon the judgment of the Apex Court in the case of Ganpatbhai Mahijibhai Solanki Vs. State of Gujarat and others; (2008)12 SCC 353 in support of the proposition that non-disclosure of the sale deed before the trial Court

would not amount to fraud, more particularly having regard to the fact that no advantage has been taken by the defendants. Learned Counsel further submitted that the suit property having been already transferred during pendency of the suit, the appellant is not entitled to any relief in the present appeal preferred and as such, the appeal deserves to be dismissed.

6. Mr. Usgaonkar, learned Counsel for the appellant fairly conceded that in view of the sale deed dated 7th July, 2009 executed by the defendants/ respondents, the appeal has become infructuous. Mr. Usgaonkar submitted that leave be granted to the appellant to take appropriate steps before the trial Court to join the transferees in the suit filed by the appellant. However, Mr. Usgaonkar, placing reliance upon the judgment of the Apex Court in the case of Dalip Singh Vs. State of U.P. and Others, submitted that by suppressing the document namely i.e. sale deed dated 7th July, 2009, the defendants have practised fraud on the trial Court and the appropriate order deserves to be passed against them including imposition of exemplary costs.

7. The admitted facts which are reproduced above disclose a very sorry state of affairs. Indisputably, although written statements were filed by the defendants prior to execution of the sale deed dated 7th July, 2009, the reply to the application for temporary injunction by adopting the written statements was filed by the defendants on 9th September, 2009. It is, therefore, evident that although the defendants by sale deed dated 7th July, 2009 had already transferred the suit property in favour of two purchasers, the said defendants did not disclose the factum of execution of sale deed before the trial Court at the time of filing reply to the application for temporary injunction or for that matter till the passing of the impugned order dated 17th August, 2010.

8. In the case of Dalip Singh (supra) the Apex Court observed thus :

1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa"(non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the Courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the Court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of

justice with tainted hands, is not entitled to any relief, interim or final.

In the said case, the Apex Court held that it was a fit case to saddle the appellant with exemplary costs since the appellant had suppressed relevant document, but keeping in view the fact that possession of the surplus land was taken way back in the year 2002 and the same was distributed to landless poor persons, the Apex Court had refrained itself from doing so.

9. In the case of Meghmala and Others Vs. G. Narasimha Reddy and Others, the Apex Court after considering several judgments of the Apex Court held that suppression of material document would also amount to fraud on the Court after placing reliance upon the following judgments of the Apex Court :

(i) S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, .

(ii) Gowrishankar and Another Vs. Joshi Amba Shankar Family Trust and Others, .

10. In paragraph 36 of the said judgment, the Apex Court observed as follows :

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/ document amounts to a fraud on the Court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is honest "

11. In the present case, the facts clearly disclose that the defendants by not disclosing the sale deed executed by the defendants on 7th July, 2009 in the reply filed by them on 9th September, 2009, have played a clear fraud on the trial Court. Needless to mention that if the defendants were to place the document on record, the relief as sought in the application would not have been available to the plaintiff and the trial Court would have disposed of the application as having become infructuous and there would not have arisen any necessity for the plaintiff to come to this Court by way of an appeal. The defendants by playing fraud on the trial Court has called upon the trial Court to adjudicate and pass the order on the application for temporary injunction and further compelled the plaintiff to file an appeal to this Court. The conduct of the appellant to say the least is most reprehensible and discloses fraud having been played on the trial Court. It is pertinent to note that the disclosure of the said document was not made at the start of the hearing on application for interim relief and also the appeal. Therefore, the defendants have not only played fraud on the trial Court, but they have suppressed this fact for some time during the pendency of the appeal before this Court.

12. In the present case, the application for temporary injunction sought by the plaintiff has been dismissed on several grounds and not on account that the defendants have transferred the suit property to third parties. Admittedly, the

third party rights have been created in respect of the suit property and in terms of the sale deed dated 7th July, 2009 and the defendants have lost title to the suit property. I fail to understand as to how the defendants without disclosing that the suit property has been already transferred in favour of the two parties could have contested the suit.

13. In so far as the authorities cited by Mr. Kantak are concerned, none of them is directly on the point. In the case of Kachhi Properties (supra), the learned Single Judge held that in case of transfer of the suit property, it is not necessary for the plaintiff even to join transferee and the decree in the suit is binding on the transferee. The ratio of the said judgment is of no help to the respondents.

In the case of Arunima Baruah (supra), the Apex Court has held that it is trite law that to enable the Court to refuse to exercise discretionary jurisdiction suppression must be of material fact, which would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. The Apex Court further held that if the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite law that a person invoking the discretionary jurisdiction of the Court cannot be allowed to approach it with a pair of dirty hands. Even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.

In so far as the judgment in the case of Ganpatbhai Solanki (supra) is concerned, the Apex Court has held that when the fraud and suppression of material fact had been alleged, the merits of the matter as also the question with regard to adjustment of equities may be considered by the High Court. The ratio of the said judgment is not applicable having regard to the factual matrix in the present case. The Apex Court held that if the order is obtained by fraud, the principles of natural justice are not required to be complied with for setting aside the order obtained. Thus, none of the judgments relied upon on behalf of the respondents advances the case of the respondents.

14. In the present case, the defendants without disclosing that the suit property was transferred secured an order in their favour by getting the application for temporary injunction dismissed when in fact they had no subsisting right to the suit property in as much as the defendants were divested of the proprietary rights by virtue of the sale deed dated 7th July, 2009.

15. In the case of Meghmala (supra), it is clearly held by the Apex Court that suppression of a material document amounts to fraud on the Court. In my considered opinion, the facts in the present case clearly make out a case of fraud by the defendants on the trial Court by not disclosing execution of the sale deed prior to passing of the impugned order. As stated above, since third party rights have been created, the question of passing any order against the defendants in

respect of the suit property does not arise. However, considering the fact that the defendants have played fraud on the Court and having regard to the conduct of the defendants, I am of the considered opinion that this is a fit case in which exemplary costs deserve to be imposed on the respondents. By the sale deed dated 7th July, 2009, the defendants have sold the suit property to two purchasers for a consideration of Rs.90 lacs. Considering the facts and circumstances of the case, the costs are quantified at Rs.1,00,000/-(Rupees one lakh only) The respondents shall deposit the costs of Rs.1 lakh in this Court within a period of four weeks. The deposit of the costs shall be condition precedent for the defendants/ respondents to defend the suit. In case the costs are not deposited within a period of four weeks, the defence of the defendants shall be struck off. If the costs are deposited within the prescribed period, an amount of Rs.50,000/-shall be paid to the appellant and the balance amount of Rs.50,000/-shall be credited in favour of the State Government. Since by not disclosing the execution of the sale deed, the respondents/ defendants have not only played fraud on the Court, but has wasted the valuable time of not only of the trial Court, but also of this Court. If the defendants had disclosed the sale deed before the trial Court, the trial Court would have dismissed the application on the ground that the suit property had been already transferred. By suppressing the said fact the defendants not only played fraud, but wasted the time of the trial Court and this Court in which genuine litigants are waiting in queue for adjudication of their disputes. Moreover, although the defendants have suppressed the material fact, the defendants did not express any remorse nor tendered any apology before this Court but on the contrary submitted that they had committed no wrong. Considering all these circumstances, I have awarded exemplary costs of Rs.1 lakh.

16. Before concluding, one more disturbing feature deserves to be mentioned. Perusal of the order discloses that Mr. A. R. Kantak had appeared on behalf of the respondent nos.1, 2, 4, 6 to 9 herein before the trial Court and he was also a witness to the execution of the sale deed before the Sub-Registrar, Il has. As an officer of the Court, it was his duty to disclose to the trial Court that the sale deed was executed and as such, the application for interim relief had become infructuous.

17. In view of the above discussion, the appellant is not entitled to the relief sought for. The appeal stands disposed of.

