
(2014) 01 BOM CK 0237
In the Bombay High Court
Case No : Second Appeal No. 92 of 2010

Altino Gracias

APPELLANT

Vs

Pascoal Dias

RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2014) 01 BOM CK 0237

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Sudesh Usgaonkar and Ms. Rosette Pereira, Advocate for the Appellant; Valmiki Menezes, Advocate for Respondent Nos. 1(a) to 1(c) and Mr. C.A. Coutinho, Advocate for Respondent Nos. 14 and 15, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

F.M. Reis, J.—Heard Shri Sudesh Usgaonkar, learned Counsel appearing for the Appellant, Shri Menezes, learned Counsel appearing for the Respondent nos. 1(a) to (c) and Shri C.A. Coutinho, learned Counsel appearing for the Respondent nos. 14 and 15.

2. The above appeal challenges the Judgments passed by the Courts below whereby a suit for specific performance filed by the Appellant in respect of an agreement for sale, executed on or about 20.02.1993, came to be dismissed.

3. Briefly, the facts of the case are that the suit for specific performance and other reliefs was filed by the Appellants on the ground that the Appellant was in need of a plot for the construction of his own house and the Respondent no. 1 was dealing with the sale of the plot of the property known as "Tareachem Bhat", surveyed under no. 83/1 of Camorlim Village of Salcete, Taluka. A Sale Agreement was executed by the Respondent no. 1 on 20.02.1993 with the Appellants to sell a plot admeasuring an area of 450 square metres from the suit property at the rate of Rs. 85/- per square metre and the Respondent no. 1

received an advance of Rs. 15,000/- from the Appellants towards sale of the said plot. It is further his case that after execution of the said Agreement, the Appellant was always ready and willing to pay the balance amount but the Respondent no. 1 was not ready to execute the said Deed as the sub-division of the suit property was not approved by the concerned authorities. It is further the contention of the Appellant that it was also promised to the Appellant by the said Respondent no. 1 that his plot shall be accessible by a motorable road. It is further the case that a second Agreement was executed on 12.03.1997, incorporating the clauses that he shall indemnify and save the Appellants from all claims arising to the said property. The Appellants, thereafter, noticed on 20.03.2000 that the Respondent no. 1 was constructing a road in the suit property and the work was of asphaltting. A legal notice was issued thereafter by the Appellants dated 22.03.000 to the Respondent no. 1 asking him to give first preference to the Appellants to chose the plot and also request to execute the final Sale Deed. The Respondent no. 1 replied to the said notice through his Advocate, inter alia, admitting the execution of the Sale Deed dated 12.03.1997 and, however, for the first time, disclosed in the said reply, that he alone is not the owner and that there are other four co-owners to the suit property and that the development was carried out by him along with other co-owners. Upon receipt of the said reply, the Appellant made inquiries and learnt that the suit property has been purchased by Deed of Sale dated 05.12.1998 by the Respondent nos. 1, 3, 4, 6 and 8. According to the Appellants, all the Respondents are jointly and severally liable to execute the final Sale Deed in his favour. Accordingly, the suit for specific performance came to be filed by the Appellant. The plaint was thereafter amended to the effect that after filing of the suit, the Respondents in collusion carried out mutation and obtained a new holding number in the Survey Records. It is further their case that the Appellants are entitled for possession of a plot admeasuring an area of 450 square metres as stipulated in the said Agreement.

4. The Respondents filed their written statements disputing the claim put forward by the Appellants. It is, inter alia, their case that the Respondent no. 1 was not the exclusive owner of the property and, as such, he could not enter into an Agreement executed in favour of the Appellants. It is further their case that all the Respondents have jointly started development and, as such, sought for dismissal of the suit.

5. The learned Trial Judge after framing the issues and recording of evidence, by Judgment and Decree dated 12.05.2008, disposed of the suit, inter alia, directing the legal representatives of the deceased Respondent no. 1 to refund to the Appellant the amount of Rs. 15,000/- together with simple interest at the rate of 5% per annum from 20.02.1993 till the date of actual payment.

6. Being aggrieved by the said Judgment and Decree, the Appellants have preferred an Appeal before the Lower Appellate Court which came to be disposed of by Judgment dated 26.04.2010 thereby dismissing the Appeal filed by the

Appellants. Being aggrieved by the said Judgment, the Appellants have preferred the above Second Appeal.

7. Both the Courts below, upon appreciating the evidence on record have come to the conclusion that the Appellant has failed to establish that they are entitled for discretionary reliefs of specific performance of the said agreement. Essentially, the Courts below have refused such specific performance on the ground that the agreement was signed only by the original Respondent no. 1 when admittedly there were other co-owners in respect of the suit property.

8. Shri Sudesh Usgaonkar, learned Counsel appearing for the Appellant, has pointed out that the deceased Respondent no. 1 had never disclosed that the disputed property was in co-ownership with the other Respondents. Learned Counsel further pointed out that only after a notice was issued by the Appellant to comply with the directions in the agreement to execute the Sale Deed, the Appellant learnt about the existence of such co-owners in view of the reply sent by the Respondent no. 1. Learned Counsel further pointed out that during the pendency of the suit, in any event, there were partition proceedings between the co-owners and a portion of the suit property which was also part of the subject matter of the said agreement, was allotted to the deceased Respondent no. 1. Learned Counsel further pointed out that the Courts below ought to have in any event granted specific performance to that extent of the property. Learned Counsel further pointed out that the Appellant has also sought for an alternate relief claiming damages of Rs. 40,000/- whereas the Courts below whilst passing the impugned Judgment, have directed the refund of the sum of Rs. 15,000/- paid as earnest money along with interest at the rate of 5% per annum. In any event, without prejudice to his submissions the learned Counsel pointed out that considering that deceased Respondent no. 1 had not informed about the existence of other co-owners, the Appellant was entitled to claim the amount of damages claimed in the suit.

9. On the other hand, Shri Menezes, learned Counsel appearing for the Respondent nos. 1(a) to (c), has pointed out that though there were other co-owners in respect of the suit property, the Appellant has executed such agreement. Learned Counsel further pointed out that though an area of 450 square metres was agreed to be sold, nevertheless, there was no identification of the said area viz-a-viz the whole property which admeasured 25,000 square metres. Learned Counsel has further taken me through the disputed agreement and pointed out that there is no identification or location of such area in the said agreement. Learned Counsel further pointed out that the Courts below have passed a reasoned Judgment to the effect that the amount of Rs. 15,000/- paid by the Appellant has been ordered to be refunded. Learned Counsel further pointed out that such amount has been ordered to be refunded with reasonable interest at the rate of 5% per annum. Learned Counsel further pointed out that considering that both the Courts below have concurrently found that the Appellant is not entitled for specific performance, the question of re-appreciating

the evidence on record to come to any contrary conclusion would not arise at all.

10. Shri C.A. Coutinho, learned Counsel appearing for the Respondent nos. 14 and 15 has supported the submissions of Shri Valmiki Menezes, learned Counsel appearing for the Respondent nos. 1(a) to 1(c). Learned Counsel pointed out that he is one of the purchasers of a portion of the property and the question of granting any specific performance does not arise at all.

11. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. It cannot be disputed that specific performance could be obtained by the Plaintiff-Appellants only against the parties to such agreement. It is not in dispute that besides the Respondent no. 1, admittedly, the remaining co-owners namely Respondent nos. 3, 10, 12 and 14 are not parties to the said agreement. In such circumstances, the suit for specific performance as far as the said Respondents are concerned, in any event, is not at all maintainable. It is also not the case of the Appellant that such agreement was executed with the consent of the said other co-owners. It is not in dispute that the property was in co-ownership and it is well settled that as such the question of the deceased Respondent no. 1 disposing of a specific portion of the property without the consent of the other co-owners is not permissible in law. In such circumstances, the Courts below have rightly rejected the claim of the Appellant for specific performance of the agreement. The concurrent findings of the Courts below with that regard cannot be re-appreciated by this Court in the present Second Appeal u/s 100 of the Civil Procedure Code, as the Courts below have come to the conclusion that the Appellant is not entitled for specific performance of the agreement. On this ground alone, the prayer of the Respondents is rightly rejected by the Courts below.

12. The next contention of Shri Usgaonkar, learned Counsel appearing for the Appellant, to the effect that the Courts below have failed to consider the amount of damages to be paid to the Appellant, I find that considering the material on record and the findings of the Courts below, there are no reasons given by the learned Judge whilst discussing this aspect of the matter. In such circumstances, the above Appeal deserves to be admitted on the following substantial question of law :

1. Whether the Courts below were justified to refuse the claim of damages of Rs. 40,000/- claimed by the Appellant without looking into the material on record on that aspect ?

13. By consent of the learned Counsel appearing for the Respondents, the matter was heard finally on the above substantial question of law. Both the learned Counsel have pointed out that with regard to the said substantial question of law, this Court may examine the matter in the context of the submissions advanced by the Counsel as referred to herein above.

14. On perusal of the records, it is noted that on the basis of the findings of the Courts below, it is not in dispute that pursuant to an agreement for sale, the

deceased Respondent no. 1 had agreed to sell the said portion of the property to the Appellant. On perusal of the terms of the agreement, I find that the Respondent no. 1 had not disclosed the existence of the other co-owners in such property. In such circumstances, the question of retaining the sum of Rs. 15,000/- admittedly paid by the Appellant to the Respondent no. 1, does not arise at all. The Courts below as such has rightly directed the refund of the said amount of Rs. 15,000/-. Considering that the amount was paid way back in the year 1993 and the appreciation in the value of the property in the locality, I find that the interest awarded by the Courts below whilst directing the refund of the said sum of Rs. 15,000/- to the Appellant by the legal representatives of the Respondent no. 1 at the rate of 5% per annum is not at all justified. Considering that the Appellant had claimed total damages of Rs. 40,000/-, I find that in the over all facts and circumstances of the case, the said sum of Rs. 15,000/- directed to be refunded to the Respondents, would carry interest at the rate of 8% per annum from the date of the filing of the agreement upto the date of actual payment. Even on perusal of the subsequent agreement executed in the year 1997, there is a specific clause at para 6 to the effect that in case there is a default on the part of the deceased Respondent no. 1 in executing the agreement, the Appellant would be entitled to damages. In such circumstances, I find in the peculiar facts and circumstances of the case that the amount of Rs. 15,000/- admittedly received by the Respondent no. 1 is to be refunded with interest at the rate of 8% per annum from the year of the execution of the agreement in the year 1993. To that extent, the impugned Judgment deserves to be modified. The substantial question of law is answered accordingly.

15. In view of the above, I pass the following :

ORDER

(I) The Appeal is partly allowed.

(II) The impugned Judgment and Decree passed by the Courts below stands modified to the extent that the amount of Rs. 15,000/- directed to be paid to the Appellant by the legal representatives of Respondent no. 1, is to be paid along with interest thereon at the rate of 8% per annum from the date of agreement upto actual payment.

(III) Decree to be modified accordingly.

(IV) Appeal stands disposed of.